



Deportation Appeals

**Deportation of Nationals of the
European Union (EU)
European Economic Area (EEA)**

July 2023

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 prisons.

- 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

I am an EU/EEA National. Can the Home Office deport me from the UK?

Yes, EU/EEA Nationals can be deported.

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

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).

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 took place after 11pm on 31 December 2020, decisions to deport for people in the above categories may be taken on grounds that the decision is conducive to the public good.

In some cases, offending will span both **before and after 31 December 2020**. The Home Office guidance 'Conducive deportation Version 2.0 (08 June 2023)' provides some information on how the Home Office decides which rules apply.

This can be very complicated. You are very strongly advised to seek legal advice if this applies to you.

Relevant conduct both pre and post 11pm 31 December 2020

1. If the conduct committed **after 23:00 GMT on 31 December 2020** is **sufficiently serious** to meet the threshold for deportation under the 2007 Act or under the 1971 Act, the Home Office will make a decision to deport on conducive grounds under the immigration rules.
2. If not sufficiently serious, the Home Office will consider conduct committed **before 11pm on 31 December 2020** and assess it under the EEA regulations to consider whether the EEA tests for deportation are met.
3. The Home Office can decide to apply the EEA regulations to the whole of the conduct, both before and after 11pm on 31 December 2020 where:
 - the person has engaged in conduct that spans both before and after 11pm on 31 December 2020, but that conduct **is a continuous course of conduct rather than multiple individual offences** (for example a fraud that has taken place over several months and which has resulted in a single conviction)
 - the conduct has occurred **before 11pm on 31 December 2020** and the **threat is still present** (for example, national security threat: deporting someone on public policy or public security grounds due to extremist conduct / inciting violence) (p.21).

How conduct before 11pm 31 December 2020 may affect how conduct after that date is considered

4. Conduct that occurred before 31 December 2020 may affect how the **seriousness** of conduct after that date is considered.

The Home Office guidance gives the following example; A conviction for wounding after 31 December 2020 may be treated as more serious if the person has a conviction before 31 December 2020 for possession of a bladed article.

It may be that conduct before 11pm on 31 December 2020 is more serious than conduct that occurred after that date but conduct after 11pm on 31 December 2020 indicates **a continuous serious pattern of offending**.

The Home Office guidance gives the following example: multiple convictions for shoplifting before 11pm on 31 December 2020 followed by further convictions after that date may show a continuing pattern of serious offending.

This is complex area of law and you are strongly advised to seek specialist advice to check which rules apply to deportation action in your case.

Can I use EU law to challenge my deportation from the UK?

EU law provides some protection against deportation. The EEA Regulations 2016 state that EU/EEA nationals can only be deported on grounds of public health, public policy and public security. Different tests apply for the Home Office to meet depending on how long you have lived in the UK.

The length of **residence** in the UK prior to the decision to deport is relevant to how strong the grounds must be to justify deportation.

- If the EU/EEA national has **permanent residence** it requires '**serious grounds**' of **public policy or public security to justify deportation**. A right of permanent residence is obtained after a person has lived in the UK for 5 years continuously exercising Treaty Rights (EEA Reg.15).
- If the EU/EEA national is **under 18 or has resided in the UK continuously for 10 years** (excluding prison time), prior to the decision to deport, it requires '**imperative grounds of public security to justify deportation**'.
- If the EU/EEA national has not lived in the UK as a 'qualified person' for 5 years or for 10 years before the decision to deport, the Home Office can deport on grounds of public policy or public security. However the decision must still be fair or 'proportionate' and must take account all personal circumstances including private and family life in the UK.
- A person's previous criminal convictions do not in themselves justify the deportation of an EU/EEA national. Deportation may only be justified where the person represents "**a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society**" (Reg. 27 (5) EEA Regulations 2016).

How can I show that I do not pose a threat to society?

If you were sentenced to more than 12 months in prison, a report on the level and nature of risk you may present should have been done by your Probation Officer. The report is called an OASys report. It is sometimes called a NOMS report. You can ask your Probation Officer for it.

If you have done any rehabilitation courses in prison, it will be important to provide evidence of this to show that you have taken steps to make sure you do not re-offend.

If you have a permanent right of residence, even if you are considered to be a threat to public policy, you have some protection under EU law. If you can show that there are **reasonable prospects of successful rehabilitation if you remain in the UK**, this will help you to show that your deportation cannot be justified. For example, you may be able to show that you are well integrated in the UK and have a support network of family or friends here who can help you with your rehabilitation, but that no effective support network would be available to you in your home country.

If I have a private and family in the UK, will the Home Office consider this?

Yes. If you have family in the UK who cannot be deported with you because they are British citizens or whose right to be in the UK is not dependent on your right to stay, you may be able to argue that it would be a violation of your right to respect for family and private life to remove you. The Home Office must also consider other issues such as how your deportation would interfere with the private life that you have built up during your time living in the UK.

Can I get legal aid to help me with my deportation challenge?

Challenges to deportation based on the EEA regulations and on family life and length of residence in the UK are excluded from legal aid. However, you may be able to make an application for legal aid under the 'Exceptional Funding' scheme. This provides legal aid for complicated cases. As deportation is a very complicated area of law, it is worth making an application for exceptional funding. You do not need a lawyer to make the application.

The BID factsheet *'Exceptional Funding—Applying for Legal Aid in Deportation Cases: A Guide for Individuals'* explains how you can make an application. The factsheet is available on the BID website: www.biduk.org

If I do have a right of appeal against a decision to deport me can I stay in the UK while I appeal?

The Home Office can 'certify' a decision under regulation 33 of the EEA regulations 2016. If your case is certified, this means that you can lodge your appeal in the UK but can be removed from the UK at any time before your appeal is finally decided by the Immigration and Asylum Chamber. The Notice of Decision to Deport will state, usually towards the end of the letter, whether the decision has been certified.

BID also has a factsheet on how to challenge certification under regulation 33. This is available on the BID website. It provides more detailed guidance on how to use the Supreme Court case of 'Kiarie & Byndloss' to challenge certification and is titled *Deportation Appeals—Challenging the Home Office decision to deport you before you can appeal (certification under EEA Regulation 33)*

Can I challenge a decision to refuse me the right to stay in the UK while I appeal?

The Home Office can only certify a case if removal during the appeal period would not result in a breach of human rights.

The courts have provided guidance on the factors that the Home Office should take into account when deciding whether to certify a case. For example: whether you have family in the UK, particularly minor children that would be affected by your removal during the appeal period; whether you have family in your country of origin, your age and state of health and the level of risk of reoffending. However, the recent Supreme Court case of *Kiarie & Byndloss v SSHD [2017] UKSC 42* found that removing a person from the UK before the appeal was heard unfairly placed obstacles in the way of effectively preparing the appeal. In particular, the Court noted that removal from the UK before an appeal is heard makes it very difficult to:

- Gather the necessary evidence of length of residence in the UK and of integration into British society;
- Gather the necessary evidence of the strength of family life in the UK. In particular, it would not be possible to obtain expert reports such as an Independent Social Work report to comment on the relationship between the individual and their children because the expert would need to be able to observe them with the children;
- Obtain expert evidence on the risk of re-offending, such as a Forensic Psychologist report. This is because the individual would need to be present in the UK for the assessment by the expert to take place for the report to have any real weight as evidence

If your case is certified, you should write to the Home Office explaining all the reasons why your case should not be certified and asking that the certificate be cancelled. You should refer to the Supreme Court case of *Kiarie & Byndloss*. If the Home Office refuses to cancel the certificate, the only legal avenue will be to apply for Judicial Review.

BID's Factsheet on challenging Certification under Reg.33 contains a 'model letter' that you can use to write to the Home Office to request that the certificate is withdrawn. This can be found on our website www.biduk.org.

Will I be able to come back to the UK to make submissions in person at my hearing?

If you are an EU/EEA national or a non EEA National family member who is being deported under the EEA regulations, **and you lodged your appeal within the correct time limits**, you should refer to the advice above regarding the *Kiarie & Byndloss* case. If you have been removed from the UK you can also apply from outside the UK to re-enter temporarily for the purpose of making submissions in person in your appeal hearing. The Home Office 'Decision to make a Deportation Order' letter will tell you how you can do this. However:

- You will only be able to make the application for temporary return once you have a date for your appeal hearing.
- You will be held in immigration detention or in prison if you were deported under the Early Removal Scheme.

The Supreme Court found that the person who is appealing should be able to give evidence at their appeal. It found that:

- ◇ Evidence in person is more valuable to the court than evidence by video link;
- ◇ A video link may not be generally available and may be very difficult to arrange.
- ◇ Denial of entry could therefore be challenged through the legal process of judicial review on the grounds that this would prevent a person from having a fair hearing.

Please be aware that the Kiarie & Byndloss case is likely to have a major impact on how the Home Office operates out of country appeals if these are continued at all. Please seek legal advice for the most up to date information regarding out of country appeals.

How long does a Deportation Order last?

Under the 2016 EEA regulations, a Deportation Order remains in force until it is revoked or 'cancelled' by the Home Office or for the period specified in the order (Reg. 34 (2)). A person can apply to the Home Office for the Deportation Order to be 'revoked' on the basis that there has been a material change in the person's circumstances since the Order was made. However, such an application can only be made once the person is outside the UK (Reg.34(4)). Once an application is received by the Home Office, a decision must be made within 6 months.

If you are still in the UK and there has been a material change in your circumstances since the Home Office Decision to Deport or since the Court finally refused your case, you can make a fresh human rights application and request the cancellation of the Deportation Order based on your Article 8 right to respect for family life and private life.

The EEA regulations 2016 state that such an application can only be made from outside the UK (Reg.34 (4)). However, it is arguable that the presence of the person outside the UK is unlawful. If you wish to make an application to revoke your Deportation Order under the EEA regulations, we would advise you to seek legal advice.

KEEPING RECORDS

1. Keep a record of all phone calls & conversations you have with the Home Office, your offender manager/supervisor, and probation services

- Every time you have a telephone conversation with your offender manager/supervisor, probation services, the Offender Management Unit in your prison, or a Home Office official you should write down what you talked about, the questions that you were asked, and the answers that you gave.
- Try to get the name and job title of the person you spoke to and write that down too, and put the day of the week, the date and the time as well. You should ask for their name at the start of the conversation.
- If the telephone conversation does not go well, or you hear something you don't like, you should keep calm and try not to get angry. When the phone call is finished write down as much as you can remember of what was said. You will then have a record of discussions that will help you to remember what was said, and which can be used as evidence in court.

2. Keep all notes you send and receive from your Offender Manager/Supervisor or Home Office caseowner

- Every time you send a request to your offender manager or Home Office caseowner, make sure that you keep all your notes and their written responses. If they don't respond to one of your requests you should make a note on a piece of paper and keep the note.
- You will then have a record of your requests for information and help. This will help you to remember what was said, and you can use your notes as evidence in court.

3. Get proof of posting when sending letters and faxes

If you write letters or send a fax to try to obtain information you should:

- Keep a copy of the letter you sent and make a note on the copy of the date you sent it to be posted.
- Try to get 'proof of posting' from the Post Office so that you can prove to the Home Office or the court or tribunal that you have written the letter. If you are detained and have a visitor from the visitors' group at your IRC or prison you could ask them if they will help you with this, but not all groups will be able to help with this.

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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