EU nationals, settled status and criminal records

Policy briefing – September 2019

This briefing sets out the concerns that Unlock has about the EU Settlement Scheme (EUSS) in relation to EU nationals with criminal records in the UK. Our aim is to help secure the rights of EU nationals to settled status in the UK by ensuring that a criminal record does not unfairly exclude them. The briefing aims to inform the ongoing work that the Home Office and other key stakeholders are doing on the process to better understand the policy and to improve practice. We are working on publishing information on settled status and for applicants with criminal records and those supporting them.

Introduction to the EU Settlement Scheme

EU, European Economic Area (EEA) and Swiss citizens and their non-EU family members living in the UK need to apply to the EUSS to have a right to remain in the UK. It provides an alternative immigration status to the current EU free movement provisions following the UK's departure from the EU.

Around 3.3 million EU nationals live in the UK. To qualify for settled status (indefinite leave to remain) or pre-settled status (limited leave to remain), **applications must be made by 31 December 2020 in a 'no-deal' scenario, or 30 June 2021 in a 'deal' scenario**. In the event of a 'no-deal' scenario, EU citizens intending to be a main applicant under the EUSS must enter the UK by 31 October 2019. In the event of a 'deal' scenario, the government's status of intent[1] is that:

1. EU citizens and their close family members who, by 31 December 2020, have been continuously resident in the UK for five years are eligible for "settled status" enabling them to stay indefinitely.[2]
2. EU citizens and their family members who arrive by 31 December 2020, but will not yet have been continuously resident here for five years, are eligible for "pre-settled status", enabling them to stay until they have reached the five-year threshold. They can then also apply for settled status.
3. EU citizens and their family members with settled status or pre-settled status will have the same access as they currently do to healthcare, pensions and other benefits in the UK.
4. Close family members (a spouse, civil partner, durable partner, dependent child or grandchild, and dependent parent or grandparent) living overseas will still be able to join an EU citizen resident here after the end of the implementation period, where the relationship existed on 31 December 2020 and continues to exist when the person wishes to come to the UK. Future children are also protected.

There are two criteria for eligibility to the EUSS:

1. EEA nationality – the applicant must be an EU, EEA or Swiss citizen (or a non-EU family member)
2. UK residence – the applicant must have been resident in the UK by the date the UK leaves the EU. If the Withdrawal Agreement is ratified, this will extend to 31 December 2020.

In addition to eligibility, applicants must also meet the suitability requirements. Criminal records, or "criminality" in Home Office language, features heavily in the suitability requirements for settled status applications. Guidance accompanying the EUSS suggests that *all* applications will be checked against crime databases including the Police National Computer (PNC)[3], and that where this reveals 'serious or persistent' offending from either the UK or from overseas, a referral will be made to Immigration Enforcement for a case-by-case determination as to whether the applicant should be refused status on the basis of 'suitability'. It appears that criminality will be one of the main reasons that applicants may be refused settled status, as part of the suitability criteria.

The suitability criteria

Where an applicant is eligible for EUSS (i.e. where the nationality and residence criteria are met) they may still be refused status on 'suitability' grounds, pursuant to Appendix EU.[4] It appears that the primary bases on which the Home Office is considering the criminality of applicants is by considering whether applicants either are, or should be made, subject to a deportation order, or should be refused due to their suitability.

Article 20 of the Withdrawal Agreement[5] sets out the limited basis on which status can be restricted on 'conduct' grounds (which includes criminality). **Conduct prior to the end of the transition period** (i.e. 31 December 2020 in a 'deal' scenario or 31 October 2019 in a 'no-deal' scenario) *'shall be considered in accordance with Chapter VI of Directive 2004/38/EC'* in determining whether it can restrict the right to residence. The EU Settlement Scheme: Suitability Criteria sets out the relevance of criminality. EU citizens may face deportation action for historic offences if they have:

- Received any sentence of imprisonment at all within the last 5 years;
- At any time (no matter how historic) received a sentence of 12 months or more for a single offence;
- For those resident in the UK for less than five years, if in the last 3 years they received 3 or more convictions (including with non-custodial sentences);
- Previous involvement in serious deception such as sham marriage or assisting unlawful immigration;
- If 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.

Chapter VI of Directive 2004/38 (Articles 27-33)[6] 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)). Conduct (including any criminal convictions relating to it) before the 31 December 2020 is to be assessed according to the current EU public policy/public security/public heath test, as set out in the EEA Regulations 2016. In essence, applicants should only be refused status due to conduct or criminality on the basis of *'serious grounds of public policy or public security'* (Art 28(2)).

For conduct after the transition period (i.e. 31 December 2020 in a 'deal' scenario or 31 October 2019 in a 'no-deal' scenario), residence rights may be restricted in accordance with national legislation.[7] The relevant national legislation has a lower threshold for deportation / exclusion than the more permissive current EU law. Essentially, pre-settled and settled status can be taken away and the person can face deportation action. The starting point is that there is a presumption in favour of automatic deportation for an offence resulting in a period of imprisonment of 12 months or more. In rebutting the presumption in favour of deportation, consideration will be given to individual circumstance but the longer the sentence, the more difficult the presumption comes to rebut:

- 4 or + years imprisonment: deportation unless very compelling circumstances;
- 1-4 years' imprisonment: deportation unless private life or family life exceptions engaged, or very compelling circumstances
- Less than 1 year, non-persistent, no serious harm: no automatic deportation, but may still be deported if conducive to the public good.

Appendix EU states that an application will be refused on criminality grounds where a deportation decision has been made. This suggests that where an application for settled status is made and a person might meet the criteria for deportation, no decision will be reached on the application until the case has been referred to Immigration Enforcement and a decision made on whether to pursue deportation on the facts of the case.

If the UK leaves the EU without a deal, conduct (including criminal convictions relating to that conduct) before the exit date (31 October 2019) will be considered in line with EEA Regulations 2016, while conduct after exit would be considered under UK legislation.[8]

Numbers of people

Significant numbers of EUSS applicants will have a criminal record. Over 11 million people in the UK - around 1 in 6 adults - have a criminal record[9], and we have no reason to believe that the proportion of EU nationals with a criminal record is significantly different to this. Based on 3.3 million EU nationals, this equates to 550,000 with a criminal record. A Migration Advisory Committee report[10] showed that of all the cautions/convictions that were given from 2012-2016, 88.5 per cent were given to UK/Ireland citizens, 6.7 per cent to EEA citizens and 4.7 per cent given to non-EEA citizens. It goes on to highlight how *"EEA citizens (and in particular New Member States) are more likely to receive a caution/conviction than their share of the population would suggest"* although highlights caution in interpreting this.[11] **This means potentially hundreds of thousands of people with a criminal record will need to apply for settled status.**

A large number of EU nationals deported have a criminal record. Home Office statistics report the number of what they refer to as 'foreign national offenders'[12] (FNOs) returned from the UK each year. In the 5 years 2014-2018, 18,050 EU nationals were deported who had been convicted in the UK or abroad.[13] This represents 63% of all FNOs deported. In 2018 alone, 3,670 EU nationals were deported, representing more than two-thirds (68%) of all 'foreign national offenders' deported.

The above statistics do not categorise by the sentence an individual has received, so Unlock made a Freedom of Information request to obtain the numbers of EU FNOs that had been deported from the UK in the last 5 years and whose last recorded prison sentence was in a certain range.[14]

- **The majority of those deported had served a prison sentence.** In the 5 years 2014-2018, 15,303 EU nationals had been deported from the UK having served prison sentences. This represents 85% of the 18,050 deported.
- **A significant proportion of those had served a short prison sentence.** Of the 15,303, 5,266 (34%) had a last recorded sentence of less than 12 months in prison, 6,529 had a sentence of between 12 months and 4 years, and 3,508 had a sentence of 4 years and over.[15]
- **A number of EU nationals deported hadn't served a prison sentence.** Based on the figures above, it appears that 2,747 (18,050 minus 15,303) EU nationals were deported as 'foreign national offenders' but had not served any length of prison sentence.

The majority of EU nationals deported are FNOs. Figures highlighted by the Migration Observatory[16] show that a total of 4,043 EU citizens left the UK via enforced removal or voluntary return in 2018, comprising both FNOs and non-FNOs. A large majority of EU nationals deported are foreign national offenders: 91% in 2018 (3,670 out of 4,043). This share was up from 70% in 2016, when 4,093 of the 5,638 EU nationals deported were FNOs. The absolute number of non-FNO EU national removals dropped sharply from 1,545 in 2017 to 373 in 2018. To a large extent this reflects the fact that in December 2017 the Home Office's policy of removing EEA national rough sleepers on the basis that they were abusing their treaty rights was found to be unlawful.[17]

EU nationals now represent the largest group of deported FNOs. Figures highlighted by the Migration Observatory show that from 2009 to 2017, the share of deported FNOs that were EU citizens has risen, from 14% in 2009 to 68% in 2018. The Migration Observatory note that this is *"the result of a steady decline in the number of non-EU FNOs returned and a rise in the returns of EU FNOs. The rise in the return of EU nationals coincided with an increase in the population of EU citizens resident in the UK"*.[18]]

Concerns about the EUSS approach to criminality

1. Asking applicants to self-disclose criminality is unnecessary

Despite repeatedly requesting the rationale for asking applicants to self-declare their past criminality, the purpose of this remains unclear. All applicants will be checked against relevant government databases (including the Police National Computer - PNC). It would seem unlikely that the Home Office will rely on information provided by an applicant. If the Home Office carries out checks regardless, then what is the purpose of self-disclosure? The lack of clear purpose is underlined by the fact that children (those under 18) are not asked to self-declare criminality, but it appears their applications will still be checked against relevant databases.

Seemingly then, the requirement to self-disclose simply enables the Home Office to impose a test of honesty from applicants (as part of EU16(a) of Appendix EU). Essentially, by asking a question about their criminal record, if an applicant fails to answer that question accurately, they appear to be at risk of being considered to have submitted false or misleading information (which alone could lead to refusal if it is considered material to the decision). This is deeply problematic; we know that many people, even with the best of intentions, will honestly make mistaken declarations about their criminal record.

As explained in section 2, the requirement to self-disclose is additionally problematic given the conflicting and confusing approach the Home Office has taken in its information and guidance. Some documents suggest "all convictions" need to be disclosed, in other cases explaining "spent convictions" don't need to be, failing to provide any guidance to applicants on how to answer these questions, and yet potentially using false or misleading answers against the applicant.

If the Home Office are of the view that they need to ask for certain criminality information which they are unable to verify by other means, it is unclear how asking applicants to self-disclose this information is effective.

Recommendation 1: The Home Office should follow the approach it takes to applications from children by removing the need to self-disclose criminality from all applicants, given that checks will be made of the PNC and other databases.

2. Failing to disclose creates a de facto integrity test

The Home Office says it will take into account *"whether [applicants] have been open and honest in their application"*[19]. Seemingly, this requirement to self-disclose (as part of EU16(a) of Appendix EU) is enable the Home Office to impose a test of honesty; if an applicant fails to answer the question accurately, they risk being considered to have deliberately submitted false or misleading information (which alone could lead to refusal if it is considered material to the decision).

This is deeply problematic; we know that many people, even with the best of intentions, will honestly make mistaken declarations about their criminal record – especially when that criminal record was a long time ago and they have no way of checking the details

Recommendation 2: The Home Office should resolve this issue by removing the need to self-disclose criminality from all applicants. Without prejudice to that, if questions about criminal records remain, the policy and guidance should be clear that mistaken declarations will not be used against people.

3. There is lack of clarity and guidance on what must be disclosed

Applicants for settled status online are asked an initial broad question about criminality – *"Have you ever been convicted of a criminal offence?"* - and then a number of more intricate questions about their criminal record.[20] Around 1 in 6 adults in the UK have a criminal record, and we have no reason to believe that the proportion of EU nationals with a criminal record is significantly different, meaning hundreds of thousands of people – potentially up to 550,000 - will tick 'yes' to the initial question.

The overall approach is inconsistent and contradictory. The existing guidance is not detailed enough.

The GOV.UK information 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. You'll be asked to declare convictions that appear in your criminal record in the UK or overseas. You do not need to declare any of the following:*
>
> - *convictions that do not need to be disclosed ('spent convictions')*
> - *warnings ('cautions')*
> - *alternatives to prosecution, for example speeding fines*
>
> *You'll also be checked against the UK's crime databases. You'll still be eligible for settled or pre-settled status if you've only been convicted of a minor crime. You may still get settled or pre-settled status even if you have other convictions. This will be decided on a case-by-case basis."*[21]

We welcome recent improvements to the GOV.UK guidance – particularly in stating that "spent convictions do not need to be disclosed".[22] However, there is no guidance on what a spent conviction is or how an individual can find out if their conviction is now spent. It also appears that this statement does not appear on the online form. Section 5 of the paper application – "Suitability" - states "*Please note – you are not required to declare non-recordable or spent convictions*", yet provides no guidance on what "non-recordable or spent convictions" means.

Despite these (minor) improvements to the GOV.UK guidance, the government continue to contradict this (see, for example, the Government response to the Home Affairs Committee report on the EU Settlement Scheme, which states "EEA and Swiss citizens only need to complete three key steps – prove their identity, show that they live in the UK, and *declare any criminal convictions*." *[emphasis added]*

There is inconsistency between the questions being asked in the settled status application form (e.g. *"offences [in the UK] within the last 12 months"*), and the caseworker guidance the Home Office has published on how it will make an initial assessment of suitability (e.g. *"the applicant has, in the last 5 years, received a conviction which resulted in their imprisonment"*[23]).

All of the guidance lacks clarity as to how the suitability criteria and threshold of criminality applies. The Home Office has told us that: "*Further changes have already been made to the 'What you'll need to apply'/ If you have criminal convictions' section on gov.uk. The main changes are that the applicant is given clear information on what they don't need to declare and also explains citizens may still be eligible for pre-settled or settled status despite having a criminal conviction."*[24] We have highlighted how these changes are not sufficient.

The majority of applicants with a criminal record should still be suitable for pre-settled or settled status. Words such as "*may still*" are unduly negative and risk embedding a sense that a criminal conviction will in most cases mean that an applicant is not eligible, when that shouldn't be the case.

There is insufficient guidance. The Statement of Intent 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.[25] Most parking fines will not result in a formal criminal record. The use of the most minor of offences as exemplary of the type of conduct that won't be taken into account implies that anything above – or an actual criminal record - may be.

This is misleading to applicants who may be deterred from applying if they have a criminal record but which, in fact, may still fall far short of the strict criteria under EU law. This risks deterring eligible applicants from applying for fear that all but the most minor, one-off offences will hinder their application. The Statement of Intent is now a dated document; the suitability criteria have substantively changed since and it is also inconsistent with the guidance that 'spent convictions do not need to be disclosed'.

Recommendation 3: The Home Office should make it clear whether spent convictions will be considered as part of the suitability criteria.

Recommendation 4: The Home Office should publish public facing, easy-to-understand information that is factual but reassuring in terms of the impact of criminal records on EUSS applications and how they will be considered.

Recommendation 5: The Home Office should ensure that the guidance in the online form and paper forms is clear, detailed and consistent and is reflected in official statements and correspondence.

4. There is uncertainty about whether the initial assessment of suitability is the extent of the criminality considered when making a decision on suitability

EU law sets out principles to be applied in deportation cases, not hard and clear criteria. The UK position on when EU citizens can and should be deported under EU law has changed considerably over the last decade. The *EU Settlement Scheme: Suitability Criteria* sets out the relevance of criminality and the circumstances in which caseworkers should refer to Immigration Enforcement for a case-by-case assessment.[26] These are quite detailed in describing the types of criminal records which, if indicated following the check of the Police National Computer or other databases, UK Visas and Immigration (UKVI) must refer to Immigration Enforcement. The suitability criteria also sets out convictions which must be considered without a referral to Immigration Enforcement.[27]

However, while the suitability criteria states that UKVI *must* refer where the initial criteria are met, the document does not make clear whether UKVI *can* refer other cases which indicate criminal records that are outside of the types listed in the guidance. There are many scenarios that fall between "types that must be referred" and "types that must be considered without referral". For example, the criteria for referral only mentions non-custodial sentences leading to a referral where "the applicant has, in the last 3 years, received 3 or more convictions (including non-custodial sentences)". However, could an applicant that received a suspended prison sentence 1 year before application have their case referred? Or could an applicant with a single conviction that resulted in a community sentence have their case referred? A significant proportion of people with criminal records are likely to fall between the two.

Now that there is reference to how "spent convictions" do not need to be disclosed, this creates a realistic expectation that spent convictions will not be considered. However, the suitability guidance for caseworkers suggests they will be: *"Caseworkers can where appropriate consider evidence of criminality that they encounter on the PNC and WI [warnings index] even if that evidence was not declared by the applicant."*[28] It is therefore unclear as to whether spent convictions are considered.

Recommendation 6: The Home Office should make clear how UKVI should handle cases that do not meet either the 'must refer' or 'must not refer' criteria, and in particular how spent convictions are considered.

5. The policy on who will be refused due to criminality is ambiguous

Currently, criminal records are considered as part of the EU public policy/public security/public health test, as set out in the EEA Regulations 2016. The bar for a criminal record to lead to an EU national being deported has been a high one. Yet the Home Office has failed to give any meaningful detail to applicants about whether a criminal record will mean they will be refused settled status (as highlighted in sections 3 and 4. In practice, EEA nationals are often issued with deportation orders despite relatively minor offending history, including individuals who have only committed one offence and received a custodial sentence significantly shorter than 12 months. This is reflected in page 12 of the suitability guidance, highlighting the pace at which the bar has fallen. Yet the Home Office explains this to individuals by stating: *"It is considered you represent a genuine, present, and sufficiently serious threat to the public to justify your deportation on grounds of public policy."* There have also been cases where deportation has been on the basis of 'persistent offending' in cases where the offending has been very minor. In one case we are aware of, an individual received a deportation order after committing 5 offences that resulted in a number of fines (totalling less than £300), a conditional discharge and 2 days' detention.

Recommendation 7: The Home Office should publish clear information on how Immigration Enforcement decisions relating to criminality will comply with the EU case law applying Article 28, Directive 2004/38.

Where a case is referred to Immigration Enforcement, a proportionality assessment will be applied. In response to requests for clarity about this, the Home Office has simply stated:

> *"Each application is assessed on a case by case basis, taking into account a range of criteria. The public policy and security test is a matrix of factors, looking at the conduct and the proportionality of the decision in relation to each application. For this reason, descriptive lists of what is considered to meet the public policy and security test threshold or what constitutes a minor crime will not be appropriate because the consideration is not a tick box or linear process but considers a range of factors."*[29]

Whilst we appreciate that each case must be considered on its merits, consistent and defensible decision making depends upon a rigorous approach. As Lord Sumption stated in a recent Supreme Court ruling, *"For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible.... The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself."*[30] There is no specific policy relating to the EUSS that sets out how Immigration Enforcement will carry out the proportionality assessment – all that exists is a 2017 policy[31] which mainly emphasises the potential reasons to deport, rather than the potential reasons not to deport; much of the policy focuses on how EU law does not necessarily prevent deportation..

Relatedly, we are concerned that EU nationals with convictions from certain countries may be disproportionately affected. For example, it may be that due to anti-Roma discrimination, more Roma (than non-Roma) might have previous convictions in their countries of original.

Recommendation 8: The Home Office should publish its policy on how Immigration Enforcement will approach considering the criminality of those cases referred to it.

6. The current approach could make eligible citizens reluctant to apply

Reports from British Future[32] and Migration Observatory[33] have highlighted how people with minor or spent convictions may choose not to apply because of fear of rejection. Inconsistences in the application process, conflicting public statements and media noise around 'foreign criminals' are likely to contribute to this fear. As a result, people may be hesitant to engage with the process, answer the questions incorrectly, and/or find that their criminal record affects their ability to gain settled status.

We expect that potentially hundreds of thousands of eligible citizens will think they need to answer "yes" to one or more of the criminality questions put to them. At the very least it will raise questions and create confusion. It is also likely to significant amounts of – often unnecessary - work for caseworkers. We are worried that many people who are concerned about the impact of their criminal record will simply not apply for settled status, leaving them in a precarious position in the future.

Recommendation 9: The Home Office should resolve this issue by publishing clear, public-facing guidance and clarifying the extent of what will be considered.

7. The relevance of a period of imprisonment on 'continuous residency'

Home Office guidance states that *"Where a person has completed a continuous qualifying period of residence in the UK and Islands of less than 5 years, continuity of residence is broken, and restarts from scratch on release, where the applicant served or is serving a sentence of imprisonment of any length in the UK and Islands."*[34] As a matter of principle, we do not believe it is fair that a prison sentence should mean that continuous residence 'restarts from scratch on release' for someone with less than 5 years' residence in the UK.

Earlier versions of caseworker guidance were unclear on the impact of a prison sentence where 5 years' continuous residency had previously been established, and from the immigration rules and updated Home Office guidance, it appears that an individual who accumulates 5 years' continuous residence before imprisonment can rely on their previously accumulated continuous residence in an application for settled status. However, the GOV.UK guidance[35] 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."* This does not make it clear that continuous residency *could* have been acquired before a prison sentence and this would allow an individual to be considered for settled status.

Recommendation 10: The Home Office should make it clear in GOV.UK guidance that a person who has 5 years' continuous residence prior to imprisonment retains that qualifying period for settled status.

8. People in prison might not be able to apply

11% of the prison population are foreign nationals, of which 43% are European (EEA).[36] Given the Home Office guidance on continuous residency above, it is unclear whether people can apply for settled status while currently serving a prison sentence. It appears that anyone in prison who has 5 years' continuous residence retains that qualifying period for settled status. However, there is no guidance as to how this works for those who are applying from prison.

It appears that Home Office guidance may be implying that people in prison who had yet to accumulate 5 years' continuous residence in the UK before prison are not able to apply while they are in prison as they have not yet built up any level of residency, or the Home Office may be considering issuing deportation proceedings. It appears that anyone in prison who did not accumulate 5 years' continuous residence before imprisonment is not eligible to apply for pre-settled status while they are in prison as they cannot rely on previously accumulated continuous residence.

If there is a "no-deal", this may mean that individuals who are serving sentences for minor convictions over exit day (31 October 2019) are unable to secure their status. This would also preclude people remanded whose charges are later dropped, or who later receive a non-custodial sentence. This would be unfair as the Home Office has consistently stated that only "serious or persistent criminals"[37] would be excluded on the basis of suitability. Would someone in prison over exit day count as a good reason for a late application and an extension of time?

Questions for the Home Office:

1. **Can individuals with 5 years' continuous residence prior to imprisonment apply for settled status while in prison?**
2. **Can individuals who accumulated less than 5 years' continuous residence before imprisonment apply to the EUSS while they are in prison?**
3. **In the event of no-deal, and if individuals serving a prison sentence are unable to apply while in prison, will those in prison over "exit day" be able to apply to the EUSS after release?**

Recommendation 11: The Home Office should allow all eligible people in prison to apply to the EUSS and work with the Ministry of Justice to ensure applicants can access paper forms

Regardless of the above, there are a number of particular groups the Home Office need to consider:

1. EU nationals in prison will often have family members resident in the UK who will be making applications for settled status. It is unclear what impact the imprisonment of a family member will have on their application.
2. EU nationals leaving prison need to be made aware of the situation with their criminal record and applying for settled status.
3. Children in detention (see below)

Recommendation 12: The Home Office should produce specific guidance for people in prison, people leaving prison, and their families.

There are questions about who should be responsible for supporting applications from those groups above. The Home Office has acknowledged and provided tailored guidance for children who are looked after. Criminal justice professionals are unlikely to have the level of specialist immigration knowledge or regulation to provide advice to those in prison or serving a sentence in the community. Their role, supported by the Ministry of Justice, should be to identify those who are or may be EU nationals and refer them where appropriate to suitable specialised advice and support.

Recommendation 13: Guidance should be developed for criminal justice agencies and professionals, setting out their obligations towards those in the criminal justice system in relation to the EUSS.

9. The approach to children

We are concerned about the treatment of applicants with a criminal record that was acquired in childhood. The Brexit and Children Coalition have highlighted how children in detention – like children in other types of residential care – have a heightened need for support when applying for status. We support the 16 recommendations they have made in a recent briefing.[38] In particular, they have recommended that all childhood offending should be removed from consideration under the suitability requirements including for applicants who have now reached adulthood.

10. The outcomes of decisions

Once cases are referred to Immigration Enforcement for consideration, it is not clear how long it will take for decisions to be made, nor is it clear that the applicant will be informed that this is what is happening. It is only if the person is served with a deportation decision that the application for settled status will be refused. If a deportation decision is made and the settled status application is refused, it is not clear whether the Home Office will look to detain, notify of a right of appeal on human rights grounds or serve a "deport first, appeal later" notice requiring any appeal to be pursued from abroad.

In third-country deportation cases, people with criminal records have been subject to deportation for low-level offences. People tend not to challenge decisions to deport – there is no legal aid available and it is generally hard to challenge. EEA nationals are more likely to have their deport orders certified[39] (meaning that an appeal doesn't act as a barrier to removal) than third-country nationals – 84% of deportation orders in 2017 for EEU nationals were certified – this compares to 12% for non-EEA nationals.[40] We would be concerned if this would continue to be the case where EUSS applications are refused.

As highlighted above, outside of the EUSS the majority of EU nationals deported are foreign national offenders. We are concerned that a significant number of individuals will be refused settled status due to criminality. Recently published EU Settlement Scheme statistics[41] do not make clear how many have been refused, but further experimental quarterly statistics published by the Home Office[42] state that between 28th August 2018 and 30th June 2019 *"no applications were refused in this period."* Despite this seemingly positive statistic, at the end of June 2019 there were 103,800 applications that hadn't concluded. By the end of July this figure had reduced to 88,900, but still with no explanation as to why these had not been concluded. We are concerned that complex suitability cases are simply not being decided rather than being refused. There is no detail in either the monthly or quarterly statistics about how long these applications have been pending for, nor any details on the number of cases pending due to a referral to Immigration Enforcement following an initial assessment of suitability in relation to criminality.

In relation to applications concluded, there are three 'outcomes' being reported – settled status, pre-settled status or 'other outcome'. The 'other outcome' is defined as including *"any outcome that did not result in a grant of leave because the application was withdrawn by the applicant, was invalid as it did not include the required proof of identity and nationality or other mandatory information, or was void because the applicant was ineligible to apply, for example because they were a British citizen."* In June 2019, 137,600 applications were concluded, with 0.7% resulting in 'other outcome', which equates to 963 concluded applications. The only explanation is that "there were 2,010 withdrawn or void applications and 260 invalid applications in the same period". The reasons for withdrawal and what constitutes void or invalid is not explained. Worryingly, in July 2019 the percentage of 'other outcomes' increased to 1.6%, which equates to 2,338 concluded applications.

Recommendation 14: The Home Office should publish specific information for those applicants who have their case considered by Immigration Enforcement.

Recommendation 15: The Home Office should state in their published statistics how many applications have been refused due to criminality.

Recommendation 16: The Home Office should state in their published statistics how many cases are pending due to a referral to Immigration Enforcement following an initial assessment of suitability in relation to criminality, with a breakdown on how long they have been pending for.

11. The treatment of the convictions of EU nationals after the UK has left the EU

We are concerned about the treatment of criminal records acquired after the UK has left the EU. Defaulting to UK legislation on deportations will mean that EU nationals convicted after the specified date (31 December 2020 in a 'deal' scenario, or 31 October 2019 in a 'no deal' scenario) will find themselves at much higher risk of deportation.

Recommendation 17: The Home Office should clarify the position, in a 'no deal' scenario, of EU nationals resident in the UK before 31 October 2019 who are convicted before they make an application for settled status.

For EU nationals coming to the UK after the UK has left the EU, is the Home Office planning to apply the same criminality policies to EU nationals as currently apply to non-EU nationals? We have a number of concerns about the approach taken to non-EU citizens, and we would be deeply concerned if the government's policy was to approach post-exit offending of EU citizens in the same way as non-EU citizens. This raises fundamental policy questions which we would encourage the Home Office to engage with key stakeholders on.

Recommendation 18: The Home Office should engage with stakeholders on its future approach to EU nationals that become resident once the UK has left the EU.

About Unlock

Unlock is an independent award-winning national charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence.

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End notes

[1] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf
[2] 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.
[3] And dependent on the outcome of Brexit negotiations, European databases e.g. the Schengen Information System to which the UK presently has access
[4] Available at https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu. This includes the following:

- 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).

[5] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf
[6] Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004L0038
[7] The UK Borders Act 2007 creates a presumption that foreign criminals will be deported if they are convicted in the UK of a crime leading to a prison sentence of 12 months or more, unless one of a number of exceptions apply. The exceptions include where deportation would breach our obligations under the European Convention on Human Rights or the Refugee Convention or where the person was under the age of 18 on the date of conviction. Where a foreign criminal does not fall within the scope of deportation under the 2007 Act, for example if the person is convicted of an offence outside the UK, consideration may be given to deportation under section 3(5) of the Immigration Act 1971 on the basis that the individual's deportation from the UK would be conducive to the public good.
[8] The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 http://www.legislation.gov.uk/uksi/2019/745/contents/made
[9] https://www.unlock.org.uk/policy-issues/key-facts/
[10] Section 6.13, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741926/Final_EEA_report.PDF
[11] The report states: *"we should to be careful in interpreting such data. We know, for example, that the incidence of criminality is higher for young men than for the population as a whole. So, if migrants are more prevalent among the population of young men, they will have a higher share of cautions/convictions. The third row of the Table shows that this explains a significant amount of the overrepresentation of EEA citizens. Ideally, we would like to control for all observable characteristics of an individual and test whether nationality differences remain after such characteristics are accounted for. Unfortunately, we cannot do this with the data that we have."*
[12] A foreign national offender is a non-British citizen who has been convicted either in the UK of any criminal offence, or abroad of any serious criminal offence.
[13] Based on figures in table rt_06_q of the Immigration Statistics published 24th May 2019. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/803187/returns5-mar-2019-tables.ods. In these statistics, the Home Office define a foreign national offender (FNO) as someone who (1) is not a British citizen; and (2) is/was convicted in the UK or abroad of any criminal offence. Following the introduction of Association of Chief Police Officers Criminal Records Office (ACRO) cases, the FNO returns figure has included cases where foreign nationals, who had a criminal conviction in another country, were picked up by police in the UK, and subsequently returned from the UK. In addition, these people could also have a UK conviction. Those with an overseas criminal record may also have a UK criminal record.
[14] Based on figures provided to Unlock on 9 July 2019 in response to a Freedom of Information request (53305), following advice from the Home Office as to the figures available. Note these are based on 'latest sentence length'. The Home Office response has a note which states: "*Sentence details are as of the last sentence recorded against the FNO on the case management system however some cases could have had previous convictions of a greater or lesser sentence length.*" Available at https://www.whatdotheyknow.com/request/567592/response/1395018/attach/3/53305%20Stacey.pdf?cookie_passthrough=1
[15] See reference above.
[16] Available at https://migrationobservatory.ox.ac.uk/wp-content/uploads/2019/07/Briefing-Deportation-and-Voluntary-Departure-from-the-UK.pdf
[17] https://www.theguardian.com/uk-news/2017/dec/14/home-office-policy-deport-eu-rough-sleepers-ruled-unlawful
[18] Page 7, available at https://migrationobservatory.ox.ac.uk/wp-content/uploads/2019/07/Briefing-Deportation-and-Voluntary-Departure-from-the-UK.pdf
[19] Page 8 of EU Settlement Scheme: suitability requirements, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791597/EUSS_suitability_guidance_v1.0.pdf
[20] The questions are as follows:

1. Have you ever been:
    a. convicted of a criminal offence
    b. arrested or charged with an offence that you're on trial for or awaiting trial

   This includes offences in the UK or any other country
2. Have you been convicted of a criminal offence in the UK in the last 12 months?
3. Have you had a criminal conviction outside the UK that involved any of the following:
    a. a violent offence
    b. a drug-related offence
    c. a prison sentence of 12 months or longer
4. Have you ever been arrested or charged for an offence for which you are currently on, or awaiting, trial or which is pending a decision to charge?
5. Have you ever supported, encouraged or been involved in:
    a. terrorist activities
    b. war crimes, crimes against humanity or genocide
    c. an extremist organisation

[21] https://www.gov.uk/settled-status-eu-citizens-families/what-youll-need-to-apply
[22] Available at https://www.gov.uk/settled-status-eu-citizens-families/what-youll-need-to-apply
[23] Page 11 – Initial assessment of suitability – in the EU Settlement Scheme: suitability requirements, Version 1.0, published 1st April 2019. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791597/EUSS_suitability_guidance_v1.0.pdf
[24] Email to Unlock on 19th June 2019 from Rebecca Collings, EU Settlement Lead at UK Visas and Immigration
[25] See, for example, the EU Settlement Scheme: Statement of Intent, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf. Page 21: *"5.16. As agreed with the EU in the deal on citizens' rights, criminality and security checks will be carried out on all applications for status under the scheme. In line with the draft text of the Withdrawal Agreement, conduct (including any criminal convictions relating to it) before the end of the implementation period (31 December 2020) by a person protected by the agreement will be assessed according to the current EU public policy tests for deportation, as set out in the EEA Regulations, while their conduct (including any criminal convictions relating to it) after that period will be considered against UK deportation thresholds.14 This is a sensible approach to ensure that we identify any serious or persistent criminals, or anyone who poses a security threat, to protect everyone who lives in the UK; we are not concerned here with minor offences, such as a parking fine. It will not affect the overwhelming majority of EU citizens and their family members."*
[26] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791597/EUSS_suitability_guidance_v1.0.pdf On page 11, the guidance states: *"This section tells you about the initial assessment of suitability and referral of an application from UK Visas and Immigration (UKVI) to Immigration Enforcement (IE). Where the result of the check of the Police National Computer (PNC), Warnings Index (WI) or immigration records indicates that:*

- *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*
- *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)*
- *the applicant has fraudulently obtained, attempted to obtain or assisted another person to obtain or attempt to obtain a right to reside in the UK under the EEA Regulations 2016 (or IE is pursuing action because of this conduct)*
- *the applicant has participated in conduct that has resulted in them being deprived of British citizenship*

UKVI must refer the case to IE for a case by case consideration of the individual's conduct under the public policy and public security test as set out in the EEA Regulations 2016 (for conduct pre-exit in a 'no deal' scenario or before the end of any implementation period agreed with the EU in a deal scenario, i.e. before the 'specified date' under Appendix EU) or otherwise under UK legislation."
[27] The guidance states, on page 12, *"Where an applicant has a past conviction or convictions which were not referred to the Home Office for deportation consideration under the policy in place at the time, as set out in the list below, and who have not committed any further offence that meets the referral criteria, the application must be considered without referral to IE:*

- *prior to 1 April 2009, Home Office policy was to consider whether to deport an EU citizen (or their family member) where they had received a single custodial sentence of 24 months or more*
- *on 1 April 2009, this was reduced to 12 months for sexual, violent or drugrelated convictions*
- *on 14 January 2014, the 12-month criterion was applied to all other convictions, and a further criterion was included of 6 or more custodial sentences for any offence in the last 3 years*
- *this was further amended on 27 January 2014 to a custodial sentence of 12 months or more for any offence and 4 or more custodial sentences for any offence in the last 3 years*
- *on 1 April 2015, the criterion of a single offence resulting in a custodial sentence of 12 months or more was retained, and the low level persistent offending criterion was reduced to 3 convictions in the last 3 years*
- *from 6 October 2015, the sentencing criterion was removed for all EU cases and since then, HM Prison and Probation Service (HMPPS) have referred all EU and non-EU citizen foreign national offenders to the Home Office for deportation consideration"*

[28] Page 8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791597/EUSS_suitability_guidance_v1.0.pdf
[29] Email to Unlock on 19th June 2019 from Rebecca Collings, EU Settlement Lead at UK Visas and Immigration
[30] Paragraph 19 of [2019] UKSC 3, available at https://www.supremecourt.uk/cases/docs/uksc-2016-0195-judgment.pdf
[31] Available at https://www.gov.uk/government/publications/eea-decisions-taken-on-grounds-of-public-policy
[32] http://www.britishfuture.org/wp-content/uploads/2019/01/EU-Citizens-report-1-pdf.pdf
[33] https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit/
[34] EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members (29 March 2019). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791153/Main-EUSS-guidance-29-March-v1.0.pdf
[35] https://www.gov.uk/settled-status-eu-citizens-families/what-youll-need-to-apply
[36] House of Commons Library Briefing Paper, UK Prison Population Statistics, 23 July 2018 https://researchbriefings.files.parliament.uk/documents/SN04334/SN04334.pdf
[37] EU Settlement Scheme: Statement of Intent, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf.
[38] Hollingsworth, K. and Stalford, H. (2018) Briefing: The EU settled status scheme and children in conflict with the law. Available at https://www.liverpool.ac.uk/media/livacuk/law/2-research/ecru/June,25,FINAL,-,EUSS,and,Youth,Justice.pdf
[39] The Home Office can `certify' the decision to deport an EEA national. If a case is certified, it means that a person can lodge the appeal in the UK but can be removed from the UK before the appeal has been finally decided by the Immigration and Asylum Chamber. However, the Home Office can only lawfully certify a case if removal from the UK during the appeal period would not be in breach of the Human Rights Act 1998.
[40] Figures based on a Home Office response (number 51644) dated 1 February 2019 to a Freedom of Information request from Rudy Schulkind.
[41] Available at https://www.gov.uk/government/statistics/eu-settlement-scheme-statistics-june-2019
[42] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826750/eu-settlement-scheme-quarterly-statistics-28-august-2018-to-30-june-2019.pdf?_ga=2.183962851.476291165.1566463696-356550743.1551115006