

Non-EEA national Foreign National Offenders with a ‘Zambrano Right to Reside’ and the EUSS Scheme

An Overview

May 2021

Bail for Immigration Detainees (BID) is a national charity that provides legal advice and representation to individuals held under immigration powers to secure their release from detention. We also provide legal advice and representation to detainees facing deportation. BID works with detainees in all removal centres in the UK, and with immigration detainees held in prison at the end of their sentence.

- We provide free legal advice, information and support to immigration detainees to help them exercise their right to liberty and access to justice, and to help them challenge their deportation.
- We prepare and present (free of charge) applications for release on bail or temporary admission.
- We carry out research and use evidence from our legal casework to influence decision-makers, including civil servants, parliamentarians, and regulatory bodies through policy advocacy.

The Article 8 Deportation Advice project (ADAP) is a project that provides free legal advice and representation to individuals challenging deportation on the grounds of their long residence in the UK and/or their family life in the UK.

The right to respect for family and private life is protected by Article 8 of the European Convention on Human Rights.

Disclaimer

Although every effort is made to ensure the information in this factsheet is accurate and up to date, it should not be treated as a complete and authoritative statement of the law. BID cannot be held liable for any inaccuracies and their consequences. The information in this factsheet is not legal advice. If you have a legal problem you should talk to a lawyer or legal adviser before making a decision about what to do.

Please check that this factsheet is up to date before using it. Please also check whether BID has written other factsheets or leaflets that might be relevant to you. All BID factsheets and leaflets can be found at www.biduk.org

Q. Who is this leaflet for?

This leaflet is for people who are not nationals of the UK or of the EEA, but who are the primary carers, or the joint primary carers of a British citizen child with a non EEA partner or spouse. It is mainly intended for people who have a deportation order against them (which is not issued under EEA rules).

Q. What is the purpose of the leaflet?

The purpose of this leaflet is to provide some general information about which third country (not EEA or UK) nationals who have responsibility for the care of a British citizen child may qualify to apply for status under the EUSS (European Union Settlement Scheme). It is mainly aimed at Foreign Nationals who have a criminal record and have a non-EEA deportation Order against them.

See also BID's self-help leaflet 'The EUSS (European Union Settlement Scheme): A basic guide for people with criminal convictions' for information about the EUSS scheme and criminal offending (insert link).

*Although the UK left the EU on **31 December 2020**, some applications can be made to remain under EU laws until **30 June 2021**. This means that people who could benefit from certain EU rights before the UK left the EU can still benefit from them until 30 June 2021.*

This leaflet is intended to provide general information, but you should still obtain legal advice for your case.

Q. How might the 'Zambrano carer' option benefit foreign nationals with who might be issued with a Deportation Order?

A foreign national may have a deportation order if they lost their appeals against deportation and have become Appeal Rights Exhausted, or because they did not appeal to the Tribunal against the deportation decision.

Some will be on immigration bail, living in the family home, caring for their British citizen child, either alone, or as the joint primary carer with their non-EEA partner or spouse, who may be a British citizen or a Third Country National.

People facing deportation may have grounds to make a fresh human rights application and application to revoke or 'cancel' the deportation order based on their family life with their partner and children. This would be done under the Immigration Rules. If they succeed, under the current rules, they would first receive permission to remain in the UK for 30 months. This would be renewable for further periods until they can apply for permanent residence after having completed 10 years in the UK with permission to remain.

However an EUSS application may lead directly to a grant of Settled Status (SS), which is permission to remain in the UK permanently. This is possible if the person can show five years continuous residence as a Zambrano carer. If they have been a Zambrano carer for less than 5 years they can be given Pre Settled Status (PSS). The PSS can be upgraded to Settled Status after five years continuous residence has been completed.

The EUSS route may therefore be a faster route to settlement (permanent residence) for those that qualify compared to making a fresh human rights application based on family life.

However, there may be important issues around access to welfare benefits for people who receive a grant of Pre-Settled Status rather than Settled Status.

It is very important that a person seeks legal advice on how the law applies to the facts of their particular case. There is information on sources of legal advice at the end of this leaflet.

Q. What is the EUSS scheme?

Britain left the EU at 11pm on 31 December 2020. EEA nationals and their family members who remained in the UK or who arrived in the UK before Britain left the EU, must apply for immigration status to continue living in the UK lawfully. The EUSS is the scheme under which EEA nationals and their family members must apply for immigration status to remain in the UK. The deadline to apply is **30th June 2021**.

Non-EEA nationals who had what is known as a 'Derivate Right to Reside as a Zambrano carer' under EU law on 31 December 2020 can also apply under the scheme.

Q. Who has to apply to remain under the EUSS scheme?

Anyone who is a citizen of a European Union country, or an EEA country (including nationals of Iceland, Liechtenstein, and Norway); or Swiss nationals who wish to continue to live in the UK must apply. Family members of these nationals must also apply.

Irish citizens, and people who have Indefinite Leave to Remain (ILR) under the Immigration Rules do not have to apply, although they can do so if they wish as there are additional benefits under EUSS. For example, under the EUSS you should be able to spend up to 5 years in a row outside the UK without losing your settled status (instead of 2 years with indefinite leave to enter or remain).

If a person required to apply does not apply within the deadline, they will be unlawfully in the UK after 30 June 2021.

Q. What is a Derivate Right to Reside as a Zambrano carer?

Under the EEA Regulations, the right of a British citizen child to live in the EU is protected. This means that a Third Country national primary carer may have a right to reside in the UK if the child would also have to live outside the EU if the primary carer were removed from the UK.

It is called a 'derivative right to reside' because the right to reside in the UK is based on or 'derived' from the right of the British citizen child to live in the EU. It is commonly called a Zambrano right to reside as it is named after an important court at the European Court of Justice.

Although the UK left the EU on 31 December 2020, some of the EU laws still apply until 30 June 2021. This means that people who were exercising Treaty Rights, including a Derivative Right to Reside as a Zambrano carer on 31 December 2020, may continue to benefit from some EU law protections.

This means that, in order to apply for status under the EUSS as a Zambrano carer, a person must have been a Zambrano carer on 31 December 2020 **and** continue to be a Zambrano carer on the date of application.

Q. What is the definition of 'primary carer'?

A person is the "primary carer" of another person, in this case a British citizen child, if the person is a direct relative or a legal guardian of the child; and either:

- the person has **primary responsibility** for the child's care; or
- **shares equally the responsibility** for the child's care with one other person.

Q. What is meant by 'shares equally the responsibility' for the child's care?

It is not necessary to share all responsibilities for the upbringing of the child equally. It is not necessary to be living in the same household as the child. It is necessary to have parental responsibility for the child. The key issue is whether there is active involvement in the child's life and involvement in key decisions affecting the upbringing of the child.

The Home Office Guidance "Free Movement Rights: derivative rights of residence, version 5.0" states:

"A person will, generally, be considered to share equal responsibility in the following circumstances, where both parents are:

- *living together in the same household with the child;*
- *separated but share responsibility for the child – evidence of this may include (but is not limited to) a:*
 - ◇ *custody agreement or court order*
 - ◇ *statement(s) from the parent(s) to this effect"*

Equal responsibility does not mean there has to be evidence of equal sharing of responsibilities, as this is not always practical. For example, a child may reside with their mother during the week and their father at weekends or they may reside with the mother full-time, but the father has regular contact with the child. Whilst the father may not provide the majority of care for the child, in both of these examples, the father is actively involved in the child's life and continues to have parental responsibility for the child. In such cases, unless there is evidence to indicate the father is unable to care for the child, it can be accepted that parents share equal responsibility."

Q. If a person is joint primary carer but their partner is a British Citizen or has permission from the Home Office to remain in the UK, can the application be refused on grounds that the child can stay in the UK and be cared for by the partner?

An application should not be refused on those grounds alone. This is because, the effect of regulation 16(9) is that, “if the role of primary carer is shared”, then reg 16(5)(c) is to be read as the British citizen “would be unable to reside in the United Kingdom or in another EEA State if **both** primary carers left the United Kingdom for an indefinite period.”

So, where there are two primary carers, the three requirements of reg 16(5) are:

- I. There is a British citizen child;
- II. The third country national applicant is one of the two primary carers of that child;
- III. If both the primary carers left the UK for an indefinite period, the child would also have to leave the UK – and the EEA.

Q. Does a non-EEA Deportation Order affect the right to a Zambrano right to reside?

No. Under the EU regulations a deportation order that was not made under the EEA regulations does not exclude a person from a Zambrano right to reside (Reg 16 (12)). While the Home Office could decide to begin deportation proceedings under the EEA regulations, it would have to show that the deportation was justified on EU law grounds. This can provide a person with more protections than the normal Immigration Rules.

Q. If a person meets the Zambrano carer definition on 31 December 2020 and continues to meet it, are there are other conditions that have to be met to apply for Settled Status under the EUSS?

Yes, a person must meet the definition of ‘Continuous Qualifying period’ as a Zambrano carer under the EUSS rules.

Q. Does prison time count in the calculation of Continuous Qualifying period?

No. The definition of ‘Continuous Qualifying period’ excludes time ‘the person served or is serving a sentence of imprisonment of any length in the UK and Islands’ (‘CRQ (b) (ii)).

Q. How does a Deportation Order affect an application under the EUSS?

Appendix EU, Rule EU15 states that an application will be refused on grounds of suitability if at the date of decision 'the applicant is subject to a deportation order'. However, the definition of a deportation order under the EUSS is complicated.

Being subject to a non-EEA deportation order does not necessarily mean that an application must be refused.

If you have a deportation order against you, it is very important that you seek legal advice. We have provided information below on possible sources of help.

Q. What is the definition of a Deportation Order under EUSS?

The definition of "deportation order" is:

- An order made under the EEA Regulations;
- An order made under the 1971 Immigration Act or the 2007 Borders Act in respect to:
 - i) Conduct committed **after** the specified date of 31 December 2020; OR
 - ii) Conduct committed **before** the specified date of 31 December 2020 where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations.

Q. What are the circumstances in which an application *may* be refused on 'suitability grounds'?

The grounds on which an application *may* be refused are called 'discretionary grounds' for refusal. Some examples of discretionary grounds for refusal are below. It is a complex area and a full list is not included.

- false/fraudulent information or representations have been submitted in the application
- the applicant is subject to a removal decision under the EEA Regulations for non-exercise or misuse of Treaty Rights
- the applicant has previously been refused admission to the UK under the EEA Regulations
- the applicant's EUSS status has been cancelled
- the applicant is a 'relevant excluded person'

For people who were residing (living) in the UK under the EEA Regulations, including those with a Zambrano right to reside, as at 31 December 2020, deportation action can only be taken under the EEA Regulations in relation to conduct that took place *before* 11pm on 31 December 2020.

For conduct that took place after 11pm on 31 December 2020, deportation action can be taken on the grounds that deportation is *conducive to the public good*.

An application may be refused where a person is a 'relevant excluded person'. What this means is complicated. However, it is intended to exclude applicants who have committed very serious crimes. It covers applicants who have been excluded from refugee status or humanitarian protection (or would have been if they had applied for refugee status or humanitarian protection) because of serious offending.

Q. When is the deadline to apply?

An application must be made by 30 June 2021.

Q. What is the process for applying?

Most applications can be made online. However, an application for status based on a Zambrano derivative right to reside must be made on a paper form by post.

A paper application form can be requested by calling the EU Settlement Resolution Centre **on 0300 123 7379**. This phone line is open Monday to Friday (excluding bank holidays), 8am to 8pm and Saturday and Sunday, 9:30am to 4:30pm.

Q. Do I need a lawyer to make the application?

No, you can make the application yourself. There are lots of organisations that provide advice on the application process (see below for where to get help).

Q. If I want a lawyer to make the application for me, can I get legal aid if I cannot afford to pay privately?

Legal aid is not normally available for making applications under the EUSS. However, it may be possible to apply for Exceptional Case Funding legal aid if there are strong reasons why you cannot make the application by yourself. For example, if there are language barriers or you have difficulties reading and writing or suffer from mental health difficulties.

If you need advice on applying for Exceptional Case Funding legal aid, you can contact BID on the Advice Line on 020 7456 9750. The advice line is open Monday to Thursday from 10 am until 12 midday.

Q. If an application is refused, is there a right of appeal?

There is a right of appeal to the First-tier Tribunal of the Immigration and Asylum Chamber for applications made under the EUSS after 11pm on 31st January 2020. Applications made before that date do not have a right of appeal to the Tribunal. However, an application can be made for Administrative Review if refused on grounds of eligibility or the type of status granted. A fresh application can also be submitted, free of charge.

Q. Where can an applicant get help with making an EUSS application?

There are lots of organisations that provide help with EUSS applications. However, very few specifically offer help to people in prison.

A list of organisations that provide advice and assistance in making EUSS applications can be found at <https://www.gov.uk/government/publications/eu-settlement-scheme-community-support-for-vulnerable-citizens/list-of-organisations>

Q. How else can BID help me?

BID can help you to apply for bail. For more information, please contact our advice line or send an email to us about your case to casework@biduk.org.

Advice Lines

- BID advice line: 020 7456 9750 (Monday-Thursday 10am to 12 midday)
- Here For Good: 020 7014 2155 (Monday 9.30-11.30, Wednesday 11.30-13.30, Friday 13.30-15.30) or 0115 964 4112 (Tuesday 9-11, Thursday 15.00-17.00).
- AIRE Centre: 020 7831 4276 (10.30-6pm Monday-Friday)

Some organisations that work with specific vulnerable groups include:

Rights of Women (ROW) Provides an advice line for vulnerable women, including those who are EU citizens or their family members who have experienced violence, (including domestic abuse, sexual violence, trafficking, modern slavery, so-called honour-based violence and FGM). Open Tuesdays & Thursdays 11-1 and 2-4 on 020 7118 0267

The AIRE Centre Women In Prison Project Advice Line. 020 7831 4276 10.30-6 Monday-Friday.

Help finding a lawyer

The website below allows you to search to find immigration lawyers in your area:

Civil Legal Advice: 0345 345 4 345 (Monday-Friday 9-5)

<https://bit.ly/2MBbufK>

Useful websites

The UK government site lists organisations across the UK that provide advice on the EUSS:

<https://www.gov.uk/help-eu-settlement-scheme>

The website of the European Union:

<https://bit.ly/2ZOET5P>

This website allows you to search for advice in your area on the EUSS

<https://bit.ly/3jojJYG>

Useful Guidance:

Home Office Guidance is often updated. Is it important to check for the most updated guidance.

Home Office Guidance: EU Settlement Scheme: Suitability Requirements version 3.0

<https://bit.ly/3ayVPFP>

EU Settlement Scheme: person with a Zambrano right to reside Version 3.0

<https://bit.ly/3oSTNWb>

Free movement rights: derivative rights of residence Version 5.0

<https://bit.ly/3clgxpj>

Glossary of key terms

Specified Date

- 11pm on 31 December 2020

Grace Period

- Between 11pm on 31 December 2020 and 30 June 2021

Settled Status

- Indefinite Leave to Remain.

Pre-Settled Status

- Limited Leave to Remain. Granted for 5 years. An application must be made before the leave expires for Settled Status.

How to contact BID

By post:

Freepost RTSU-ZJCB-XCSX
Bail for Immigration Detainees (BID)
1b Finsbury Park Road
London
N4 2LA

Fax: 020 3745 5226

General enquiries: enquiries@biduk.org

Casework enquiries: casework@biduk.org

Advice Line: 020 7456 9750
(Mon-Thurs, 10am - 12 midday)

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