

# BRIEFING: THE EU SETTLED STATUS SCHEME AND CHILDREN IN CONFLICT WITH THE LAW

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This briefing examines the implications of the Government's EU Settled Status Scheme (EUSS) for children from other European Economic Area (EEA) States<sup>3</sup> who have been or who are involved in the criminal justice system. It complements other briefings produced by members of the Brexit and Children Coalition relating to the impact of Brexit on different areas of children's lives.<sup>4</sup>

This briefing will:

- Examine the qualifying conditions under the EUSS and how they might affect children with criminal convictions;
- Identify gaps in training, personnel and data that might affect the level of support available to children with criminal convictions who will need to obtain settled status.

The legal and policy documents primarily referred to in this briefing include:

- [The Withdrawal Agreement](#) (25 November 2018) ('WA')
- [Appendix EU Immigration Rules](#) (designed to transpose the citizens' rights provisions of the draft Withdrawal Agreement into UK law - last updated 23 April 2019) ('Appendix EU');
- [EU Settlement Scheme: Statement of Intent](#) (21 June 2018)
- [EU Settlement Scheme: Suitability Requirements](#) (1 April 2019)
- [EU Settlement Scheme: EU, other EEA and Swiss Citizens and their Family Members](#) (29 March 2019)
- [EU Settlement Scheme: Looked after Children and Care Leavers – Local Authority and Health and Social Care Trusts Guidance](#) (undated – hereafter referred to as 'Local Authority Guidance').
- [Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to](#)

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<sup>3</sup> EEA includes all other 27 EU Member States (Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden) as well those countries to whom the EU's single market has been extended, namely Iceland, Norway, and Liechtenstein. Switzerland is neither an EU nor EEA member but is part of the single market meaning that Swiss nationals have the same rights to live and work in the UK as other EEA nationals.

<sup>4</sup> See in particular Coram Children's Legal Centre Briefing '[Uncertain futures: the EU settlement scheme and children and young people's right to remain in the UK](#)' (March 2019); Coram Children's Legal Centre '[The EU Settlement scheme – Concerns and Recommendations](#)' (Aug 2018) and The Brexit and Children Coalition Report '[Making Brexit Work for Children: The Impact of Brexit on Children and Young People](#)'.

[move and reside freely within the territory of the Member States](#), OJ L 158/77 ('Directive 2004/38')

## Introduction and background context: EU Settled Status

1. The EUSS was launched fully on 30<sup>th</sup> March 2019 to provide nationals from other EEA Member States with a right to remain in the UK. It provides an alternative immigration status to the current EU free movement provisions which will no longer be operable following the UK's departure from the EU. Those who obtain settled/pre-status (hereafter referred to as 'status') will continue to enjoy most of the benefits available under the free movement provisions, including access to public services on the same basis as nationals (such as schools, healthcare, leisure facilities and transport) and access to public funds, such as social welfare assistance.
2. To qualify for status (leave to remain), all applications must be made by June 2021. If the UK leaves the EU **without a deal**, applications for leave to remain will have to be made by **31 December 2020**. Some extensions will be granted in limited, exceptional circumstances (relating, for instance, to vulnerable groups such as children).

## Issue 1: Eligibility and Suitability Criteria

There are two basic criteria for **eligibility** for the EUSS:

3. **EEA Nationality:** The child must be an EEA national **or** the child of an EEA national.<sup>5</sup> A 'child' for the purposes of the EUSS is defined as:
  - a. anyone under the age of 21 **and**
  - b. the direct descendant of the relevant EEA citizen or of his/her spouse or civil partner.<sup>6</sup> This includes a grandchild or great-grandchild; **Or**
  - c. An adopted child, a child born through legally recognised surrogacy, a child subject to guardianship orders; **Or**
  - d. A child over the age of 21 who is the direct descendant of **AND dependent on** the relevant EEA citizen or their spouse/civil partner.<sup>7</sup>

The applicant will need to provide proof of their relationship when they apply for status. A child can apply on his or her own behalf, or the parent can apply on behalf of the child.

4. **UK Residence:** The child must have been resident in the UK by 12 April 2019. If the Withdrawal Agreement is ratified this will extend to 31 December 2020. Those resident in the UK for 5 years<sup>8</sup> at the time of the application will be eligible for settled status (meaning they will have indefinite leave to remain, with no time limit

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<sup>5</sup> Irish nationals need not apply for EUSS as they have an automatic right of residence in the UK.

<sup>6</sup> Condition 7 of Rule EU11

<sup>7</sup> 'Dependency' is determined by reference to relevant financial, social or health conditions, such that the applicant cannot meet their essential living needs without the financial or material support of the relevant EEA citizen or his/her spouse/civil partner.

<sup>8</sup> To be eligible for settled status, you usually need to have lived in the UK, the Channel Islands or the Isle of Man for at least 6 months in any 12 month period for 5 consecutive years.

on how long they can stay in the UK). Those who have accumulated less than 5 years of residence in the UK at the time of the application will be eligible for **pre-settled status**. Once they have accrued five years of residence in the UK they can ‘upgrade’ to settled status. If a child has accrued less than 5 years residence he/she will be entitled to settled status under the EUSS<sup>9</sup> by virtue of their relationship with a relevant EEA citizen who has acquired settled status/indefinite leave to remain.

5. Guidance accompanying the EUSS suggests that *all* applications will be checked against crime databases including the Police National Computer; and that where this reveals ‘**serious or persistent**’ offending, a referral will be made to Immigration Enforcement (IE) for a case-by-case determination as to whether an applicant should be refused status on the basis of ‘suitability’.

### Suitability

6. Where an applicant is eligible for EUSS (i.e. where the nationality and residence criteria set out above are met), she or he may nonetheless be refused status on ‘suitability’ grounds, pursuant to Appendix EU. Specifically:
  - Refusal is mandatory where a person is subject to a deportation order or a decision to make a deportation order, or to an exclusion order or exclusion decision (EU15, Appendix EU).
  - Refusal is discretionary if it is proportionate to refuse the application where an applicant submits false or misleading information, representation or documents where these are material to the EUSS decision, or where there has been a non-exercise or misuse of rights under EU Directive 2004/38/EC (the free movement legislation governing the rights of EU migrants up until withdrawal from the EU) (EU16, Appendix EU).
7. Article 20 WA also sets out the limited basis on which rights of residence and entry may be restricted on ‘conduct’ grounds.
  - Conduct **prior to the end of the transition period** ‘*shall be considered in accordance with Chapter VI of Directive 2004/38/EC*’ in determining whether it can restrict the right to residence.<sup>10</sup>
  - Chapter VI of Directive 2004/38 (Articles 27-33) sets out a number of safeguards to protect EU citizens against expulsion, including a requirement to take into account the age, health, family relationships and social and cultural integration of the individual (Art 28(1)).
  - In essence, expulsion of those with the right of permanent residence should only be allowed on ‘serious grounds of public policy or public security’ (Art 28(2)).
8. As far as children are concerned Art 28(3)(b) states that:

*An **expulsion decision may not be taken** against Union citizens, except if the decision is based on imperative grounds of public security, as*

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<sup>9</sup> Condition 2 of Rule EU11

<sup>10</sup> Chapter VI (Articles 27-33) sets out EU free movement restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.

*defined by Member States, if they...are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.*

9. For conduct **after the transition period**, residence rights may be restricted in accordance with national legislation.<sup>11</sup> The relevant national legislation allows exclusion/deportation in a wider range of circumstances than is currently permitted under EU law, but even then any restrictions on the right to residence must be in accordance with the protections available under Directive 2004/38/EC (Article 21 WA).
10. It follows, then, that any refusal of settlement status to children on grounds of ‘conduct’ must be absolutely exceptional, based on *imperative* grounds of public security and when it is in the *best interests* of the child.
11. Various references are made to criminality and criminal convictions in the Home Office publications, guidance and other documents on EUSS (including in the step-by-step guide accompanying the on-line application and in the following official publications: EU Settlement Scheme: Statement of Intent (June 2018); EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members (29 March 2019); EU Settlement Scheme: suitability requirements (01 April 2019); EU Settlement Scheme: Looked after children and care leavers - Local Authority and Health and Social Care Trusts Guidance (undated)).
12. Read together, these documents present a complex, confusing, and inconsistent picture of whether and how a child’s conduct and specifically their criminal convictions affect their EU settled status. Specifically:

### **The applicability of criminality criteria to children**

13. EUSS guidance for applicants is inconsistent in its articulation of the applicability of the criminality provisions to children. Nowhere is it explained how the provisions will apply to children, nor is it explained that they should (in law) be applied differently from how they apply to adults.
14. Although most of the guidance appears to exempt children from actively *declaring* their criminal convictions,<sup>12</sup> there is inconsistent and unclear treatment of whether children’s applications are, by default, subject to a criminal records check. The *EU Settlement Scheme Suitability Guidance* is ambiguous in its application to children,<sup>13</sup> yet the Local

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<sup>11</sup> Under domestic law, the Secretary of State can make an exclusion decision to refuse entry into the UK ‘on the ground that the person’s presence in the UK would not be conducive to the public good’; and a deportation order is one made under section 5(11) of the Immigration Act 1971 by virtue of s.3(5) or 3(6).

<sup>12</sup> The Local Authority Guidance appears to exempt all under 18s from declaring their criminal convictions (p.14), but earlier the same guidance suggests that children of 10 years and above have to *declare* their convictions (see p.6).

<sup>13</sup> *EU Settlement Guidance* specifies that over 18s must declare criminal convictions and ‘all applications’ will be checked against the police national computer. It is unclear whether ‘all

Authority Guidance regarding children in care and care-leavers explicitly says that all children over 10 years old will be automatically subject to criminality checks against the police national computer.<sup>14</sup>

15. In contrast, mainstream step-by-step guide to applicants (available on the government website) implies that children are excluded from any criminality checks. The relevant section of the guide (section headed '*If you have criminal convictions*') opens with the sentence '*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. You'll be asked to declare convictions.*'. It continues '*[y]ou'll also be checked against the UK's crime databases*'. **At no point does this particular guidance say that these checks will be made for those under 18 as well as those over 18 (to whom the section is explicitly addressed).**<sup>15</sup> **This creates a legitimate expectation that children (those aged under 18 years) will not be subject to a criminal record check, thereby contradicting the other guidance.**

**Question 1: Given the conflicting guidance, please clarify whether or not children are subject to an automatic criminal records check and/or have to declare if they have been convicted of an offence or are subject to criminal proceedings either in the UK or abroad.**

#### **A failure to differentiate adequately the threshold criteria for adults and children**

16. All of the guidance lacks clarity as to *how* precisely the suitability criteria and the threshold of criminality apply to children. Moreover, the guidance fails to explain that the threshold for excluding EUSS for suitability reasons pursuant to EU15<sup>16</sup> is higher for children than for adults (i.e. it has to be justified on imperative grounds of public security and must be in the best interests of the child).<sup>17</sup>
17. The CJEU has stated that 'imperative reasons' means 'exceptional circumstances' and that this 'considerably strengthens' the protections available under Article 28 Directive 2004/38.<sup>18</sup> UK immigration law similarly applies a different threshold for adults and children in relation to permissible deportation.<sup>19</sup>

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applications' refers to all adult applications (ie that it follows directly from the 'over 18s' limitation) or whether it is intended to capture applications from those over *and* under 18.

<sup>14</sup> EU Settlement Scheme: Looked after Children and Care Leavers – Local Authority and Health and Social Care Trusts Guidance (undated) at pp 6 and 14.

<sup>15</sup> The inclusion of the word 'also' supports this reasoning.

<sup>16</sup> This relates to conduct *before* the transition period, which specifically cross-refers to EU protections contained in Chapter VI of Directive 2004/38. For the position in relation to conduct *after* the transition period, see our concerns about the lack of clarity regarding which standards/protections apply, above at

<sup>17</sup> Article 28(3)(b) Directive 2004/38 summarised at paras 7-10 above. For adults, Article 28 of the Directive (and regulation 27 of the Immigration Rules) *only* allow expulsion or deportation on the basis of a person's conduct posing 'a genuine, present and sufficiently serious threat to the fundamental interests of UK society, on grounds of public policy or security'. Criminality, and previous criminal convictions are deemed relevant to this assessment (Article 28 2004/38/EC transposed into UK law via Regulation 27 of the Immigration Rules).

<sup>18</sup> *Land Baden Wurttemberg v Tsakourdis* [2010] C 145/09, ECLI:EU:C:2010:708

<sup>19</sup> See UK Borders Act 2007 where people convicted of a 12-month prison sentence must be deported *except* if they were a child when convicted (see also the Statement of Intent, footnote 14).

18. In short, then, the threshold for children’s criminality to be relevant to EUSS is extremely high, and certainly higher than for adults, and yet none of the guidance specifies this.

**Question 2: How do the suitability criteria and the threshold of criminality apply to children?**

**The criteria of ‘serious or persistent’ offending and their application to children**

19. The examples given in the guidance are misleading as to the threshold criteria for both adults and children. The guidance states that only ‘serious or persistent’ offending will be relevant to a suitability assessment and gives a ‘parking fine’ as one type of offence that will not affect suitability.<sup>20</sup> A parking fine is not, in fact, a criminal offence.
20. The use of the most minor of offences as examples of the type of offence that is *not* taken into account implies that anything above *may* be. This is misleading to applicants for status who may be deterred from applying if they have a criminal record for anything more serious but which, in fact, may still fall far short of the strict criteria under EU law.
21. Moreover the term ‘serious *or* persistent’ implies that offences of a relatively minor nature (such as criminal damage, minor assault or minor drugs-related offences or anti-social behaviour) may, if repeated (or ‘persistent’) pose a threat to obtaining status. This problem is heightened for children who are more likely to be charged with a number of offences of a relatively minor nature as part of a linked series of events or adverse circumstances (such as a child in care involved in local criminal activity). This risks deterring eligible applicants from applying for status for fear that all but the most minor (parking), one-off offences will hinder their application.
22. In contrast to the Statement of Intent and the step-by-step guide, the *EU Settlement Scheme: Suitability Criteria* sets out in more detail the relevance of criminality and the circumstances in which caseworkers should refer to IE for a case-by-case assessment of suitability (ie the factors to take into account in the initial assessment of suitability).<sup>21</sup>

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<sup>20</sup> See for example Statement of Intent.

<sup>21</sup> See *EU Settlement Scheme: Suitability Guidance* at p. 11: Specifically, UK Visas and Immigration are obliged to refer a case (including cases involving children) to Immigration Enforcement for ‘case by case consideration of the individual’s conduct’ where the results of PNC and WI checks indicate one of the following (the first three are of particular relevance to children in conflict with the law):

- the applicant has, in the last 5 years, received a conviction which resulted in their imprisonment
- the applicant has, at any time, received a conviction which resulted in their imprisonment for 12 months or more as a result of a single offence (it must not be an aggregate sentence or consecutive sentences)
- the applicant has, in the last 3 years, received 3 or more convictions (including non-custodial sentences) unless they have lived in the UK for 5 years or more
- the case is of interest to Criminal Casework in respect of deportation or exclusion, for example where the applicant is in prison and the case is awaiting deportation consideration

This criteria provides a definition of ‘serious or persistent’ offending that is to be used by caseworkers at initial assessment. There are no specific criteria for children. Rather, the conditions are generic and appear to apply to adults and children alike.

23. A failure to differentiate between children and adults and to explicitly exclude children from criminality/suitability assessments fails to take into account a number of considerations:
- That childhood offending is common and the broad definition of persistence given in the ‘suitability’ guidance risks capturing many children who come into conflict with the law during their teenage years.
  - Childhood offending is usually temporary and most children ‘grow out’ of crime.
  - That the primary aim of the Youth Justice System is to prevent children from offending and reoffending, and that special measures are taken throughout the criminal justice system to ensure that mistakes made in childhood do not have a prolonged detrimental effect;<sup>22</sup>
  - Within the criminal justice system there is an over-representation of certain groups of children (notably BAME boys, and children living in residential care). Taking account of the serious and persistent offending of children in order to potentially exclude them from EUSS risks compounding the disadvantages/discrimination these groups already face.
  - A significant proportion of children in the criminal justice system have complex needs relating to communication, learning disabilities and mental health. The EUSS criminality conditions, if applied to children, compounds the barriers they already face and adds an additional layer of complexity to the application process.
  - Any suggestion that children would not qualify for status on the basis of their criminal behaviour is contrary to the obligation to promote the child’s reintegration into society. As Article 40(1) The United Nations Convention on the Rights of the Child (which is legally binding on the UK) provides: *States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*
  - Any additional conditions imposed on children such as those described above makes children’s immigration status in the UK and access to services more precarious, potentially heightening their potential for re-offending or to go missing.

**Question 3: What type of offences are taken into account for children for when determining what is ‘serious or persistent’?**

- the applicant has entered, attempted to enter or assisted another person to enter or attempt to enter into a sham marriage, sham civil partnership or durable partnership of convenience (or IE is pursuing action because of this conduct).

<sup>22</sup> For example, there are special protections in place to protect the privacy of children during proceedings, that sentencing reflects their lower culpability and capacity to change, and their convictions are ‘spent’ more quickly. See section 37 Crime and Disorder Act 1998; Article 40(2) UNCRC; *R (R) v Durham Constabulary* [2005] 1 WLR 1184; *T v UK and V v UK* (2000) 30 EHRR 121.

## A failure to explicit refer to children’s best interests in the suitability assessment

24. In all immigration decisions affecting children, the authorities have a duty under [section 55 of the Borders, Citizenship and Immigration Act 2009](#) to have regard to the need to safeguard and promote the welfare of a child. This should be interpreted in accordance with Article 3 of the UN Convention on the Rights of the Child, meaning that consideration of the child’s best interests must be a **primary** consideration in immigration decisions affecting them. Home Office guidance states as follows:

*Where a child or children in the UK will be affected by the decision, you must have regard to their best interests in making the decision. You must carefully consider all the information and evidence provided concerning the best interests of a child in the UK and the impact the decision may have on the child.*<sup>23</sup>

25. This obligation applies equally to the assessment of suitability. As such, further guidance is required as to what measures should be put in place to ensure that best interests remain a primary consideration in conducting such assessments, both procedurally (*how* the assessment will be carried out) and substantively (*what* factors should be taken into account).
26. In short, we are concerned that the lack of clarity regarding determinations of criminality/suitability and the application of the best interests principle:
- increases the likelihood of unfair and/or inconsistent decision-making by caseworkers that will undermine the best interests of children;
  - misleads and creates unnecessary anxiety for child applicants and those supporting them with their EUSS application;
  - may deter children and those applying on their behalf from making an application as a result of a wrong (but reasonably formed) belief that children with criminal convictions are ineligible for EUSS.

### Question 4: How will a best interest assessment be carried out when assessing suitability?

**RECOMMENDATION 1:** Children should be entitled to status where they **meet** the nationality and residence criteria. There should be no restriction of EU settlement for children on the basis of their criminal history.

**RECOMMENDATION 2:** The definitions provided in EU 15 and Annex 1 should be amended to make it clear that the continued protections of children’s rights under EU law apply, in particular under Article 28(3)(c) Directive 2004/38/EC. Specifically, the high threshold for deporting or excluding children –that it should only on the basis of ‘imperative grounds of public security’ and in children’s best interests - should be explicitly stated in Appendix EU.

<sup>23</sup> [EU Settlement Scheme: Suitability Requirements](#), at p.4

**RECOMMENDATION 3:** Without prejudice to recommendation 1, all guidance and step-by-step guides should explicitly and consistently state whether or not applications by children will be subject to checks against UK crime databases.

**RECOMMENDATION 4:** Without prejudice to recommendation 1, if the suitability requirements are deemed to apply to children, then the guidance must be amended to clearly and explicitly state that the threshold criteria for suitability is considerably higher for children than adults, and that only in exceptional circumstances will children's criminality be relevant to their application for status.

**RECOMMENDATION 5:** Notwithstanding earlier recommendations, guidance should set out child-specific conditions for the initial assessment of suitability for referral to the IE that include shorter time-frames and the removal of 'persistent' offending.

**RECOMMENDATION 6:** Explicit reference must be made to the primacy of best interests to assessments of suitability for children. Guidance should be provided as to how, substantively and procedurally, best interests assessments should be undertaken by decision-makers and how they will inform decision-making on suitability.

## Issue 2: Identifying EU children involved in the criminal justice system

27. There is currently no publicly available, centralised complete data on the nationality or immigration status of children who are involved in the criminal justice system, including EEA national children in places of detention. For example, in England and Wales it is mandatory for Youth Offending Teams (YOTs) to record nationality in the [AssetPlus](#)<sup>24</sup> custody module and YOTs may record nationality for community cases on their case management systems (ChildView) but this is not required other than when a child is sentenced to custody.
28. The lack of centralised and accessible criminal data disaggregated by nationality/immigration status makes it very difficult to identify, advise and assist EU national children with criminal records on their post Brexit immigration status and to ensure they are provided with specialist immigration advice on the potential impact of their criminal offending on their immigration status.

### **Specific Data-Related Questions Include:**

- 1. How many EEA national children are currently receiving services from youth offending services across the UK?**
- 2. How many EEA national children are currently held in places of detention across the UK?**
- 3. How can EEA national children who come into contact with the criminal justice system be identified (for the purposes of providing advice and support) in future?**

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<sup>24</sup> The Asset plus framework 'is used jointly by community and custodial youth justice services to support assessment and the delivery of targeted interventions to young people.

**4. How many EEA national children who are no longer involved in the criminal justice system have criminal records? How can these children be identified in order to provide advice and support for the purposes of the EUSS?**

**RECOMMENDATION 7:** The Government (eg Youth Justice Board or Youth Custody Service) should collect centralised nationality data for children in youth offending services and places of detention.

### **Issue 3: Relevance of period of imprisonment to continuous residence eligibility criteria**

29. Children’s involvement in the criminal justice system may be relevant to their status in ways other than determinations of suitability. It can also impact on children’s eligibility under the continuous residence criteria.
30. If an applicant has been to prison, he/she will usually need 5 years’ continuous residence **from the day they were released** to be considered for settled status (with some exceptions for those with over 10 years residence). The caseworker guidance<sup>25</sup> makes no distinction between adults and children in terms of resetting the clock following a period of imprisonment.<sup>26</sup>
31. The most frequently used custodial sentence for children in England and Wales is the Detention and Training Order (DTO) which can last between four and 24 months, with half of the sentence served in custody and half in the community.<sup>27</sup> The guidance is unclear as to whether the entire period will be taken into account in calculating residence. By way of example, an EEA national child could have lived in the UK for most of their life, be sentenced to a 20-month DTO, only ten months of which are spent in detention. It is unclear as to whether the child’s qualifying residence period would restart on release from detention, or at the end of the community-based component of the sentence.

**Question 5: Which element(s) of the DTO will be included when assessing children’s eligibility and resetting the clock under/calculating the continuous residence criteria?**

<sup>25</sup> EU Settlement Scheme: EU, other EEA and Swiss Citizens and their Family Members (29 March 2019);

<sup>26</sup> The Court of Appeal has recently confirmed that the term ‘imprisonment’ also includes the sentence of ‘detention’ (the custodial sentence imposed on children and young adults) for the purpose of EU immigration continuous residence criteria (see *Secretary of State for the Home Department v Visca* [2019] EWCA Civ 1052). This decision does not affect the questions and recommendations in this briefing other than to heighten the importance of clarifying the response to questions 5 and 6.

<sup>27</sup> See Powers of the Criminal Courts (Sentencing) Act 2000, s. 100. 80% of custodial sentences for young people are DTOs. See *YJB/MOJ (2019) Youth Justice Statistics 2017-18*.

32. In 2017-18: in England and Wales, the average monthly population of children in youth custody was 894;<sup>28</sup> in Northern Ireland it was 21;<sup>29</sup> and in Scotland, a snapshot for April 2017 shows 47 children in detention.<sup>30</sup>
33. Central data on children in detention is not disaggregated according to nationality. We therefore have no idea how many children in detention should apply for status, and no current means of identifying them. Indeed, given that a period of imprisonment breaks the ‘continuous residence’ criteria required for status, it is not clear whether children in secure care/detention are even eligible to apply.

**Question 6: Are children in secure care/detention eligible to apply for status under the EUSS?**

34. Even if children in detention can apply for EUSS, there are questions over who should be responsible for supporting such an application. Children who are remanded or sentenced to custody have been compulsorily removed from their parents and carers and are, by virtue of that parental and familial separation, under-supported and acutely vulnerable. Children in custody are also proportionately more likely to be subject to a care order or to have experienced time in care.<sup>31</sup> Many children in custody are placed at considerable distance from their parents or carers and may have few or infrequent visits. Many children are inadequately supported when they leave custody. In short, many children in or leaving secure care/custody are likely to have inadequate parental or family support to make an application for status. This is likely to be a particular difficulty for children serving long sentences.
35. For this reason, children in detention – like children in other types of residential care - have a heightened need for support when applying for status
36. The Home Office has already acknowledged and provided tailored EUSS guidance and concessions for children who are looked after, including those in residential care.<sup>32</sup> Such provision does not currently accommodate the specific, additional needs of children in care who are also involved in the criminal justice system, including those who are in detention.<sup>33</sup>

<sup>28</sup> *Youth Justice Annual statistics*. The monthly report for January 2019 was 812.

<sup>29</sup> <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/yja-workload-stats-bulletin-2017-18.pdf> (this includes those on remand and sentenced to custody).

<sup>30</sup> <https://cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf> This is only 16-17 year olds (younger children cannot be sentenced to imprisonment, but can be referred to secure care) and is a snapshot figure for April 2017.

<sup>31</sup> In England and Wales, over half of the children in custody have been in care at some point in their lives. See Lord Laming (2016) *In Care, Out of Trouble How the life chances of children in care can be transformed by protecting them from unnecessary involvement in the criminal justice system An independent review chaired by Lord Laming* (Prison Reform Trust). For data on Scotland, see <https://cycj.org.uk/wp-content/uploads/2017/10/Young-People-in-Custody-October-2017.pdf> at p 5.

<sup>32</sup> EU Settlement Scheme: Looked after Children and Care Leavers – Local Authority and Health and Social Care Trusts Guidance (undated).

<sup>33</sup> In England and Wales, the legal framework and status of children who are or were ‘looked after’ prior to, during, and after a period in youth detention is complex. It is beyond the scope of this briefing to consider in precise details the implications of the varying status of such children to the support they might receive, but this should be considered in any subsequent guidance. See for example, the briefing by Coram, above note 4.

37. Criminal justice professionals are unlikely to have the level of specialist immigration knowledge or clearance necessary to adequately advise the children for whom they are responsible. Their role should therefore be to identify children who are or may be EU national children and refer them, where appropriate to suitable specialised advice and support.

**RECOMMENDATION 8:** The EUSS should be amended to ensure that a custodial sentence imposed on a child does not impact on the calculation of their continuous residence.

**RECOMMENDATION 9:** If recommendation 1 is *not* accepted, and the suitability and residence requirements are applied to childhood offending, then detailed guidance is needed to explain how children in detention can apply for EUSS and how the residence criteria will be applied to them. Such guidance should also set out in concrete terms how the best interests assessment will be conducted and applied to this particularly vulnerable cohort of children.

**RECOMMENDATION 10:** If children can apply for EUSS during a period of detention, clarification is also required as to whether children who turn 18 whilst in detention can also apply for settled status during their detention.

**RECOMMENDATION 11:** *EU Settlement Scheme: Looked after Children and Care Leavers – Local Authority and Health and Social Care Trusts Guidance* (undated) should be updated to address explicitly the specific needs of looked after children who are involved in the criminal justice system (including the detained children for whom they retain legal responsibility).

**RECOMMENDATION 12:** Guidance should be developed for criminal justice agencies and professionals<sup>34</sup> setting out their obligations towards children (other than those who are currently looked after) involved in the criminal justice system in relation to the EUSS.

**RECOMMENDATION 13:** Training should be available to relevant youth justice professionals to ensure early identification of children affected by the EUSS and to facilitate referral to appropriate/specialist (immigration) support.

**RECOMMENDATION 14:** Youth Offending Teams, personal advisors or others with responsibility for children involved in criminal justice should be under an obligation to identify all EU national children in their care, inform them of their right to apply for status and refer them to specialist immigration advice.

**RECOMMENDATION 15:** The EUSS Scheme and related guidance should clarify that children in custodial detention are eligible to apply for EUSS.

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<sup>34</sup> Including local authority youth justice agencies (such as YOTs in England and Wales) and managers/governors of secure care/detention facilities.

### Issue 3: The relevance of childhood conduct to an adult application

38. For adult applicants, no distinction is made in the guidance between the relevance of crimes committed during childhood and those committed as an adult.<sup>35</sup> Particular account should be had of the childhood factors set out above (para 23), as well as the long time that childhood offences can remain on a person's criminal record before they become 'spent'. This is particularly important for EU migrants who may have received childhood convictions under different, stricter European criminal justice regimes, and under particularly harsh circumstances (for example under former communist regimes of Eastern Europe).

**RECOMMENDATION 16:** All childhood offending should be removed from consideration under the suitability requirements including for applicants who have now reached adulthood.

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<sup>35</sup> On the relevance of criminal records to adult applications, see *Unlock Briefing: EU national, settled status and criminal records* (February 2019) (and for more information about adults with childhood convictions contact [christopher.stacey@unlock.org.uk](mailto:christopher.stacey@unlock.org.uk)).