

## **GUIDE ON SUBMITTING A LATE APPLICATION UNDER THE EU SETTLEMENT SCHEME**

### **Who is this guide for?**

This guide has been developed by the [Strategic Alliance for Europeans Project \(S.A.F.E\)](#) to assist EU Settlement Scheme (EUSS) advisers who are providing regulated advice preparing late EUSS applications. It assumes a certain knowledge of the legal framework and the application process including eligibility for pre-settled or settled status under the EUSS. The focus is on late applications submitted after 9 August 2023 when the new validity requirements entered into force. You can contact the S.A.F.E. project on [safe@hereforgoodlaw.org](mailto:safe@hereforgoodlaw.org).

### **Determine the deadline**

In order for a late EUSS application to be accepted as valid, the applicant will need to show that they have 'reasonable grounds' for their delay in submitting the application. To understand the length of delay in submitting the late application, it is first necessary to establish when your client should have applied by.

For EEA citizens and their family members who lived in the UK prior to 31 December 2020, the deadline in most cases was 30 June 2021. The deadline is different for non-EEA family members with limited leave to enter or remain, who have until the end of that leave to make an application before they would need to justify missing the deadline<sup>1</sup>. For persons exempt from immigration control, they have 90 days from the point they cease to be immigration exempt before they need to justify missing the deadline<sup>2</sup>.

For those who arrived after 31 December 2020 and who will be applying as Joining Family Members (JFM), the deadline to apply to the EUSS would be 3 months from the date that they arrived in the UK, unless they arrived in the UK with a valid EUSS Family Permit or another type of non-visitor immigration status, in which case, the deadline is the expiry of that limited leave<sup>3</sup>.

The more time that has passed since the deadline, the greater the justification required to show reasonable grounds.

### **Why was the deadline missed?**

Once the applicable deadline has been determined, you should take detailed instructions from your client to ascertain why they did not apply by the deadline. There could be more than one reason why someone missed the deadline, usually there is a mix of reasons and it is important to be able to

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<sup>1</sup> The Appendix EU rules treat the application as late but automatically passport it on the grounds that the applicant applied with extant leave.

<sup>2</sup> As with footnote 1.

<sup>3</sup> As with footnote 1.

explain to the Home Office in detail why it happened. It may be a case of working backwards starting from the event that lead your client to realise they needed to make an EUSS application. If your client has applied before to the EUSS and been refused, it will be very important to understand what they thought happened to that application as you will need to justify to the Home Office why they should accept the new late application.

Important questions to ask your client:

- When did you learn about the EUSS?
- Have you travelled in and out of the UK in the last few years, and if so, did you have any issues? What did Border Agents say to you on your return?
- Have you been working, and if so, has your employer asked for proof of your immigration status?
- Have you been renting in England, and if so, has your landlord asked for proof of your immigration status?
- Do you have any family or friends who applied to the EUSS?
- Have you applied to the EUSS before? If so, what happened to that application(s)?
- Have you had any advice from an regulated / unregulated adviser or the Home Office about the EUSS? If so what was the advice?

Once you know the reason(s) why you client missed the deadline, you will then need to explore if the late grounds could be accepted as being reasonable by the Home Office. The first step would be to check what the Home Office guidance considers to be acceptable as reasonable grounds as to why an application is submitted late.

## Grounds accepted as reasonable by the Home Office

The Home Office policy guidance document '*EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members*', gives example scenarios where the Home Office is likely to accept an applicant has reasonable grounds for submitting a late application. The examples in the current guidance is considerably more restrictive than it was before 9 August 2023, so it is worth to familiarise yourself with the list. In brief, the acceptable grounds set out in the guidance includes:

- Those who have **a valid EUSS Family Permit, existing limited leave to enter or remain under another immigration route (not as a visitor), are exempt from immigration control, or were exempt from immigration control within the last 90 days**, can submit a late application without needing to provide further justification.
- **Children under 18** where a parent or a carer has failed to apply to the EUSS by the relevant deadline. Those who fall within this category except for the fact the **children are now over 18**, should also generally be allowed to submit a late application but it will depend on their individual circumstances.
- Those who **lack physical or mental capacity and/or have care or support needs**.
- Those who have or had a **serious medical condition**, or is undergoing or has undergone **significant medical treatment**.
- Those who were / are in an **abusive or controlling relationship**.
- Those who have been in **prison** (but are not facing deportation proceedings) and there were practical problems for them to submit an application by the deadline.

If your client falls within any or several of these categories and the information written in the guidance fits their situation, make sure you quote the relevant section of the guidance in your representations to the Home Office.

## Grounds not accepted as reasonable by the Home Office

Unlike previous versions of the guidance, the post-9 August guidance now sets out situations the Home Office believes are **generally** not accepted as showing reasonable grounds for submitting a late application (although there are exceptions, see below):

- Those who states **they were unaware of the need for them to apply** to the scheme unless they provide a sufficient explanation of why they were unaware (see below).
- Those who have missed the deadline because they did not have **access to a computer, internet or only limited English language skills**.
- Those who have submitted **previous in-time or late applications which have been refused**.

In the above examples late applications can still be accepted, but only if the applicants show there were '*compelling practical, compassionate or other good reasons*' as to why they are making a late application.

In an update to the guidance, published on 16 January 2024, the Home Office has included a list of situations where the applicants might be able to show they had a reasonable belief that they did not need to apply, or a reasonable basis for being unaware of the need to apply, which could be accepted as reasonable grounds for submitting a late application. These situations cover:

- Those who have been issued with EEA Regulations documents or ILR under other immigration routes who are applying to the EUSS for the first time.
- Those who have lived in the UK for a long time and where the Home Office can confirm the residence through the automated checks.
- Those who have been issued with EEA Regulations documents and have close family members who applied under EUSS, but they believed they did not need to because of the EEA Regulations document.
- Those who have believed they did not need to apply because they have received wrong advice from landlords or employers, or they have been able to travel in and out of the UK without being signposted to the EUSS.

In practice, there are many good reasons why a person was unaware of the need to apply to the EUSS, or why a person who previously applied unsuccessfully has a good reason to reapply, regardless of the Home Office guidance.

Therefore, if your client's reasons for submitting a late application fall under the categories set out above or they fall outside the guidance all together, how you present their case to the Home Office will be very important to its success.

## How to make a strong late application

### *Detailed representations*

It is important to provide as much detail as possible as to why your client missed the deadline. The Home Office will reject applications if no details are provided. There is a text box in the online application form that allows applicants the opportunity to explain their reasons for applying late in detail. Alternatively you can also use the text box to refer to a cover letter where the reasons for the late application can be set out in detail. It may be necessary to take a statement from your client to

include with the application but if this is not possible, the information can be set out as detailed representations.

Previously rejected applications can be accepted as valid once a new, comprehensive application has been submitted by a legal representative and so it may be worth pursuing a new application with your client, even if there has been a previous rejection.

### ***Previous guidance***

The pre-August 2023 Home Office guidance on the EUSS was much more generous as to what could be accepted as a reasonable ground for submitting a late application, so if your client's reasons were covered in older versions of the guidance then, it may be worth emphasising this point, arguing that there is no logical reason why the reasonable ground for missing the deadline would be valid before 09 August but not afterwards.

### ***Set out eligibility grounds***

You should include arguments on how your client meets the eligibility requirements for pre-settled or settled status in your representations; for example, if your client has been living in the UK for many years it is worth highlighting this point. The Home Office have stated the changes to the late application process was to:

*"...help to protect the integrity of the EUSS against speculative and abusive applications, whilst continuing to enable those with reasonable grounds for their delay in applying to make a late application".*

By showing that your client is clearly eligible under the EUSS and is not making a speculative and / or abusive applications, the Home Office should be more flexible as regards accepting the late application as being valid. In many cases there may be a clear link between being eligible for status and the reasons for missing the deadline; for example, someone who has lived in the UK continuously for a long time (and thus clearly eligible for status), may have reasonably and honestly believed that they were not required to apply to the EUSS. Therefore, you should set out your client's eligibility when explaining the reasons for the delay in submitting the application.

### ***Guidance is non-exhaustive***

Remember that the guidance is there to guide Home Office caseworkers and the list of acceptable reasonable grounds situations is not exhaustive, so other situations not covered by the guidance can be accepted as demonstrating reasonable grounds for submitting a late application. If your client's reasons fall outside those identified in the guidance, you should clearly make reference to the fact that the guidance is not intended to be exhaustive. The below section of the guidance is useful to cite in a cover letter when setting out your client's case:

*"The guidance below describes some circumstances in which you may be satisfied that a person has reasonable grounds for their delay in making their application. It is not exhaustive and every case must be considered in light of its particular circumstances and the evidence provided.*

*In all cases, the relevant test is whether, on the balance of probabilities and based on all the information and evidence provided by the applicant or otherwise available to you, you are satisfied that, at the date of application, there are reasonable grounds for the person's delay in making their application under the EU Settlement Scheme."*

### ***The test is on the balance of probabilities***

What constitutes reasonable grounds for submitting a late application is not defined in the UK-EU Withdrawal Agreement, it simply requires a late application to be accepted and considered where

there are “*reasonable grounds to do so*”. The Home Office guidance sets out “*some circumstances*” of what they consider to be reasonable grounds, but the UK-EU Withdrawal Agreement means the examples cannot be exhaustive and therefore, Home Office case workers must decide what is ‘reasonable’ on a case-by-case basis. It is important to emphasize the test of reasonableness is not a high bar to success.

### ***The Home Office decision will need to be proportionate***

When taking decisions on late applications the Home Office will need to abide by the principle of proportionality. They will need to consider the individual's circumstances and make a proportionate decision on the basis of the aim that is intended to be achieved, which, according to the Home Office is to prevent abusive and fraudulent applicants taking advantage of the EUSS to obtain a certificate of application (and the associated rights to work, rent etc). It is therefore arguably disproportionate if, for example, a Home Office rejection of a late application leaves a long-standing resident without any possibility of achieving EUSS status, given that applicant is clearly not an abusive or fraudulent applicant.

### ***Always provide evidence with the application***

The guidance says that ‘*objectively verifiable evidence*’ would be expected in support of late applications. This means doctors’ and hospital letters, letters from support or care workers, police records etc, but can also include a detailed statement from your client and others close to them. Remember that evidence which is not ‘*objectively verifiable*’ can be submitted; the Home Office may prefer some evidence over others, but it does not mean that all other types of evidence can be completely disregarded. The general rule should be to submit the application with as much evidence and detail as is possible. A late application must be ‘front loaded’ with all evidence that is available to ensure the best chance of success at the application stage, or when challenging a negative decision.

As it may be necessary to lodge a pre-action protocol letter / Judicial Review if the application is rejected, it is very important that the original application was as strong as possible and all relevant information and evidence was included. If relevant information or evidence was missing, it will weaken the chances of succeeding with a Judicial Review stage.

## **Will the Home Office contact an applicant for more information?**

Unlike the eligibility stage of the EUSS process, the Home Office does not necessarily contact applicants to ask for additional evidence and information that could help them to pass the validity stage. The guidance states that Home Office caseworkers are not required to contact applicants if the reasons for the late submission of the application falls outside the guidance, or if no substantive information for the late application is given. However, if the case appears to fall within the late application policy but insufficient evidence or information was provided by the applicant, the Home Office caseworker should contact the applicant and give them an opportunity to provide it, usually within 14 days. If evidence was not supplied and the application is rejected as invalid, the applicant can apply again with the further evidence.

## **Judicial Redress**

As a late application rejected for failing to show reasonable grounds is an invalid application, this decision cannot be appealed to the Immigration and Asylum Tribunal. The only way to challenge an invalid application is through the Judicial Review process. If your client’s application has been rejected as invalid, you will need to assess what the next appropriate action is: submit a new application, or proceed with a pre-action protocol letter with a view to issuing Judicial Review proceedings. If the rejected application was well prepared and all relevant arguments had been raised, then the pre-action protocol process will most likely be necessary in order to assist the client to overcome the invalidity and ultimately achieve status under EUSS. The S.A.F.E project has prepared a [template pre-](#)

[action protocol letter](#) to assist legal representatives to challenge invalidity decisions. The template will need to be amended to fit your client's circumstances and you should make sure that your regulatory level permits you to undertake pre-action protocol work.

If you think the original rejected application for EUSS status can be improved, for example if the client has submitted their application without representation, it is likely to be preferable to prepare and submit a new application. If that application is also rejected, it may then be necessary to proceed with a pre-action protocol letter.

## **Examples of categories of rejected applications**

Below follows some examples of various categories of late application which we have seen and how to best help these clients.

### ***Vulnerable applicants***

Vulnerable applicants should argue they fall within the category of applicants who have care or support needs, and/or medical problems and make use of the guidance when doing so. The Home Office has emphasised repeatedly that vulnerable applicants are still encouraged to apply to the EUSS and therefore, highlighting any vulnerabilities is very important. The Home Office has a dedicated EUSS vulnerability team and so if possible, it can be helpful to raise late applications from vulnerable persons with them.

For those with care or support needs, and those with medical issues, the guidance specify that applicants will have to show that they have suffered these issues since the deadline in June 2021 (if applicable) and until they apply to the scheme. It is generally not sufficient to show that an applicant had medical problems at some point during this period, but rather they have a long term medical problem that has prevented an earlier application. This is a restrictive approach as there could be many reasons why a medical or health situation experienced some time ago has continued to affect the person and stopped them applying. It is always worth emphasising your client's medical history or support needs if there are any. If looked at in conjunction with other issues, it may be enough to have the application accepted as valid.

If possible, evidence will need to be submitted to support the fact that your client is vulnerable. This can be letters from medical professionals or support workers but can also be in the form of a detailed statement from your client if no other evidence is available. Remember that not all vulnerable clients will see/present themselves as vulnerable when meeting you for the first time so it is important to ask questions and take detailed instructions of their situation. For example, the guidance states that it is no longer acceptable as a reasonable ground for submitting a late application for those who are computer illiterate or those who have limited English. But these applicants may well be vulnerable with support needs, like the elderly or members of marginalised communities and as such, should be able to submit a valid late application.

### ***Repeat applicants***

This is the category of applicants which the Home Office has most actively tried to target by the amended rules, as they try to address '*speculative*' and '*abusive*' applications. For these clients, it is therefore crucial to explain in detail why none of the previous applications have been successful despite them being eligible. If the client has failed to engage with the Home Office due to vulnerabilities or because they did not receive the communication, this will have to be clearly set out. Unqualified legal representatives could be a reason for needing to make a repeat application, or applicants who have been encouraged by the Settlement Resolution Centre to apply again instead of appealing a refusal. The main argument to make for repeat applicants is that their case is not speculative or abusive by emphasising that the applicant meets the eligibility requirements.

If your client is unsure as to what has happened with past applications or what evidence has previously been submitted, it is in most cases useful to make a Subject Access Request for the client's Home Office records. When assessing eligibility in previous applications, Home Office guidance sets out applicants should be contacted on 3 separate occasions with at least 2 different methods over a period of 3 weeks. If the Home Office did not do this, they did not apply policy correctly which should be pointed out. You can emphasise why the Home Office failed to assist the client sufficiently to show they were entitled to status, which is a breach of the Withdrawal Agreement (Article 18.1(o)).

Similarly, if the Home Office has previously clearly taken a wrong decision or made errors when deciding the application, it can be useful to go back and address the flaws in their decision.

If the client has previously received bad legal advice from a regulated adviser, then you may want to encourage the client to raise a complaint with the relevant organisation and their regulatory body. If a complaint is upheld, it could assist in establishing reasonable grounds.

### ***Applicants with EEA Regulations documents***

An obvious group of people who one would expect to be accepted as having a reasonable ground to submit a late application would be those EEA citizens and their family members who have been issued with residence or permanent residence cards under the EEA Regulations ('EEA Regulations document'). Although the guidance was amended on 16 January 2024 to make it easier for this cohort to submit valid applications, if they can show they had a reasonable belief they did not need to apply for status, the Home Office has not adopted a blanket approach to these applicants. They will still need to provide evidence to support their claim that they had a reasonable belief they did not need to apply, or a reasonable basis for being unaware (such as having been able to travel in and out of the UK using the EEA Regulations document). It is therefore, still very important to provide the reasons put forward by your client as to why they did not think they were required to apply for a status under the EUSS.

Legal representatives should re-submit applications following the publication of the amended guidance on 16 January 2024 if there have been previous rejections of applications for these types of clients.

If your client has travelled in and out of the UK using the EEA Regulations document without being challenged or informed of the need to obtain EUSS status, this information should be included in the application. You should also explore if the client has been able to exercise other rights, for example, the right to work or rent a property, or sponsor relatives, without issue by relying on the EEA Regulations document.

The fact that an applicant is in possession of an EEA Regulations document, demonstrates that the person is not submitting a speculative or abusive application which should be emphasised in any representations.

### ***Children born in the UK***

Those children who are born in the UK to parents with pre-settled status (and whose parents do not have permanent residence under the UK-EU Withdrawal Agreement), should apply for a status in line with their parents and should do so within three months of birth. It can be difficult for new parents to acquire a UK birth certificate and a national passport or identity card within three months. Parents can submit a paper EUSS application form explaining why the child does not yet have a birth certificate or an ID document. However, many parents are unaware of this paper application process and instead wait to submit an online application after the relevant documents are issued; if this is 3 months or more after the child's birth this will be considered a late application and reasons will be provided in the application.

If one parent has settled status under the EUSS (or is settled in another way), or pre-settled status and permanent residence under the UK-EU Withdrawal Agreement (i.e. they can show that they have exercised treaty rights for a period of five years) at the date of the child's birth, the child is born British and can apply for a British passport.

