

The EUSS (European Union Settlement Scheme): A basic guide for people with criminal convictions

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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?

A. This leaflet is for EEA nationals and their family members living in the UK who have criminal convictions, particularly those in prison serving a custodial sentence or detained under immigration powers.

Q. What is the purpose of the leaflet?

A. It is intended as a basic overview of the EUSS scheme. It is not a comprehensive guide. Applications to the scheme from individuals with criminal convictions are complex. You are strongly advised to obtain specialist advice if possible before making an application. However, you are also encouraged to make sure you make an application under the EUSS scheme as soon as you can, and certainly before 30 June 2021.

Q. What is the EUSS scheme?

A. As Britain has left the European Union, EEA nationals and their family members who are currently in the UK or arrive in the UK before 31st December 2020 must apply for immigration status to remain in the UK lawfully. The EUSS is the scheme under which EEA nationals and their family members must apply for immigration status in the UK. The deadline to apply is 30th June 2021.

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

Q. Who has to apply?

A. Anyone who is a citizen of a European Union country, or an EEA country, which includes nationals from Iceland, Liechtenstein, and Norway; or Swiss nationals and living 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).

Q. Does a person have to apply under the EUSS if they already have a right of Permanent Residence under the EEA regulations?

A. Yes. Even if you have a grant of Permanent Residence, you must still apply.

Q. Can non-EEA family members of an EEA national apply?

A. Yes. They must also apply.

Your direct family members include your spouse, civil partner, your direct descendants or those of your spouse or civil partner who are aged under 21, or dependants on you or your spouse or civil partner, dependent direct relatives in your ascending line or those of your spouse or civil partner, e.g. parents or grandparents. An extended family member who has been issued by the Home Office with an EEA Family Permit, a registration certificate or a residence card will be treated as a family member provided that family permit, registration certificate or residence card remains in force and the applicable conditions in Regulation 8 of the EEA regulations continue to be met. For example, a non-EEA national in a 'durable relationship' with an EEA national, or the child under age 18 of that partner. If you are not sure who qualifies as a direct family member or an extended family member, you should seek advice. The rules on extended family members are a little different for students. You could contact the UK Council for International Student Affairs: <https://www.ukcisa.org.uk>.

Q. When is the deadline to apply?

A. The deadline to apply is **30th June 2021** for applicants resident in the UK by 31st December 2020.

Q. The deadline of 30 June 2021 has passed, can I make a late EUSS?

A. Yes you can make a late application. You should make it **as quickly as possible**. The Home Office has stated in its guidance that it *'will take a flexible and pragmatic approach to accepting late applications and will look for reasons to grant applications, not to refuse them'* (<https://bit.ly/3Ds6Oyn>).

The Home Office has published guidance on the type of reasons that it will consider reasonable grounds for a late application. This includes, but is not limited to:

- where a parent, guardian or Local Authority has failed to apply on behalf of a child
- where a person has or had a serious medical condition, which meant they were unable to apply by the relevant deadline
- where someone is a victim of modern slavery or is in an abusive relationship
- where someone is isolated, vulnerable or did not have the digital skills to access the application process
- where a person was unable to apply by the relevant deadline for compelling practical or compassionate reasons – including in light of the coronavirus pandemic.
- 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. This will normally be the case where, for example, in light of information from HM Prison and Probation Service (or the equivalent in Scotland or Northern Ireland) or other information, you are satisfied that in prison they either:
 - lacked ready access to immigration advice
 - had reduced access to relevant documents required in order to make an application
 - were awaiting a decision on whether they were to be deported.

However, in a letter to Bail for Immigration Detainees dated 07 October 2021, Mr T Eastaugh, Director General of Immigration Enforcement, has stated that, 'An applicant being in prison is a reasonable ground for being unable to make an application to the EU Settlement Scheme by their application deadline'.

However, there may other reasons not on the list. For example, you may have language barriers or difficulties with reading and writing and were not able to get the help that you needed to make the application. You may also only have found out you can make an application by reading this leaflet.

The most important thing is to make the application as soon as possible and to explain to the Home Office your reasons for applying late and for not applying before 30 June 2021.

Q. How much does it cost?

A. The application is free.

Q. What is the process for applying?

A. Most applications can be made online. However, if an application cannot be made online, a paper application can be made by post. The prison should have copies of the application form. You can ask prison staff for a paper application form. However, if you are making an application under the Zambrano Derivative Right to Reside, you will have to contact the EU Resolution Centre to request a form. A paper application 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.

An applicant in prison will need to explain that they cannot apply online because they are in prison. You are likely to be asked questions about whether or not you have a national identity document.

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

A. 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?

A. Legal aid is not normally available for making applications under the EUSS. However, it may be possible to apply for Exceptional Legal Aid funding 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 Legal Aid Funding, 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.

You may find our leaflet on Exceptional Funding helpful: <https://bit.ly/33Eio8D>

Q. What do you have to prove to qualify for status under the EUSS?

A. The Home Office will check 3 key areas:

1. *Identity.* You will need to prove your identity. That can be by your valid passport or national identity card. If you are unable to provide a valid ID document you must explain the reasons as fully as you can on the form.

2. *Eligibility (length of residence in the UK).*

Applicants need to show they have had 'continuous residence' in the UK. They do not have to show that they were exercising Treaty Rights during their residence, e.g. as a worker/student/self-employed person.

Applicants with continuous residence in the UK for 5 years will qualify for Settled Status, and applicants with less than 5 years continuous residence will qualify for Pre-Settled Status, as long as no 'supervening event' has occurred at the date of application and the 'suitability' tests are met.

A 'supervening event' includes the issue of a deportation or exclusion order, other than under the EEA regulations, or a decision to exclude or remove a person under the EEA regulations.

The application form provides detailed information on the type of evidence needed to prove residence. However, you cannot use the following as evidence:

- photos and videos
- letters or references from family and friends
- greeting cards, for example birthday cards
- postcards sent or received
- personal scrapbooks

You may find it helpful to check the Home Office website <https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-uk-residence>

3. *Suitability*

This covers circumstances in which applications can be refused based on factors such as deception or criminal history or immigration history even if the 'continuous residence' test is met.

Q. Do criminal convictions have to be declared?

A. Applicants over 18 must declare previous convictions in the UK and abroad. Only convictions that appear on the criminal records need to be disclosed. Spent convictions, cautions or alternatives to prosecution do not need to be disclosed. However, if unsure, it is best to disclose because an application may be refused on grounds of deception if a conviction is not disclosed which should have been.

A conviction becomes 'spent' after a specified period of rehabilitation set down in the Rehabilitation of Offenders Act 1974. The length of rehabilitation depends on the type of punishment you received for the offence and whether you were 18 or over on conviction.

You may find it helpful to look at the government website <https://www.gov.uk/exoffenders-and-employment> or the National Association for the Rehabilitation of Offenders (NACRO) <https://bit.ly/3hLoKrA>.

Q. If an applicant is not sure of their criminal record, and which convictions are 'spent' can they obtain a copy of the record held on the PNC (Police National Computer)?

A. Yes. An applicant can make a Subject Access Request to the Criminal Records Office (ACRO). The application is free and can be made online at <https://www.acro.police.uk/Subject-access> or by post to Subject Access Post: ACRO (SAR), PO Box 623. Applications are processed within approximately one month.

Q. Will the Police National Computer (PNC) be checked?

A. Yes. The Home Office will carry out checks against the PNC and the Warning Index (WI) for all applicants age 10 and over. The Home Office can take spent convictions into account when considering whether the 'Suitability Requirements' are met under the scheme.

Q. Does time in prison break continuity of residence?

A. Generally, it does. If a prisoner has acquired a right of Permanent Residence before going to prison by exercising Treaty Rights in the UK for a continuous period of 5 years, the 5 years counts, unless a 'supervening event' has occurred since the Permanent Residence was acquired, for example:

- the issue of a deportation or exclusion order, other than under the EEA regulations;
- the issue of a decision to exclude or remove under the EEA regulations

Q. If an applicant is in prison, when should an application be made?

A. It is usually best to make the application as soon as possible. This is because the deadline for those resident in the UK by 31st December 2020 is 30th June 2021. There is a danger that if an applicant waits until the deportation proceedings are over, the deadline to apply might have passed.

Q. Might an application by a person with criminal convictions lead the Home Office to consider whether to take deportation action?

A. An application can be referred to Immigration Enforcement (IE) to consider if deportation action should be taken. This may happen under the following circumstances:

- the applicant has, in the last 5 years, received a conviction which resulted in their imprisonment;
- the applicant has, at any time, received a conviction which resulted in imprisonment for 12 months or more as a result of a single offence (not a combination of sentences for different offences)
- the applicant has, in the last 3 years, received 3 or more convictions (including convictions that did not result in imprisonment) unless they have lived in the UK for 5 years or more. At least one of these convictions must have taken place in the last 12 months and, where the applicant is resident in the UK, at least one of these convictions must be in the UK;
- the case is of interest to Criminal Casework in respect of deportation or exclusion, for example where the applicant is in prison and the case is awaiting deportation consideration;
- the applicant has entered, attempted to enter or assisted another person to enter or attempt to enter into a sham (a false) marriage, sham civil partnership or durable partnership of convenience (or the Home Office is taking some action because of this conduct);
- the applicant has fraudulently obtained, attempted to obtain or assisted another person to obtain or attempt to obtain a right to reside in the UK under the EEA Regulations 2016 (or the Home Office is taking some action because of this conduct);
- the applicant has participated in conduct that has resulted in them being deprived of British citizenship.

Q. If an application is referred to Immigration Enforcement, how will the case be considered?

Although Britain left the EU on 31 December 2020, some people may find that deportation action against them will be decided under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

Q. Who will the EEA Regulations continue to apply to in relation to deportation action?

There are 3 categories of people who may continue to benefit.

1. People who have been granted Settled Status or Pre-settled Status as part of the European Union Settlement Scheme (EUSS) under Appendix EU of the Immigration Rules.

2. EEA citizens and their family members and people with a Zambrano or other ‘derivative right’ to reside who were *living in the UK under the EEA Regulations on 31 December 2020* (even if temporarily out of the country) who applied to the EUSS on or before 30 June 2021 and are awaiting a decision on their EUSS applications.

3. EEA citizens and their family members and people with a Zambrano or other ‘derivative right’ to reside who were *living in the UK under the EEA Regulations on 31 December 2020* who made valid late applications after the 30 June 2021 and are awaiting a decision on their late application. In this situation, the Home Office guidance also says that these individuals will have temporary protection until the conclusion of their applications – although they may also need to have a Certificate of Application.

Where someone has not been granted settled status or pre-settled status but is waiting for a decision on an application, they will only benefit from the protection of the EEA Regulations if they were resident in the UK under, or in accordance with the EEA Regulations. For example: being a person in work or in education or with another EEA Regulations right to reside.

For these individuals, decisions to deport relating to ‘conduct’ that took place before 11pm on 31 December 2020 can only be taken if the criteria in Regulation 27 of the EEA Regulations apply.

However, where conduct that took place after 11pm on 31 December 2020 is concerned, decisions to deport any of the individuals in the categories above can be taken on the ground that the decision is ‘conducive to the public good’. This is the same test that applies to non-EEA nationals without EEA family members.

This is a complex area of law, so you are strongly advised to seek specialist advice to check which rules apply to your deportation action.

Q. Are there circumstances where the applicant has a criminal history but a referral to Immigration Enforcement will not be made?

A. Yes. A referral should not be made where:

- The Home Office has decided not to pursue deportation action or has revoked or 'cancelled' a deportation or exclusion order and the applicant has not committed any further offence that meets the referral criteria since that decision.

A previous decision to deport the applicant was overturned on appeal, the Home Office is not appealing that decision and the applicant has not committed any further offence that meets the referral criteria.

- The applicant received a custodial sentence and at the time the applicant was in prison, the applicant's conviction did not meet the criteria for referral to the Home Office and the applicant has not committed any further offence that meets the referral criteria.

Q. What if an applicant has a Deportation Order in force against them at the date of decision on the EUSS application?

A. An application must be refused if, at the date of the decision, the applicant is subject to a deportation order or decision to make a deportation order or an exclusion order or decision to make an exclusion order. However, the law on this is complicated so it is very important that you seek legal advice if you have a Deportation Order against you.

You may be able to appeal against the deportation decision, even if you are outside the deadline given for the appeal. If you cannot appeal against the deportation decision, it may be possible to make an application to cancel or 'revoke' the deportation order. If your application under the EUSS is refused because you have a deportation order against you, you should seek legal advice immediately regarding whether this can be challenged. This is because the rules around the effect of a Deportation Order on an EUSS application are complicated.

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

A. 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 conduct committed before 31st December 2020, refusal must be justified on grounds of public policy, public security or public health in accordance with the EEA regulations.

For conduct committed after 31st December 2020 the decision must be justified on the grounds that it is 'conducive to the public good'.

The definition of 'relevant excluded person' is complicated. However, it is concerned mainly with excluding applicants who have committed very serious crimes. In particular 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. If an application is refused, is there a right of appeal?

A. 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. If I am detained by the Home Office and I have not yet made a claim, will I be able to make one?

A. The Home Office guidance states that, *'if you do not have status or a pending application and you are encountered by Immigration Enforcement, and you may be eligible for the EUSS, you will be provided with a written notice giving you an opportunity to apply to the EUSS, normally within 28 days, and directed to the support available to you if you need it'*.

You can get help with an application from the places listed below.

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

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

A list of organizations 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. Where can I get more information about the EUSS scheme in prison?

A. The Home Office has provided a Question and Answer leaflet about the scheme to prisons. You can ask prison staff for a copy of the leaflet

Q. Can I get information in different languages?

A. Yes. The Home Office website has information in different languages.

<https://www.gov.uk/guidance/settled-status-for-eu-citizens-and-their-families-translations>

Q. How else can BID help me?

A. 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.

More information

Advice Lines:

BID advice line:

- 020 7456 9750 (Monday-Thursday 10am to 12 midday)

Here For Good:

- 0207 014 2155 (Monday 9.30-11.30, Wednesday 11.30-13.30, Friday 13.30-15.30).0115 964 4112 (Tuesday 9-11, Thursday 15.00-17.00).

AIRE Centre:

- 020 7831 4276 (10.30-6pm Monday-Friday)
- 020 7831 4276

Some organisations that work with specific vulnerable groups include:

- Rights of Women (ROW). Provides an advice line for vulnerable women 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://www.gov.uk/civil-legal-advice>

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://eeas.europa.eu/delegations/united-kingdom/69562/residing-uk-and-eu_en

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

- <https://www.eurights.uk/#search>

Glossary of key terms

- 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.

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://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878321/euss-suitability-guidance-v3.0ext.pdf
- https://www.gov.uk/settled-status-eu-citizens-familiesv7831_4276
- 020 7831 4276

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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