

Benefits Bulletin

EEA Nationals and Benefits...

22nd June 2021

Issue **4** [2021]

1. Introduction

In [Benefits Bulletin 2: EEA Nationals and Benefits \(2021\)](#) we provided information on the benefit rights of EEA Nationals (See Box 1: EEA Nationals on page 4 for who we mean by EEA Nationals) living in the United Kingdom in the wake of Brexit and consequential changes to the benefit rules.

This Benefits Bulletin seeks to build on the information already provided whilst underlining the message that people have until the **30th June 2021** to apply to the [European Union Settlement Scheme](#) (EUSS).



We must acknowledge that due to how complex and multifaceted the rules are and that there is an important test case judgement pending from the Court of Justice for the European Union on the Social Security benefit rights of those people with **PRE-SETTLED STATUS**, it is difficult to provide exacting information to cover every scenario.



Therefore, the best advice is for EEA Nationals (and their family members) who are now living in the United Kingdom to seek further information about the European Union Settlement Scheme and to obtain appropriate immigration advice as may be necessary depending on the circumstances. **This is because those who fail to apply by the relevant deadline may be considered to be unlawfully present in the United Kingdom and by virtue of this, they would lose any Social Security benefit rights and entitlements they have.**

Moreover, those in doubt about their rights to apply for Social Security benefits should similarly obtain advice on this subject. We are aware that many EEA Nationals are being wrongly refused entitlement to Social Security benefits. We are seeing this particularly in the case of Universal Credit claims.

This is especially worrying because Universal Credit is designed to, at the very least, ensure that eligible people have a minimum amount of money for day-to-day living and help towards their housing costs. We think the errors in decision-making is partly down to how complex the rules are.

2. The EUSS...

The European Union Settlement Scheme (EUSS) was introduced on **30th March 2019** to enable EEA Nationals (and their family members) to apply to remain living in the United Kingdom post Brexit.

To be eligible to apply applicants must ordinarily have been living (resident) in the United Kingdom on or before **31st December 2020**. Moreover, the deadline for applications is **30th June 2021**.

As previously explained, under this scheme successful applicants may be granted either:

- **SETTLED STATUS** (Indefinite Leave to Remain) if they have lived in the United Kingdom for 5 years or more; providing them with a permanent right to reside which allows them to continue to live and work in the United Kingdom indefinitely; or
- **PRE-SETTLED STATUS** (Limited Leave to Remain) if they have lived in the United Kingdom for less than five years; providing them with the right to live and work in the United Kingdom for up to five years.

Under the scheme, those who have been granted **PRE-SETTLED STATUS** can apply for **SETTLED STATUS** once they have been living in the United Kingdom for at least 5 years.



The 5 years period of residence is counted from the day a person first arrived / started to live in the United Kingdom.

When counting a person's period of residence some gaps (i.e. periods when a person has been absent from the United Kingdom) may be disregarded. Do seek further advice and information as may be necessary on this point.

The Numbers:

- **5.61 million** - the number of applications so far made to the European Union Settlement Scheme
- **5.27 million** - the number of applications that have been concluded
- **52%** of applicants were awarded **SETTLED STATUS**
- **43%** of applicants have been awarded **PRE-SETTLED STATUS**
- **2%** of applications have been refused
- **3%** of applications were wither withdrawn, void or invalid.



What about family members?

All members of a family will need to apply to the European Union Settlement Scheme. Family members do not need to be an EEA National; they can be of any nationality.

What about family members who were not resident in the UK by 31st December 2020?

A 'close family member' of an EEA National granted either **SETTLED STATUS** or **PRE-SETTLED STATUS** will be able to join them in the United Kingdom at any point in the future as long as the relationship still exists. A 'close family member' is a spouse, civil partner, unmarried partner and any dependent children. It also includes grandchildren, parents and grandparents.

What if someone misses the 30th June deadline?

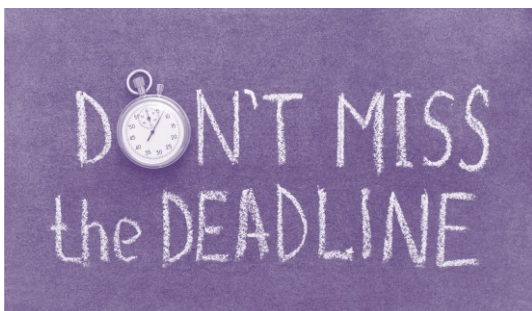
Applications to the European Union Settlement Scheme should be made by **30th June 2021** or as soon as reasonably possible thereafter.

Late applications (i.e. applications made after 30th June 2021) may be accepted where there are '**reasonable grounds**' for the deadline having been missed.

A child whose parents (or guardians) have failed to make an application for them could be said to have 'reasonable grounds' for missing the deadline. So too might a person who has been prevented from applying because they have been in an abusive or controlling relationship. Those who lack the physical or mental capacity to apply may also have 'reasonable grounds' for missing the deadline.

The [Withdrawal Agreement](#) which sets out the post Brexit rights of British nationals living in the European Union and EEA Nationals living in the United Kingdom provides (see Article 18(d)) that where the deadline for submitting the application is missed, then the "*competent authorities*" (i.e. in this case the Home Office):

"... shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline".



What is the potential impact of missing the 30th June 2021 deadline for applying to the European Union Settlement Scheme?

If an EEA National (or their family member) fails to apply to the European Union Settlement Scheme, then they may be treated as unlawfully present in the United Kingdom.

This would invariably place limitations not just on their ability to live and work in the United Kingdom, but also their right to access free NHS healthcare, social housing and housing assistance. These limitations would remain until a valid application to the European Union Settlement Scheme was made.

If an application was made but refused because, for example, it was determined that the person did not have 'reasonable grounds' for the delay in applying to the scheme then they would need to apply to remain living in the United Kingdom under the current [Immigration Rules](#) which apply to people seeking permission to enter and remain in the United Kingdom.

IMPORTANT: Please be aware that if an EEA National (or a family member) fails (without a reasonable grounds) to apply to the European Union Settlement Scheme by 30th June 2021, this could result in them being considered to be unlawfully present in the United Kingdom.



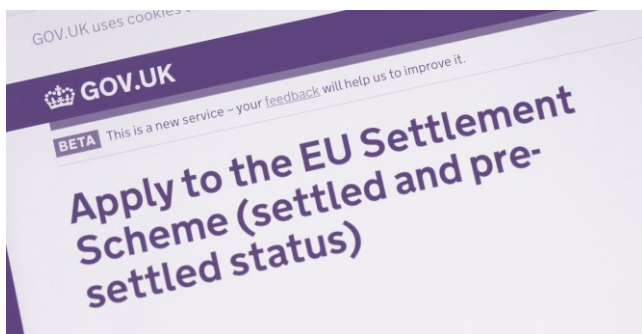
A failure to apply to the European Union Settlement Scheme could also mean that the person loses any right to claim and/or receive Social Security benefits. For example, for Universal Credit purposes a person needs to have a 'right to reside' in the United Kingdom to be entitled and for Personal Independence Payment (PIP) entitlement a person must not be a 'person subject to immigration control'. An EEA National who has failed, without 'reasonable grounds', to apply to the European Union Settlement Scheme prior to the deadline may fall into both categories meaning that any Universal Credit or PIP entitlement, should stop and any future claim would not be accepted.

Box 1: EEA Nationals When we refer herein to a person being an ‘EEA National’ we mean a person who is a national of Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Iceland, Liechtenstein, Norway and Switzerland.

3. The EUSS - Which Benefits?

As explained in our [Benefits Bulletin 2: EEA Nationals and Benefits \(2021\)](#) the position of an EEA National who has been awarded **SETTLED STATUS** is straightforward. They have indefinite leave to remain in the United Kingdom and as such they have the right to access Social Security benefits both before and after **30th June 2021** in the same way as British citizens.

Moreover, a ‘**family member**’ (whether they are themselves an EEA National or not) of an EEA National who has **SETTLED STATUS** has the same right to access Social Security benefits.



However, as also explained in our [Benefits Bulletin 2: EEA Nationals and Benefits \(2021\)](#), the benefit rights of an EEA National WITH or WITHOUT PRE-SETTLED STATUS will depend on the different factors as outlined below.

An EEA National WITH PRE-SETTLED STATUS should be able access / continue to access entitlement to **Means-tested Benefits** (See Box 2: Means-tested Benefits on page 5) up to and beyond **30th June 2021** providing they were living in the United Kingdom on **31st December 2020** and at the material time and since they were / have been:

- a ‘**worker**’ - a person who undertakes work at the direction of another person in return for remuneration and that work may be considered to be ‘genuine and effective work’ rather than ‘marginal and ancillary’; or
- a ‘**self-employed person**’ - a person that provides services (which are not undertaken under the direction of another) in return for remuneration and the undertaking may be considered to be ‘genuine and effective work’ rather than ‘marginal and ancillary’.



IMPORTANT: Please be aware that if an EEA National is presently getting a Social Security benefit but fails to apply to the European Union Settlement Scheme by 30th June 2021, the Department for Work and Pensions (DWP) might consider that any benefit paid to them after this date has been paid incorrectly on grounds that since this date, they have been unlawfully resident in the United Kingdom and may seek to recover any overpayment. Should this happen then it is important that the person seeks specialist advice.

Note: Similarly, An EEA National who could be considered to be a ‘**self-sufficient person**’ or ‘**self-sufficient student**’ who was living in the United Kingdom on 31st December 2020 would be able to apply a Means-tested Benefit (See Box 2: Means-tested Benefits on page 5).

However, this could then bring into question / undermine the very sense of their self-sufficiency. This is because to be 'self-sufficient' a person must have sufficient resources not to become an unreasonable burden on the Social Security benefit system.



Moreover, and importantly, to count as 'self-sufficient' the person must also have comprehensive sickness insurance. Whilst some otherwise 'self-sufficient' people might be able to argue that applying for a Means-tested Benefit is not placing an unreasonable burden on the public purse there is no escaping the need to, in effect, have private sickness insurance / some other provision to cover the cost of any NHS costs, which many do not have.

A '**family member**' (whether they are themselves an EEA National or not) of an EEA National who may be considered to be a 'worker' or 'self-employed' (see page 4) person will have the same access rights to Means-tested Benefits.



In this context, '**family member**' includes a spouse, a civil partner and a child aged under 21. It also includes a parent or grandparent. A spouse, a civil partner will remain a spouse, a civil partner even if they separate, up until such time as they divorce or dissolve the civil partnership. A person who is in a 'durable relationship' with an EEA National may also be treated as a 'family member' if they hold a valid EEA Family Permit, a Registration Certificate or a Residence Card.

Box 2: Means-tested Benefits

- Universal Credit
- Pensions Credit
- Child Benefit
- Income-related ESA
- Income-based JSA
- Income Support
- Child Tax Credit
- Housing Benefit
- Council Tax Support

An EEA National **WITHOUT PRE-SETTLED STATUS** but who was a 'worker' or 'self-employed person' (see page 4) on **31st December 2020** (and who continues to be a 'worker' or 'self-employed person') should be able to access / continue to access entitlement to Means-tested Benefits up to but not beyond **30th June 2021**.

It is, therefore, important that anyone in this situation give serious consideration to applying for **PRE-SETTLED STATUS** before the **30th June 2021** European Union Settlement Scheme deadline.



A '**worker**' or '**self-employed person**' may retain their 'worker' or 'self-employed person' status during a period of involuntary unemployment (providing they have not withdrawn from the labour market) or during a period when they are temporarily unable to work due to ill-health.

Moreover, please bear in mind that a woman who was a 'worker' or 'self-employed person', is able to retain her worker / self-employed status whilst not working during the latter stages of pregnancy / for a short period after the birth of a child, by virtue of case law (see *Saint Prix v SSWP* and *SSWP v HD*).



Note: If an EEA National who does not have **SETTLED STATUS** or **PRE-SETTLED STATUS** was a jobseeker and living in the United Kingdom on **31st December 2020** (i.e. they were lawfully resident) and they have since become a ‘worker’ or ‘self-employed person’ (see page 4) then they may apply for Means-tested Benefits up to **30th June 2021**.



However, after this date they will need to be a ‘worker’ or ‘self-employed person’ **WITH PRE-SETTLED STATUS** to be able to apply or continue to be entitled to a Means-tested benefit.



From the above information it is quite clear that as things stand only those with **SETTLED STATUS** have a straightforward access to Means-tested Benefits. The availability of Means-tested Benefits for those with **PRE-SETTLED STATUS** is essentially restricted to those who may be considered to be a ‘worker’ (or someone who can retain their worker status) or ‘self-employed person’ (or someone who can retain their self-employed status). However, do see 4. The Case Law because this could change.

Those with **PRE-SETTLED STATUS** will be able to apply for **Non-Means-Tested Benefits** (See Box 3 below) providing they are able to meet the basic qualifying rules / general rules of entitlement for that benefit.

Box 3: Non-Means-Tested Benefits

- Personal Independence Payment (PIP)
- Attendance Allowance (AA)
- Disability Living Allowance (DLA)
- Carer’s Allowance (CA)
- New Style JSA (NJSA)
- New Style ESA (NESA)
- Maternity Allowance (MA)
- Industrial Injuries Disablement Benefits (IIDB)

This is because all that is ordinarily required for entitlement to these benefits is that a person be lawfully present / habitually resident in the United Kingdom and in the case of PIP, AA and DLA that they are not excluded from applying for public funds.

Indeed, entitlements to Industrial Injuries Disablement Benefits may be paid when a person is living abroad.

Tax Credits: Those with **PRE-SETTLED STATUS** who are working and getting **Working Tax Credit (WTC)** should be able to continue to get WTC for as long as they remain (or may be treated as remaining) in work or self-employment (e.g. during a period of sickness or maternity leave).



If someone with **PRE-SETTLED STATUS** is getting WTC and they become a parent, then they should be able to apply for Child Tax Credit (CTC).

If someone with **PRE-SETTLED STATUS** is getting CTC, then this should remain in payment for as long as they continue to be a 'worker' or 'self-employed person' (See page 5). If they were to cease to be a 'worker' or 'self-employed person', then CTC may remain in payment providing they would be able to rely on the *Fratila* judgement (See 4. The Case Law).

If someone with **PRE-SETTLED STATUS** is getting CTC (and not WTC) but were to embark upon paid employment or self-employment that would meet the qualifying conditions for WTC, then they could apply for WTC.



If a person is not getting either WTC or CTC then a new tax credit claim is not now possible due to the introduction of Universal Credit but they are not, in principle, prohibited from applying for an award of CTC if they are getting WTC (or vice versa).

4. The Case Law

There are two test cases upon which the benefit rights of those with **PRE-SETTLED STATUS** could change.

The test cases are:

- United Kingdom Supreme Court: *Fratila and Tanase v Secretary of State for Work and Pensions*
- Court of Justice for the European Union: *CG v Department for Communities* (Northern Ireland).

In both cases, the claimant(s) had been granted **PRE-SETTLED STATUS** rather than **SETTLED STATUS** because, on the date of their application to the European Union Settlement Scheme they had not resided in the United Kingdom for a period of 5 years or more.



In both cases it was, in effect, argued that it was discriminatory to refuse those with only **PRE-SETTLED STATUS** a right to live and work in the United Kingdom but no right to access to Means-tested Benefits. See Box 2: Means-tested Benefits on page 5.

The case of *Fratila and Tanase v Secretary of State for Work and Pensions* was not heard by the United Kingdom Supreme Court on **19th May 2021** as scheduled because all the parties agreed that the Court would be bound by the decision in *CG v Department for Communities*.

The case of *CG v Department for Communities* was heard by the Court of Justice for the European Union on **4th May 2021**. Whilst neither Court have yet handed down their full decisions it is understood that the United Kingdom Supreme Court has ruled that its findings would be bound by the findings of the Court of Justice for the European Union.

When *Fratila* was heard by the Court of Appeal (18th December 2020) it ruled that the regulations that prohibited those with **PRE-SETTLED STATUS** from claiming Universal Credit were in principle unlawful and so should be squashed. This, it is understood, should mean that those WITH PRE-SETTLED STATUS who had applied for Universal Credit (and/or other Means-tested Benefits) before 1st January 2021 should have been treated as eligible. Whereas, claims and entitlement on or after this date will depend on the information provided in 3. The EUSS - Which Benefits? and this chapter.



Zambrano Carers: The High Court (in the case of [Olorunfunmilayo Oluwaseun Akinsanya v SSWP](#)) has recently ruled that it was unlawful to refuse Zambrano carers who have leave to remain living in the United Kingdom access to the European Union Settlement Scheme. A 'Zambrano' carer is a person from a non-EEA state whose residence is required in the United Kingdom in order to enable a child or dependent adult, who is British, to live in the United Kingdom (or some part of the European Union).

We will seek to provide a further update once the news of the judgements have been released. In meantime, please bear in mind the following advice...

People with **PRE-SETTLED STATUS** who have applied for but been refused Means-tested Benefits (See Box 2: Means-tested Benefits on page 5) either before or after **1st January 2021** should seek to challenge the decision by requesting a **Mandatory Reconsideration**. This can be done by writing to the relevant Department for Work and Pensions (DWP) office or by telephoning them.

If the DWP then refuse to favourably revise its decision, the person should make an **Appeal** to the First-tier Tribunal. This can be done online. See this [LINK](#) or in the case of Universal Credit by downloading and completing the form available via this [LINK](#). In both asking for a Mandatory Reconsideration or Appeal all the person need do is state that they believe they have an entitlement to the benefit in question, because they believe that they are able to meet the general qualifying rules for that benefit, including those pertaining to the 'right to reside' requirement by virtue of their **PRE-SETTLED STATUS** or some other circumstance. Please act quickly.

There is a one-month time limit for asking for a Mandatory Reconsideration or Appeal. If a person has missed the deadline then they can ask for any Mandatory Reconsideration or Appeal request to be accepted albeit that it is late but in order for this to happen they will need to show that there is some 'special circumstance' (i.e. good reason) for this in the case of a Mandatory Reconsideration request or that it is 'fair and just' to do so in the case of an Appeal.

4. Getting the Correct Advice...

What is clear is that many EEA Nationals (and their family members) may need advice about Social Security benefits and immigration matters at this time.

Whilst the Welfare Rights Service provides advice on Social Security benefit entitlements, we are neither accredited to nor able to provide advice on immigration matters.

If someone needs advice on Social Security benefit issues, they may contact the Welfare Rights Service by email at wrs@wolverhampton.gov.uk or ring them on (01902) 555351.



However, if someone is in need of immigration advice then they can go to this link: [Adviser Finder](#) to locate an immigration advisor near to them.

Welfare Rights Service
Specialist Support Team
City of Wolverhampton Council
WRS@wolverhampton.gov.uk