The AIRE Centre – Written evidence (CIT0001)

Introduction

The AIRE Centre is one of the 57 organisations in the UK granted funding from the Home Office to assist vulnerable individuals to apply under the EU Settlement Scheme ("EUSS"). We have worked on this project from May 2019 until present.

The AIRE Centre is an OISC 3 accredited organisation, which means we largely work on complex applications to the EUSS. We run an advice line, provide end-to-end assistance to support people applying under the scheme, deliver training and workshops to the voluntary sector, lawyers and Local Authorities, and have developed a number of online resources to support applications and raise awareness of the scheme.

We work with vulnerable and 'at risk' groups who struggle to apply and/or may not be aware of the scheme and the need to apply. This includes victims of abuse, those who may lack mental capacity, the homeless, and children in care/care leavers

As the 30 June 2021 deadline for applications approaches, we have seen a significant rise in requests for assistance. Between June 2020 and August 2020, we received an average of 102 requests for advice per month. Between March to May 2021, this number more than doubled, and we received an average of 230 requests for advice per month. From 1 June 2021 to 14 June 2021 alone, we received 147 requests

The AIRE Centre is concerned that there appears to be a significant number of EEA citizens and their family members living in the UK who, for various reasons, have yet to apply to the EUSS, and risk being deemed to be in the UK unlawfully as a result. These problems also appear to have been exacerbated by the Covid-19 Pandemic, as discussed in section 5 below.

Processing of outstanding applications ahead of the deadline

Article 18(1)(e) of the Withdrawal Agreement provides that: "The host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided;". The AIRE Centre is concerned that for vulnerable applicants, the processing of outstanding applications ahead of the deadline does not amount to a smooth, transparent or simple process and that there remain certain administrative burdens.

Changing Guidance

In response to concerns, the Home Office has made regular and appreciated updates to the rules and processes governing the Scheme. For example, the introduction of the new Covid-19 and the EUSS guidance, first published on 10 June 2021.1 However, the effect of frequently changing guidance, especially so

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close to a deadline, is that advice organisations must also consider their capacity and the feasibility of contacting previous clients whose eligibility may be affected by the changing rules. This puts an extra strain on advice organisations.

The AIRE Centre would recommend:

- The Home Office should identify how to publicly disseminate key points of changing rules to the Scheme.
- The Home Office should consider how best to contact those with pre-settled status to ensure they are aware of changes that may affect their eligibility for settled status, including those who may be under the impression that their continuous residence has been broken during absences occasioned by the COVID pandemic.
- Given the significant release of new guidance so close to the deadline for applications, the deadline to the Scheme (30/06/21) should be extended to allow advisors and applicants to consider how this new guidance may affect current and future immigration status in the UK for EU nationals and their family members.
- Alternatively, anyone whose application is affected by such new guidance, should automatically be permitted to apply late to the Scheme, if their application is late due to a lack of awareness of the impact of the new guidance.

Paper Applications

Before the announcement by the EUSS Grants Team on Friday 11 June 2021, applicants and advice organisations faced considerable delays trying to reach the EU Resolution Centre to order a paper application form be delivered by post. Although certain paper applications forms are now directly accessible on the gov.uk website (e.g. applications with alternative evidence of ID), other paper applications forms are only available to grant funded organisations (e.g. applications for those with derivative rights to reside). This will create a blockage, with certain paper applications only being able to be processed by grant funded organisations, who all appear to be working at capacity.

OISC competence guidance also currently requires OISC Level 1 registered advisers to refer on clients 'Where you are unable to prove a requirement is met with the required documentation - for example, the applicant does not have their own valid identity and nationality document; where the applicant is missing some evidence to prove their own residence in the UK; where a non-EEA applicant does not have evidence relating to their EEA family member.'2

This means that while the paper applications to the Scheme using alternative ID have now been made available online since 15/06/21,3 advice organisations with advisers only registered at OISC Level 1 will not be able to advise clients on completing these forms. This restriction in the OISC competence guidance is not

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/992928/covid-19-caseworker-guidance-v1.0.pdf

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/855983/Guidance_for_EUSS_advisers_on_authorised_work_at_Level_1.pdf

[3] https://www.gov.uk/government/publications/apply-to-the-eu-settlement-scheme-by-post-or-email

necessary or reflective of the difference between the EUSS and other immigration routes to the UK. While other immigration applications are not considered a valid application if the applicant does not have valid ID, or is missing evidence in their application, applications to the Scheme are not treated in the same way, as caseworkers processing applications to the Scheme must look for reasons to grant status and therefore make efforts to contact the applicant to request further evidence where missing.

Enabling OISC level 1 advisers to support applications with alternative evidence of ID would help reduce some of the demands on grant funded organisations with advisers registered at OISC level 2 and above who are struggling to meet the ever-increasing demand for support.

Furthermore, despite the increased availability of paper applications, grant funded organisations continue to face difficulties in providing in-person assistance to vulnerable applicants. The announcement on Friday has not necessarily avoided 'unnecessary administrative burdens'. The AIRE Centre therefore recommends that:

- Signatures should not be required on paper application forms, as there is no requirement to sign a normal online application to the Scheme.
- Alternatively, advisers should be explicitly permitted to sign on behalf of applicants, where the applicant consents to this.
- All blank applications should be made available on the government website. Alternatively, they should at least be made available to all OISC registered organisations, not only grant funded organisations.
- OISC competence guidance should be amended to reflect the difference in practice of the EU Settlement Scheme and allow advisers registered at OISC Level 1 to advise on:
    I. Applications to the scheme where further evidence of residence is required.
    II. Applications to the scheme where the applicant would otherwise be able to make a regular application, but who does not have valid ID.
- Paper applications submitted after the deadline should automatically be accepted as late applications, without the need for applicants to argue there are 'reasonable grounds' for submitting late applications. This would allow all applicants with complex cases time to seek assistance to be supported to apply to the Scheme. This would also make sense in light of the fact the Home Office changed the process by which paper application forms could be accessed less than a month before the deadline.

Scarcity of free biometric appointments

Third country nationals who are eligible to apply to the Scheme are also required to submit their biometrics at a Sopra Steria location. When a third country national applies, the application automatically takes them to the Sopra Steria website where they must book an appointment to submit their biometrics in person. The applicant must book an appointment within a specified time of making their application, a number of these appointments available would be available free of charge. Appointments that are not free can cost up to £135.4

However, increasingly, free appointments have not been available to applicants. This has led to vulnerable people paying disproportionality high costs, some even having to travel significant distances to reach other Sopra Steria locations where their local location has no available appointments at all. For example, the AIRE Centre is aware from another organisation of a vulnerable family that was required to travel from Glasgow to Aberdeen for an appointment. This has clearly become an unnecessary administrative burden and contradicts the Governments promise that applications to the Scheme will be free: "Since 30 March 2019, applications to the EUSS have been free of charge. This ensures that there is no financial barrier for any EEA citizen or their family member who wishes to stay in the UK."5

The AIRE Centre recommends that:

- A decision on an application should be made even when biometrics have not been submitted. An applicant should only be expected to submit biometrics when they will not incur any costs and they are supported to travel safely during the pandemic.
- There should be no specified deadline for a biometrics appointment to be made.
- When an applicant is directed to Sopra Steria via their application to the Scheme, the applicant should have any choice of appointment time and the cost should then be claimed by Sopra Steria from the Home Office.
- Applicants who have been forced to travel should be able to claim travel costs back from the Home Office.

Proof of status, including the lack of a physical document

After receiving a decision on their status, the applicant does not receive any documentary proof of that status. Proof of their status can only be accessed through a government website6. There is a special function for proving status to someone else, for example, an employer or landlord, whereby any person with status under the Scheme must share a 6 digit code with that person.

If the applicant acquires a new passport, national identity card, phone number, email address or legally changes their name then they must update these details. To update details after receipt of status they must also login to their online status. Therefore, in addition to the digital skills needed to prove status, there is also an onus on the applicant to maintain their digital status whenever they renew their ID card, change their mobile phone number, email address, or legally change their name. Further, they may only change these details if they have access to the email account and mobile phone number used in their application.

Many vulnerable applicants rely on the email accounts and mobile phone numbers of friends, family, advice workers, and support workers. The Home Office is placing an indefinite onus on the applicant to have digital skills. For vulnerable applicants without digital skills, this means that the Home Office is

[4] https://www.freemovement.org.uk/visa-appointment-fees-rise-with-no-warning/

[5] https://www.gov.uk/government/publications/eu-settlement-scheme-policy-equality-statement/policy-equality-statement-eu-settlement-scheme

[6] https://www.gov.uk/view-prove-immigration-status

making them indefinitely reliant on another person with digital skills. This has obvious issues around independence, potential abuse/exploitation, and where the relationship no longer exists for whatever reason. The AIRE Centre has advised numerous clients who were initially assisted by an advice organisation or a friend to apply, but the applicant no longer has contact with those individuals and so has not received any further correspondence from the Home Office and is not able to login to their online account or update their details.

Case Study

The AIRE Centre is currently assisting a vulnerable client who does not speak English. 'Friends' of hers, with whom she has now lost contact, incorrectly completed her application and convinced her that the Home Office now considered her unlawfully resident and at risk of deportation. Another friend of this client referred her to our organisation where we could assure her that she is in fact not of risk of deportation and assist her to complete her application. This example highlights how the current digital status system facilitates exploitation and the exercise of over vulnerable individuals.

The Impact of the Hostile Environment

Under the Hostile Environment, introduced by Theresa May in 2012, the government forces service providers like landlords, employers, banks and universities to ask everyone they provide services to, to prove their status, effectively delegating its border control responsibilities to non-governmental entities. As a consequence, non-British nationals in the UK have to prove that they are here 'legally' at every turn. In order to live and survive in the UK as a non-British national, easy access to proof of one's immigration status is therefore essential.

The Home Office argues that the digital-only status enables such easy proof, as it allows EU citizens to "check their status from anywhere, at any time" from their phone. The government stated that "the EUSS protects the rights of EU citizens in UK law and gives them a secure digital status, which unlike a physical document, cannot be lost, stolen, damaged or tampered with", selling the digital-only access as advantageous and useful for all parties involved. This reasoning fails to consider many factors which can prevent EU citizens from accessing their status, and therefore, accessing their rights.

Firstly, sharing and evidencing a digital status is hindered by numerous practical obstacles such as lack of IT knowledge, literacy, language barriers, or age differences. We have encountered many EU citizens, especially elderly or those living in isolated communities, who for example do not have email addresses or phone numbers. Both are necessary not just to apply for (pre)settled status, but also to access and share their status with service providers further down the line. For now, free advice and support is available to help EU citizens who for whatever reason are not secure in their application, apply under the EUSS, but it is not clear that there is going to be support once the deadline for applications has passed, and citizens will need assistance to change, update or share their status instead of simply to obtain it.

This will harm many EU citizens once the points-based system comes into force in January 2021. Most importantly, EU citizens are highly likely to be discriminated against in a similar manner to how third-country nationals are currently discriminated against under the "right to rent" rules. In fact, only 3 in

150 landlords said they would be prepared to do these digital checks when renting out a flat, meaning that candidates with physical proof of their status will be prioritised over EU citizens who have go through the hassle of accessing their status online. The risk of being discriminated against increases, as it always does, for more vulnerable segments of the population, including those from isolated, older or BAME communities, women, children, and those with disabilities.

Barriers also exist for the third parties requesting access to the status, multiplying the likelihood of discrimination. For example, a private landlord with a basic understanding of English and IT may find it challenging to access and understand an EU citizen's digital status, and therefore prefer to rent their property to someone where that hurdle need not be overcome, i.e. a British national who simply has to show their passport to prove that they have the right to rent in the UK.

Thirdly, the risk of any type of digital-only access scheme is that there can be a system outage at critical times, leaving EU citizens out in the cold when needing to show their status. In addition, digital security is a hot topic. Digital records can be breached, hacked or made unavailable, with not only consequences for the EU citizen who at that moment is unable to prove their status, but also for their privacy in the longer term. How securely is all this digital data stored, what are the contingency measures in case of a breach, and who is the data shared with? The government have answered none of these arguably critically important questions.

Non-EU family members who are eligible under the EUSS do receive a physical, credit-card sized document evidencing their settled or pre-settled status, so it is clear that if the Home Office wanted to, the provision of physical evidence of status would be possible.

Case Study

Those who lack both digital skills and English language skills have been particularly vulnerable to legal practitioners and others illegally charging for services in assisting applications to the Scheme. The AIRE Centre has been made aware of examples by other organisations that we work with, of vulnerable clients without English language skills and/or literacy skills who have been illegally charged for services to help apply to the EUSS (in some cases over £1000 has been paid). The AIRE Centre is aware of individuals who have been incorrectly advised that an application to the Scheme equates to an application for GB citizenship. There is further danger posed to individuals where the person who illegally charged for services uses their own email account and phone number and then becomes completely uncontactable to the applicant.

The AIRE Centre therefore would recommend:

- To ensure the safeguarding of vulnerable applicants, the Home Office has a duty to provide a future-proof and workable way for applicants to independently prove and maintain their status.
- Applicants should be able to request a paper / hard copy confirmation of their status.
- Increased digital support should be available to those who are digitally excluded.

The Government's approach to the deadline and to late applications

The AIRE Centre welcomed the publication of fairly expansive guidance on what constitutes 'reasonable grounds' to make a late application to the EUSS. This guidance is currently included within pages 26 to 44 of the general Home Office Guidance for caseworkers on the EUSS: EU, other EEA and Swiss citizens and their family members guidance.7 We will refer to this section of the general guidance as the "Late Applications Guidance".

The Aire Centre agrees with the general approach within the Late Applications Guidance that, rather than looking for reasons to refuse applications, caseworkers must take a flexible and pragmatic approach to considering whether there are reasonable grounds for the person's failure to meet the deadline applicable to them.8 However, the AIRE Centre still has concerns with regard to the impact of making a late application on a person's residence rights in the UK whilst their late application remains pending.

The Late Applications Guidance

Whilst the Withdrawal Agreement permits the imposition of a deadline for submitting applications to the EUSS, Article 18(1)(e) provides that the deadline should be "not less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period." The UK has, therefore, imposed the earliest possible deadline permitted under the Withdrawal Agreement. It would be open to the Government under the terms of the Agreement to extend this deadline especially in light of the fact that a global pandemic could not have been foreseen at the time of setting the deadline.

Article 18(1)(d) of the Withdrawal Agreement specifies that there must be case-by-case consideration of applications where the deadline is not respected, "within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline." This fairly vague provision does however mean it is open to the UK government to introduce expansive grounds on which a late application can be submitted and, indeed, it could be reasonable in all the circumstances.

The Late Applications Guidance is currently the only material published by the Home Office concerning what constitutes 'reasonable grounds' for a late application. The meaning of 'reasonable grounds' is not addressed in Appendix EU, or in any other statue, regulation or immigration rules. The AIRE Centre has the following concerns:

The Late Applications Guidance can be subject to regular change and revision. There are no domestic legal provisions which set out the grounds on which a person will be permitted to apply late to the scheme.

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7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/988540/main-euss-guidance-v12.0-gov-uk.pdf

8 Page 28 of the Late Applications Guidance.

The Late Applications Guidance contains the vague provision that: "For the time being, following 30 June 2021, you will give applicants the benefit of any doubt in considering whether, in light of information provided with the application, there are reasonable grounds for their failure to meet the deadline applicable to them under the EU Settlement Scheme, unless this would not be reasonable in light of the particular circumstances of the case." It is not clear therefore how long this approach will last, nor what would constitute a factor making it 'unreasonable' to give the applicant the benefit of the doubt.

The Late Applications Guidance also provides that generally, the more time which has elapsed since the deadline, the harder it will be for an applicant to satisfy the caseworker that, at the date of application, there are reasonable grounds for their failure to meet that deadline. It is unclear why such a general presumption needs to be imposed, given that the vast majority of late applications will likely have very good reason, such as children in care or people in care homes/who lack capacity who have not been identified by those with legal responsibility for them, that they need to make an application. The number of people who have simply not bothered to apply and who seemingly have not faced any barriers in applying will be tiny and they will struggle to satisfy the 'late applications' threshold irrespective of any presumption about time lapsed.

There are certain examples of situations which will 'normally constitute' reasonable grounds for making a late application, such as where a person lacks mental or physical capacity to apply and where a person has a serious medical condition. The potential for such applicants to make a late application is left to the discretion of the caseworker and there is no guidance on when such situations would not constitute reasonable grounds.

Pregnancy or maternity 'may' be a reason why a person has reasonable grounds to make a late application. The deadline to apply for children born after 1 April 2021 is three months from the date they are born. We would recommend this deadline be increased to six months to accommodate the physical impact of childbirth and caring for a new-born baby, as well as the practical difficulties of applying for ID documents from national embassies, which will often have very different requirements depending on nationality. For instance a number of countries require both parent's consent to obtain national ID, which is difficult where the relationship may have broken down.

The Late Applications Guidance provides that a person can: *"apply from prison (on a paper application form obtained from the EU Settlement Resolution Centre) or an appropriate third party can apply on their behalf. Where the person is released from prison after the deadline applicable to them to apply to the scheme, there may be reasonable grounds for them to make a late application to the scheme. Where the person is released from prison after the deadline applicable to them to apply to the scheme, there may be reasonable grounds for them to make a late application to the scheme."* The person is required to produced evidence that they lacked access to immigration advice, had reduced access to relevant documents required to make the application, or were awaiting a decision on whether they would be deported. This guidance disregards the reality of being (even more so as a foreign national) in prison and the fact that for instance the Home Office will likely be in possession of their passport. Even if they can apply for a paper application form, they are required to send a passport photo with the form, which cannot be taken in prison. If a

person makes the application from outside prison on their behalf, they are still required to upload a digital photo of the applicant, which cannot be taken whilst they are in prison. The onus is, however, on the applicant to obtain evidence of their difficulties, and even if obtained such circumstances 'may' rather than 'normally' constitute reasonable grounds.

The AIRE Centre recommends that:

- The approach of giving late applicants the 'benefit of the doubt' should apply indefinitely to applicants who otherwise meet the eligibility criteria for the EUSS.
- A non-exhaustive definition of 'reasonable grounds' to make a late application should be incorporated into Appendix EU, where it should be specified that it is possible to apply for the scheme indefinitely.
- Consideration of situations which would 'always' constitute reasonable grounds for late applications, or alternatively in what situations/ what factors would not constitute reasonable grounds.
- Extending the deadline for new-born babies to apply under the EUSS from 3 to at least 6 months, without any requirement for the pregnancy to have been 'difficult'.
- In light of the obvious and well known practical difficulties of prisoners being able to access advice and documents, being in prison should normally, if not always, constitute reasonable grounds for a late application.

The Impact of making a late application

Even those who are permitted to make late applications risk being subjected to Hostile Environment policies from 1 July 2021 onwards and subject to a 'cliff edge' in terms of their residence rights in the UK.

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (the "Grace Period Regulations") were introduced to protect the right to reside of a person whose application is still pending from 1 July 2021 onwards. This protection only applies, however, to those who were: i) lawfully resident in the UK under the Immigration (EEA) Regulations 2016 (the "EEA Regulations 2016") immediately prior to 11pm on 31.12.2020; and (ii) who have made an application to the EUSS prior to 30 June 2021. The EEA Regulations 2016 continue to apply in respect of such people, to govern their right to reside.

The Late Applications Guidance provides that if a person is encountered by Immigration Enforcement from 1 July 2021 onwards, they should be given a grace period of 28 days to apply to the EUSS to avoid removal.

However, this introduction of protection against removal does not protect individuals from the raft of other Hostile Environment policies to which they may be subjected. For example, from 1 July 2021 onwards, people who have not yet applied to the scheme risk losing the right to work, hold a bank account and claim means tested benefits. They may be charged for many secondary health services and excluded from social care support unless this will breach her human rights.

Late applicants would be subject to such Hostile Environment Policies until they are granted settled or pre-settled status. The AIRE Centre is working with clients who have experienced delays of between 1-2 years. This means that, even after

having submitted a late application, a person risks being subject to the Hostile Environment for months, if not years.

The AIRE Centre recommends that those who would be eligible for the EUSS are granted the protection of the Grace Period Regulations whilst their application is pending, rather than from the moment that their application is granted. This approach would accord with Article 18(3) of the Withdrawal Agreement, which provides that: "Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4)."

Case study of Woman with Huntingdon's Disease

The AIRE Centre has received a referral concerning a Polish national woman, "D", who has advanced Huntingdon's Disease and is unable to move or communicate in any way. D has needs for care and support, which are currently being met by her local authority under the Care Act 2014. She needs secondary healthcare services and means-tested benefits. D has a right of permanent residence and is currently entitled to the above support.

Through no fault of her own, D is unable to make an EU Settlement Scheme application. The AIRE Centre cannot assist her without information from her local authority. There is a real risk that it will not be possible to make an EUSS application for D before the deadline.

Although D is likely to be eligible to make a late application, she will still face a "cliff-edge" on 1 July, when she will become unlawfully resident in the UK, and subject to a raft of hostile immigration policies. These include being precluded from holding a bank account, being excluded from means tested benefits, being charged for many secondary health services, and being excluded from social care support unless this will breach her human rights. If her support is removed, she will be at grave risk of harm.

The scope of the Grace Period Regulations

The 30 June 2021 'cliff edge' also applies to certain applicants who are entitled to make an application to the EUSS after 30 June 2021, and so whose application would be in time according to Appendix EU.

Appendix EU defines the 'required date' by which applicants must make an application to the EUSS as (including but not limited to):

In the case of a joining family member who arrives in the UK after 1 July 2021, three months from the date of their arrival in the UK;

In the case of a family member of a qualifying British citizen, before 2300 GMT on 29 March 2022; and

In the case of an applicant who has limited leave to enter or remain granted under another part of these Rules or outside the Immigration Rules…and the date of expiry of that leave is on or after 1 July 2021…the date of application is…before the date of expiry of that leave.

However, the Grace Period Regulations only protect those who make an "in-time application", defined as "made on or before the application deadline" which is defined as 30 June 2021.9

This means that, certain groups of individuals, such as joining family members, those applying under the Surinder Singh Route, and those entitled to apply after 30 June 2021, before the expiry of their existing leave to remain, will be subject to the 30 June cliff edge, even though they are entitled to make their application after this date.

Further, even extended family members who make an in-time application (i.e. before 30 June 2021) will not benefit from the protection of the EEA Regulations 2016 after 30 June 2021, and will not have a right to access benefits under the EEA Regulations 2016 after 30 June even if they have pre-settled status under the EUSS, because they must have a valid EEA residence card to be classed as family members under the EEA Regulations 2016. However, these residence cards cease to be valid after 30 June 2021.10

The AIRE Centre recommends that:

- The definition of an "in-time application" in the Grace Period Regulations is amended to reflect the definition of "required date" within Appendix EU.
- The EEA Regulations 2016, as saved, are amended to change the definition of 'EEA residence card' to include residence status granted under the EUSS.

A lack of understanding of the above provisions amongst relevant decision makers

Based on the requests for advice that the AIRE Centre receives, there appears to be widespread misunderstanding amongst key decision makers, as to the effect of the Grace Period Regulations. Even those who fall within the scope of the regulations are being informed they are not eligible for benefits, local authority support, or are even being informed they are at risk of removal.

Case study – client who falls within the Grace Period Regulations threatened with removal

On 8 April, a client (R)'s 13 year-old daughter was contacted by the Home Office Removals Casework Team and informed that: "Your mother holds no valid leave to remain/status here in the UK at present. She cannot stay in the UK without authorised leave/status. If she doesn't make an appropriate application for leave/status or if her application is refused, she must then leave the UK."

She was also told her application must be completed and submitted "as soon as possible".

R is a TCN who has separated from her former EU national partner after suffering domestic violence. She is the primary carer of four EU national children in education in the UK. She was present in the UK as a person with retained residence rights and / or in the alternative as a Teixeira and Ibrahim carer immediately prior to 31.12.2020 and in April 2021. She therefore fell within the scope of the Grace Period Regulations and had a right to reside in the UK in April

[9] See regulation 2 of the Grace Period Regulations

[10] See regulation 7(3) of the EEA Regulations 2016

2021 on this basis. However, she was told she had no lawful right to reside in the UK, threatened with removal, and told she needed to make her application as soon as possible, without any mention that she had until 30 June 2021 to do so. This caused considerable stress and panic for the client and her family.

Case study – client who falls within the Grace Period Regulations initially refused homelessness assistance

We advised the housing team at Brent council that an individual in their borough was eligible for housing support under the Grace Period Regulations. The Housing Team Lawyer wrote back to say: "The AIRE Centre is wrong…the relevant Regulations have been revoked". It was only after a series of further emails from the AIRE Centre that the Housing Team understood and accepted that the relevant regulations had not been revoked and eventually conceded that the family in question were eligible for homelessness assistance. The person who originally requested the advice wrote to inform us that: 'this outcome would not have been possible without your help' and requested that the AIRE Centre provided further training to the local authority lawyers. However, we are concerned that such misunderstandings are taking place across the country where people do not have access to specialised support and advice.

The AIRE Centre would recommend that the Government ensures relevant decision makers, within the DWP, the Home Office and local authorities receive adequate training on the impact of the Grace Period Regulations. The AIRE Centre would be happy to deliver such training.

<u>The impact of COVID-19 on the Settlement Scheme</u>

Absences of more than 1 year

The Home Office needs to widely publicise the changes set out in the "Coronavirus (COVID-19): EU Settlement Scheme" version 1.0, dated 10 June 2021 (the "Coronavirus EUSS Guidance"), both in the UK and to EU citizens with pre-settled status who remain abroad (so potentially through Universities, Embassies/Consulates, Employers).

The Home Office must also make it explicitly clear and publicise the fact that once a person has been absent from the UK for more than 12 months, such residence no longer counts towards their continuous qualifying period of residence. People may, therefore, be required to apply for pre-settled status a second time, to avoid their pre-settled status expiring prior to their eligibility to apply to upgrade to settled status after completing a continuous qualifying period of 5 years' residence in the UK. Automatic reminders should be sent about this.

Inability to arrive in the UK before 31 December 2020

The Coronavirus EUSS Guidance does not provide any protection for people whose first arrival in the UK was prevented due to the pandemic. Whilst some people may be able to apply to the Scheme if they arrive after 31.12.2020, for example as joining family members, this does not apply to those who fall outside the narrow category of 'close family members'. This restriction applies even to those who have evidence of cancelled travel tickets from prior to 31.12.2020. The AIRE Centre has been forced to advise around 7 clients that flight cancellation due to the pandemic will unfortunately not be accepted as a valid

reason for failing to commence a continuous qualifying period of residence prior to 11pm on 31.12.2020.

The AIRE Centre would recommend the Coronavirus EUSS guidance be updated to allow a very limited exception to the requirement to commence a continuous qualifying period of residence in the UK prior to 11pm on 31.12.2020 where the person can show evidence of transportation booked to arrive in the UK prior to this time, but such transport was cancelled due to the effects of the pandemic.

Case study – mother of an EEA national aged over 21 whose flight to the UK prior to 31.12.2020 was cancelled and who is seeking leave to remain in the UK to care for her daughter who is undergoing treatment for cancer

We are currently supporting a client whose elderly Italian mother was due to fly to the UK in December to permanently reside with her in the UK. However, due to guidance from the UK Government at that time, her mother did not travel at this time, for her own safety and the request of the UK government that individuals not travel to the UK. Her mother has since arrived in the UK in April when it was safe to do so. According to the rules, her mother would now need to leave the UK, apply for an EUSS Family Permit, and then return in order to apply to the Scheme. We believe that this represents a disproportionate and unnecessary administrative burden. An elderly woman with health conditions should not be expected to return to Italy during a pandemic with unpredictable travel restrictions, in order to apply to a Scheme to stay in a country where she is currently residing.

Closure of ID scanner locations

The COVID-19 pandemic has had an impact on the government's ID scanner locations across the UK, stemming back to March 2020, these scanner locations were forced to close in line with government guidance. This has in turn contributed to a backlog in excess of 300,000 applications.11

Many (but not all) scanner locations charge a fee, and these fees vary from location to location, but can cost in excess of £260.12 The closure of scanner locations which would have been able to provide free appointments is particularly prejudicial to those from low-income households. Such applicants are forced to choose between: swallowing these hefty fees, waiting for a free appointment or simply not applying to the EUSS as they cannot afford it.

Finally, there is a lack of knowledge as to which centres are open. The current situation is simply a long list on the gov.uk website13 which requires users to then click on the individual links for each location and speak to the centres in question over whether they are open and accepting appointments. The AIRE Centre recommends that it would be practicable to streamline this process: there ought to be a published and centralised list on the gov.uk website which clearly sets out which locations are open and accepting appointments and their opening hours and days. Further, there should be no charge for these services, in line with the UK Government commitment that, applications to the EUSS are free of

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[11] See: https://www.london.gov.uk/press-releases/mayoral/extend-settlement-scheme-mayor

[12] See: https://www.lauradevine.com/blog/eu-settlement-scheme-a-year-of-challenges-and-achievements/

[13] Found here: https://www.gov.uk/government/publications/eu-settlement-scheme-id-document-scanner-locations/locations-offering-chip-checker-services

charge, and that there should be no financial barrier for any EEA citizen or their family member who wishes to stay in the UK."14

Difficulties in the provision of advice

The COVID-19 pandemic and the series of national lockdowns which commenced in March 2020 has limited the ability of organisations to provide in-person appointments and direct support to clients, which are particularly helpful/needed when assisting vulnerable groups to apply using the relevant technology. The national lockdown restrictions have also limited the ability of individuals without access to the internet or computers etc in their own home, to use external facilities such as internet cafes and libraries in order to apply, as these have been closed for long periods over the last 15 months.

Due to these issues, and the delays that are inherent in them, the AIRE Centre submits that due to this, the government either:

Extends (or in fact removes) the hard deadline for EU Settlement Scheme applications; or

In the alternative, provides guidance on the basis that the inability to access advice in relation to the scheme, caused by the COVID-19 pandemic, constitutes a good reason for a late application and shall not prejudice applications.

Case study – vulnerable EEA national without access to the internet or a smartphone

The AIRE Centre was referred a case by a social worker in Oldham to support an application to the EUSS for a vulnerable applicant, (J). J lives with her partner in a house without internet access. Neither J nor her partner have a smartphone and neither J nor her partner understands how to use a computer. Prior to the pandemic the AIRE Centre would have provided remote assistance over the phone / Zoom to support J to apply to the EUSS, with her social worker present at the house to provide access to a smart phone / laptop to complete the application with them. However, the social worker informed us that she was not permitted to make in-person visits. The AIRE Centre was able to complete the online aspect of the application over the phone, for J. However, she was still required to upload a digital photo of herself for her application to be valid. J did not have the technology to do this, or any friends or family in the country to support her to do this. Eventually, J and her partner had to travel 65 miles to visit a relative of her partner to ask him to take a photo and upload it to her application, thereby incurring significant costs of travel.

Delays in obtaining new ID docs

Obtaining new identity documents already takes a significant amount of time. For example, the renewal process for British passports is up to 10 weeks.15 Some applicants to the EUSS have been required to attend in-person appointments at their national embassy/consulate in the UK in order to obtain new ID documents.

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[14] https://www.gov.uk/government/publications/eu-settlement-scheme-policy-equality-statement/policy-equality-statement-eu-settlement-scheme

[15] See: https://www.gov.uk/renew-adult-passport

The COVID-19 pandemic has caused issues for such applicants. Similar to the closure of ID scanning locations, applicants have had less chance to obtain new ID documents from their consulates/embassies, which have been closed or had very limited access over the last 15 months.

As consulates/embassies have reopened, the wave of requests, combined with a reduced capacity due to social distancing requirements, has created a significant increase to waiting and processing times.

In the event that applicants are unable to obtain new ID documents before the EUSS deadline, they are then forced to complete paper application forms, which are harder to obtain and take longer to process.

Case Study - Prison Service Losing Passport

The AIRE Centre advised a Polish woman and her son to make an application to the EUSS. In this case, the client, A, had her passport taken away from her when she spent time in detention. The passport was subsequently lost by Yarl's Wood Detention Centre, leaving A with no valid ID to apply to the scheme. Due to the COVID pandemic, A was unable to make an appointment with the Polish embassy during lockdown. After restrictions were lifted, A faced incurring significant expense and needed to take time off of work to travel for the in-person appointment that is required. This was impractical as she was an agency worker and could not book in advance. Resultantly, A applied to the scheme using a paper application form and alternative evidence of ID. She relied heavily on submissions from the AIRE Centre to support her application and to confirm the sequence of events/attempts she had made to address the matter. A has applied to the EUSS, but has still not received any outcome in relation to her application.

Impact on pending prosecutions

Similarly, the COVID-19 pandemic has had implications on the administration of justice via the criminal justice system. Due to significant cuts and court closures, the criminal justice system had a backlog of cases prior to the emergence of COVID-19. Many of the cases in the criminal justice system's backlog will involve applicants to the EUSS. The backlog has grown exponentially as the criminal justice system has struggled to process cases with limited resources and at a lower capacity. This is due to:

- Self-isolation (either due to infection or necessary shielding due to vulnerability) of judges, court staff and jury members;
- Issues with technology when conducting remote hearings; and
- Social distancing measures within a courthouse, which in turn has led to reduced court listings and the number of cases being addressed each day.

The COVID-19 pandemic has meant that both the Crown Prosecution Service ("CPS") and the Police have made changes to the way they approach cases in order to comply with government guidance; this has produced a slower processing system. For example, in relation to the disposal of criminal proceedings16 the Lord Chief Justice, in March 2020, suspended all jury trials in the Crown Courts; and indicated that no new trials were to start in Magistrates' Courts either.

[16] See: https://www.cps.gov.uk/covid-19-crown-prosecution-service-planning-and-preparation

This has had a knock-on effect and delays for investigations. The current government guidance in relation to pending prosecutions states that all applicable EUSS cases are to be paused. This is limited to only 6 months if certain criteria are made out (such as only one prosecution, no previous convictions and the current prosecution not exceeding 1 year imprisonment as a category A offence). However, this is prejudicial to certain applicants.

For example, those with spent previous convictions (even if they are very minor and took place a significant time ago due to, for example, being in the wrong crowd at a young age) who will be forced to wait for the conclusion of the investigation or prosecution. This generates significant insecurity around their immigration status; it has a knock-on effect in other areas such as entitlement to social assistance, obtaining housing or finding employment.

More generally, it is also detrimental to people who have a pending investigation against them which results in no further action (NFA), who are still waiting 1 - 2 years before their application is dealt with. This causes significant insecurity around an individual's immigration status.

Finally, there are cases which the AIRE Centre have advised on where miscommunication between the police, courts and other bodies has resulted in the non-closure of historic prosecutions. These cases have then meant the applicant has had their application paused until they either wait 6 months' duration or for the matter to be concluded. Where there is a miscommunication and a lack of clarity around such cases, the applicant in question is significantly prejudiced as, through no fault of their own, they are unable to proceed with their application.

Due to these issues, the AIRE Centre submits that the government:

- Changes its guidance to allow all applications with pending prosecutions to be considered, on the basis that there remains the possibility of withdrawing this status / considering the person for deportation should the applicant be found guilty of the offences in question and sentenced to over 1-year imprisonment; or
- Alternatively, changes its guidance to broaden the circumstances in which applications for those with pending investigations can be considered, for example, removing the requirement that there be only one prior conviction, removing the requirement that there be only one pending prosecution, allowing the applicant to submit evidence that, even if the maximum sentence for the offence with which they are charged is 12 months, it is unlikely that they would be sentenced to that length of time (e.g. a statement from their criminal lawyers).

Case Study - Miscommunicated Closure of Cases

The AIRE Centre is advising a Polish national (A). A has no previous convictions but had an outstanding prosecution against him from 2012. This was in relation to a minor offence. It was A's understanding that the case against him had been dismissed and the charges dropped (the RSPCA who originally brought the charges confirmed that they had withdrawn the charges). It was only when A applied to the EUSS, that he was informed that his criminal records still showed a pending prosecution against him from 2012. The client had tried to contact the local Magistrates' Court and Police in order to have clarity over the matter and to update his records; he is elderly and has been unable to go out in public due to

the COVID pandemic. He was also informed that the police station which initially dealt with the matter is now closed. Despite multiple attempts to make enquiries, he has not been able to get through to anyone. Therefore, he was told that his application would be paused. Subsequently, A's application has been paused for over 6 months and still has not been addressed.

Case Study - Delays In Investigations

The AIRE Centre advised a client (J) on converting pre-settled status to settled status. The investigation in relation to J's offence has lasted over one year and is still not been concluded. These delays have largely resulted from the pandemic. Due to the delays over the investigations, J has not been able to convert his pre-settled status to settled status.

<u>The relationship between pre-settled status and settled status</u>

Pre-settled status is valid for five years from the date of the decision to grant pre-settled status and must be upgraded before it expires. To apply for settled status an individual must complete five years' continuous residence in the UK as a person who falls into one or a combination of the categories of person eligible for EUSS. These categories include:

- Being an EEA citizen in their own right; and
- Being a family member (spouse) of an EEA citizen person; or
- Being a person who has 'retained residence rights' under Appendix EU.

Under Annex 3 to Appendix EU, there is the possibility that pre-settled status granted under the EUSS may be curtailed, if the Secretary of State is satisfied it is proportionate to curtail that leave where the person ceases to meet the requirements of this Appendix.

We are unaware of the powers in Annex 3 being extensively used. However, there are some obvious concerns about how this could be discriminatory towards Third Country Nationals, and especially women, who are subject to controlling or abusive relationships. For instance, for TCN woman with pre-settled status, in order to show they are the family member of a 'relevant' EEA citizen, this requires their EEA national husband to have been living in the UK prior to 31.12.20 and must continue to live in the UK for the period of residence relied upon as their family member. If their husband left the UK before they are granted settled status then they would no longer meet this requirement.

As far as retained rights goes, the Home Office has always stated in communication that someone who changes position from a family member to a person with a retained right of residence, is not required to confirm their retained right until they make an application for settled status (this assumes that the person has pre-settled status when the change happens). It seems that the Home Office policy not to require pre-settled status re-applications when someone moves to retained rights is based on the understanding that the Withdrawal Agreement does not allow for beneficiaries to be retested if they change statuses (see the Commission's Guidance Note relating to the Agreement at 2.5 Article 17 – Status and changes).

This being said it is seems that the Home Office does feel constrained in curtailing a person's status if information comes to light that they no longer

meet the qualifying conditions of Appendix EU e.g. because the marriage has been terminated and the person is no longer a family member, notwithstanding the possibility that they may have a retained right of residence (see page 35 of the Cancellation of entry clearance and permission guidance). The guidance document says that someone's leave should not be curtailed if it is assessed they have a retained right of residence, but it does not say how the Home Office is supposed to obtain evidence from the applicant to carry out this assessment (and presumably an accurate assessment cannot be made without additional evidence from the person whose status is a risk).

In the context of a victim of Domestic Violence/abuse, there is the possibility to rely on subparagraph (e) in family member who has retained the right of residence definition which relies on the relationship breaking down rather than the marriage being terminated; so there is a little flexibility in being able to show a retained right, but there will be cases where a marriage termination jeopardises the continued right of the victim of abuse to upgrade their status. Further, it is the responsibility of the victim of domestic violence to demonstrate the 'permanent breakdown' of the relationship due to domestic violence and it is not clear how exactly such 'permanence' should be proved.

It is also unclear whether non-EEA family members and joining family members of all nationalities who are not victims of DV/abuse who hold pre-settled status, can progress to settled status, if their EEA sponsor with settled status ups and leaves the UK during the family member's 5 years of qualifying (rather than situations where the family member will qualify for retained rights / derivative rights as they are caring for children). When you look at EU11/EU11A concerning the qualifying conditions for indefinite leave to remain, nothing about being a family member of a relevant EEA citizen / joining family member relevant sponsor says anything about the EEA sponsor needing to be resident in the UK at the same time as the family member if the EEA sponsor holds ILR. If the EEA sponsor does not hold ILR then Appendix EU means they would probably need to remain resident in the UK at the same time as the family member, to ensure the family member can progress to settled status.

<u>General issues facing vulnerable applicants / any other issues relevant to the inquiry</u>

Applicants who lack mental capacity

There is likely to be a large number of EEA citizens and their family members living in the UK who lack the relevant mental capacity to make an EUSS application themselves. To give an idea of the scale, Age UK estimates that there are 7,700 EEA citizens living in the UK who have dementia alone. Although not all of these will lack capacity, there will be many others who are not EEA citizens and/or have other underlying conditions.

Although it is welcome that the Home Office will accept late applications from people who lacked the mental capacity to apply, and has published guidance that permits third party applications for those who lack the relevant capacity, these measures are inadequate. For the following reasons, the AIRE Centre is concerned that a significant proportion of such people will slip through the net and lose vital support on 1 July 2021.

Our experience is that many local authorities have a poor understanding of their duties to identify and assist those EEA citizens and their family members whose care and support needs mean that they cannot apply for themselves. Although some local authorities have identified the need to apply on behalf of people for whom they are professional deputy, few have systems in place to identify other vulnerable adults that need to apply and whom they have a duty to assist – even those who are deprived of their liberty in care homes (under the supervision of the local authority), or whose care and support needs the local authority is currently meeting. Many adults are, therefore, likely to slip through the net. There is no government guidance on how local authorities' statutory duties, for example under the Care Act 2014, apply in this context. This is desperately needed.

Although the Home Office EUSS guidance permits applications to be made by third parties where they have authorisation and/or it is in the person's best interests to apply (pp. 127-128), other laws and guidance mean that in many cases organisations such as the AIRE Centre, and social work professionals, are unable to make applications, or unsure about whether they can. For example:

- It is an offence for social workers (and other key workers acting in a professional capacity, whether paid or unpaid) to make an immigration application unless they are regulated by OISC or another legal services regulator. Therefore, local authorities often need to refer vulnerable adults on to immigration lawyers, or regulated charities/organisations.
- To make an EUSS application on behalf of someone who lacks mental capacity, it is necessary to share their sensitive data, including health data and biometrics, with the Home Office. Organisations assisting such people will count as data controllers for the purposes of the Data Protection Act 2018 ("DPA") and the General Data Protection Regulation ("GDPR"). In cases where the individual lacks capacity to consent to us sharing their sensitive data, and there is no one else who can consent on their behalf, it is not immediately clear what the lawful (GDPR) basis is for processing, and sharing, their data. There is no guidance on how the DPA and GDPR apply in the case of people who lack mental capacity. It is not clear whether s. 5 MCA 2005 applies to protect against liability in this context (although we believe that it may in some contexts). There is no guidance on how the DPA/GDPR apply to people who lack capacity. This is needed. The AIRE Centre is seeking pro bono legal advice on this issue, but many organisations will be wary of making applications on behalf of people who lack capacity for fear of breaching data protection rules. Guidance would assist.
- To make an EUSS application on behalf of someone who lacks mental capacity, it is necessary to take their ID and biometric data. Where they lack capacity to consent to this, and there is no deputy or attorney that can consent on their behalf, it is not clear whether, or in what situations, this is lawful. Ordinarily, absent consent, it would, at least, constitute a tort. The AIRE Centre believes that in some cases s. 5 of the Mental Capacity Act 2005 ("MCA") will apply. S. 5 MCA protects against liability for non-negligent acts in connection with care and treatment where it is reasonably believed that the person lacks mental capacity in relation to the matter, and it is in their best interests. However, there is no clear case law on whether, or how, s. 5 MCA applies in the context of making an immigration application (is this an act in connection with care and

treatment?) Therefore in "riskier" cases (see below) the AIRE Centre has decided that it is unable to apply without authorisation from the Court of Protection (or deputy or attorney with authority to consent).

- Many organisations, including the AIRE Centre, are unclear about the basis on which they can make an immigration application on behalf of someone who lacks capacity to consent (and for whom there is no deputy or attorney who can consent on their behalf). The AIRE Centre believes that s. 5 MCA 2005 may apply in some contexts. However, in "risky" cases, organisations are understandably wary of acting without clear authority. "Risky" cases include, for example, those where the applicant has a significant criminal history, which means they are likely to be referred to immigration enforcement/ face deportation; cases where the person objects (especially if their capacity is borderline or fluctuates or it is not clear whether they lack capacity); and cases where there is a risk of prejudicing their immigration status (for example, because they do not have a strong claim to settled/pre-settled status, and it could prejudice another pending immigration application). In such cases, which are not uncommon, the AIRE Centre has a policy of requiring authorisation from the Court of Protection. However, it is unable to apply to the Court of Protection itself, and is reliant on other charitable organisations, or solicitors, to assist. This leads to significant delays, and is not possible in all cases. Therefore, many people are likely to slip through the net or face late applications.

It is welcome that, according to Home Office Guidance, adults whose lack of mental capacity or care and support needs prevent them from applying by the deadline are likely to have reasonable grounds to make a late application. However, this alone neither provides adequate protection nor complies with duties under the Withdrawal Agreement:

As things stand, under domestic legislation, such people will be unlawfully resident in the UK, and subject to the hostile immigration environment from 1 July 2021 until such time as their application is approved. This means that they will be excluded from means tested benefits, prevented from holding a bank account, working, or renting private accommodation. They will also be excluded from a raft of community care services, unless it would breach their human rights not to provide it.

This breaches requirements under the Withdrawal Agreement. For example, Article 18(3) of the agreement provides that rights under the Withdrawal Agreement (including residence rights, and any right to claim benefits) should be deemed to apply pending a final application on an application (or final judgment, in cases where there has been an appeal). So late applicants should, at the very least, be protected from the point at which they apply.

There has been a lack of any adequate proactive steps to identify and assist those adults whose care and support needs (including a lack of capacity) meant that they cannot apply for themselves. For example, there is a lack of guidance for local authorities on their statutory duties, and lack of any state-wide system for identifying and assisting adults who are unable to apply for themselves. The AIRE Centre believes that this is likely to breach obligations under the Withdrawal Agreement, and may amount to disability discrimination:

For example, Article 18(1)(o) provides that "the competent authorities of the host State shall help the applicants to prove their eligibility". In the case of adults who lack mental or physical capacity to apply, inadequate steps have been taken to do this.

Many adults with care and support needs, including those who lack mental capacity to apply, will have a disability within the meaning of the Equality Act 2010 and Charter of Fundamental Rights of the EU (which forms part of the "Union law" that governs the Withdrawal Agreement. The AIRE Centre believes that lack of adequate steps to identify and assist adults with disabilities that prevent them from applying for themselves, coupled with the lack of adequate protection for late applicants, may breach disability discrimination laws under these provisions.

Children in Care

The Home Office has produced guidance on obligations of local authorities to support looked after children, and care leavers to make EU Settlement Scheme applications. This means that children in care are in a better position than vulnerable adults. However, there are still serious shortcomings:

A Home Office survey in late 202017 found that over half of eligible children in care had still not made an EU settlement scheme application.

In the AIRE Centre's experience, many local authorities have an inadequate understanding of which children need to apply, and their obligations to assist those children. This means that many children risk falling through the net.

Although it is welcome that children whose parents, or local authority have failed to make an application for them by the deadline are likely to have reasonable grounds to make a late application, this alone does not provide adequate protection. As the domestic law currently stands, such children and young adults still face the risk of being unlawfully in the UK from 1 July 2021. Although the Hostile immigration Environment is "tempered" in some respects for minors, they will still be placed at a disadvantage, and care leavers who have turned 18 will face the full force of the hostile immigration environment.

Imprisonment and continuity of residence

An EEA citizen who has not been continuously resident in the UK for five or more years breaks their continuous residence for the purposes of applying to the EUSS by serving a sentence of imprisonment of any length. Until the end of the transition period (11pm 31 December 2020), if they were released from prison they could restart a period of continuous residence in the UK.

This meant that although their continuous residence was interrupted, and the clock 'reset' for the purposes of accruing five years' continuous residence to apply for settled status, their period of imprisonment did not affect whether they could continue being lawfully resident in the UK thereafter.

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[17] Avalable at: https://www.gov.uk/government/publications/eu-settlement-scheme-home-office-looked-after-children-and-care-leavers-survey-2020/eu-settlement-scheme-home-office-looked-after-children-and-care-leavers-survey-2020

This changed at the end of the transition period. It is no longer possible for EEA citizens to restart a period of continuous residence. Any period of imprisonment after this point now appears to have one of two consequences for EU+ citizens who have not accrued five years of continuous residence:

- If they are yet to apply to the EUSS, they will be precluded from doing so; or
- If they have secured pre-settled status, they will not be able to 'upgrade' to settled status and will be denied a route to settlement through the EUSS.

The Home Office has consistently stated that only "serious" or "persistent" criminals would be excluded from the EUSS on the basis of criminality. However, the operation of this 'bright line' rule in relation to imprisonment and continuous residence means many EEA citizens are being or will be excluded for much lower levels of criminality because they have served short periods of imprisonment after the end of the transition period. For example, an EEA citizen with a one-day sentences, including, rough sleepers who receive one day 'deemed served' sentences for begging.

The AIRE Centre recommends that the EUSS caseworker guidance is updated to provide specific guidance on:

Undertaking an individualised proportionality assessment as to when a period of imprisonment after the end of the transition period will constitute a break in an applicant's continuous residence.

How section 55 Borders, Citizenship and Immigration Act 2009 applies to children with periods of imprisonment or time served in Young Offenders Institutes after the end of the transition period.

Pending Prosecutions

When an application is submitted to UKVI under the EUSS, there is a four-stage decision-making process. Firstly, the applicant's identity is verified, often through the EU Exit app. Next, the application passes through the 'Suitability Stage', and then on to the 'Eligibility Stage'. At the fourth stage, the decision is made and issued.

Where a person has any criminal history, regardless of the seriousness of the offence, or whether or not their conviction is spent, their application can often be stalled at the Suitability Stage. Delays can be excessive, unnecessary and poorly explained such that it is necessary to challenge them in order to move on to the Eligibility and Decision Stages.

Refusal of an application on the basis of suitability can be for any of the reasons set out in Paragraphs EU15 and EU16 of Appendix EU. If any of reasons identified apply, then the decision to refuse must also be 'proportionate'. This involves consideration of many factors, including the impact on any relevant family members of an applicant.

Where there is a conviction or pending prosecution, but there is not already a deportation, exclusion order, or removal or cancellation decision in place, some cases will be referred to Immigration Enforcement (IE) to consider whether a

deportation order should now be made. However, the policy document EU Settlement Scheme: suitability requirements, version 6.0, published 06 April 2021, (the Suitability Policy) is clear that the threshold for referral to IE on the basis of criminality is fairly high. Suspended sentences should not result in referral. Non-custodial sentences should not result in referral unless the offence both caused serious harm and was committed after 11pm on 31 December 2020.

Under EU15 there should be no referral for a conviction with a sentence of imprisonment of less than 12 months, if received more than five years ago. For people who have been living in the UK for five years or more, multiple convictions, so long as they each received custodial sentences of less than 12 months, should not result in referral.

Referral is also inappropriate where, following a conviction, deportation has already been considered and either decided against or successfully appealed, and there have been no further offences.

Just because a case is not referred to the IE, does not of course mean that it cannot lead to refusal. For example, when considering whether someone's presence in the UK is not conducive to the public good, the Suitability Policy document is clear that even conduct short of a conviction could lead to refusal:

"A person's presence may be non-conducive to the public good for a range of reasons, for example, because of criminality, reprehensible behaviour falling short of a conviction, or because their identity, travel history or other circumstances means that their presence in the UK poses a threat to UK society. A person does not need to have a criminal conviction to be refused admission on non-conducive grounds."

However. we have seen cases where very minor offences, spent offences or alleged offences which have not proceeded to charging, and have led to the application being suspended for over 6 months and sometimes over a year. This has then required extensive arguments explaining why refusal would not be proportionate to be made, and that the application should proceed based on the government's own EUSS guidance, as well as principles of natural justice.

18 June 2021