

BiD Bail for Immigration Detainees

Deportation Appeals

EEA Nationals

Length of Residence

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 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

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.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1162517/Conducive_Deportation.pdf

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.

European Union (EU) and European Economic (EEA) nationals' length of residence and how this can protect against deportation ?

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).

What if I have left the UK temporarily during my stay in the UK?

The rules allow a person to be out of the UK for short periods. 'Continuity of residence' is not affected by:

- a. Temporary absences not exceeding a total of six months in any one year.
- b. Absences of a longer duration for compulsory military service.
- c. One absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

What is the effect of absences from the UK once the permanent right of residence has been acquired?

Once you have the right of permanent residence under this regulation, it is only lost if you are absent from the UK for more than two consecutive years.

What is the effect of a period of imprisonment during the 5 years before gaining permanent right of residence?

The Court of Justice of the European Union (CJEU) has decided that the period of imprisonment will not count towards the 5 years¹. The court said that this is because the right to a permanent right of residence is aimed at promoting social cohesion and encouraging genuine integration into the host society. A period of imprisonment is taken by the court and the Home Office to indicate a rejection of the values of British society.

How is the 10 year period of lawful residence calculated?

The period of residence is calculated by counting backwards from the date of the 'Notice of Decision to Make a Deportation Order.'²

¹ Onuekwere v SSHD C-378/12 CJEU (16.01.14)

² SSHD v MG C-400/12 CJEU (16.01.14)

Does time in prison count towards my period of residence for the purposes of calculating the 10 years residence?

A period of imprisonment during the 10 years residence before the Home Office 'Notice of Decision to Deport' will not automatically prevent you from relying on the higher protection of 'imperative grounds'. However, the test will be the extent to which the time in prison affected your level of integration into British society (ECJ SSHD v MG (C-400/12)).

In considering this, the questions to answer will be:

- a. How far were you integrated into British society before prison?
- b. To what degree has imprisonment effectively broken that integration?

What happens if I have been absent from the UK during the 10 years before the decision to deport me?

Breaks during that time do not automatically prevent you from benefitting from the enhanced protection. It will be necessary for the Home Office to conduct an overall assessment of your circumstances at the time of the decision to deport you.

What sort of things will the Home Office consider when deciding whether my time in prison has broken my integration into British society?

It will depend on your personal circumstances. However, in general, the longer that you have lived in the UK, particularly if you came here as a young child, and the shorter the time in prison, the harder it will be for the Home Office to show that integration into British society has been broken.

You will need to try to show how you have maintained links with the community during your time in prison, for example through:

- visits from family and friends;
- undertaking any educational courses.

What are the overall issues that have to be considered?

The Home Office will still have to show that the decision to deport you is 'fair' or 'proportionate'. For instance, it will have to take account of your age, the impact of removal on your private and family life and consider any compassionate circumstances.

Where can I get more information on calculating my length of residence under EU law?

You can contact the AIRE Centre. The AIRE Centre (Advice on Individual Rights in Europe) provides advice on rights under EU/EEA law. You can email them on info@airecentre.org or call them Monday-Friday 10am-6pm on 020 7831 4276.

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Registered in England as a Limited Company No. 3803669.

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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)

Unit 1, 1a 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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