

**RIGHT TO RESIDE – THE CITIZENS’ RIGHTS
(APPLICATION DEADLINE AND TEMPORARY
PROTECTION) (EUROPEAN UNION EXIT) REGULATIONS
2020 – CARER’S ALLOWANCE, DISABILITY LIVING
ALLOWANCE AND ATTENDANCE ALLOWANCE**

Contents	Paragraphs
Introduction	1 – 3
Background	4 – 6
European Union Settlement Scheme	7 – 8
European Union Settlement Scheme family members	9
“Immediately before Implementation Period completion day”	10 – 12
Residence and presence conditions	13
Person subject to immigration control – European Economic Area national	14
Person subject to immigration control meaning – prior to the end of the transition period	15
Person subject to immigration control meaning – after the end of the transition period	16
European Economic Area national with European Union Settlement Scheme leave at the end of the transition period	17 – 19
European Economic Area national with no European Union Settlement Scheme leave at the end of the transition period	20 – 21

Definitions	
European Economic Area document	22
Family member	23
Relevant family member	24
Relevant person	25
Grace period	26
Applications which have not been finally determined by the application deadline	27 – 28
Immigration (European Economic Area) Regulations 2016 savings	29
Table: Immigration (European Economic Area) Regulations 2016 provisions that continue to apply	30
General interpretation	31 – 33
Continuity of residence	34
“Worker”, “self-employed person”, “self-sufficient person” and “student”	35
Worker or self-employed person who has ceased activity	36
Qualified person	37 – 39
Family member	40
Extended family member	41
Family members and extended family members of British citizens	42 – 44
Dual national: national of a European Economic Area State who acquires British citizenship	45
Family member who has retained a right of residence	46

Derivative right to reside	47
Effect on other legislation	48
Entitlement to income-related benefits and public services	49
Evidencing status	50

Annotations

Contacts

Appendix 1 – The Immigration (European Economic Area) Regulations 2016 provisions that continue to apply during the Grace Period

INTRODUCTION

1. The Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020¹ ("the Grace Period Statutory Instrument") came into force at the end of the transition period at 11pm on 31.12.20² (defined as "Implementation Period completion day"³). The Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 gives effect to aspects of the Withdrawal Agreement, the European Economic Area European Free Trade Association Separation Agreement and the Swiss Citizens' Rights Agreement⁴ ("the Agreements") concerning the residence rights of European Union, European Economic Area and Swiss citizens ("European Economic Area citizens") and their family members, namely that "the deadline for submitting the application (to the European Union Settlement Scheme)" shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.

Note: For guidance on European Union Settlement Scheme please see paragraphs 7 to 9 below.

¹ *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020* (SI 2020 No 1209); ² reg 1(1); ³ *European Union (Withdrawal Agreement) Act 2020*, s 39;

⁴ *Withdrawal Agreement*, art.18(1)(b); *EEA EFTA Separation Agreement*, art.17(1)(b); *Swiss Citizens' Rights Agreement*, art 16(1)(b)

2. For those European Economic Area citizens who are lawfully resident (i.e. exercised **any** right to reside under the Immigration (European Economic Area) Regulations 2016 (see **Note 1** below) in the United Kingdom by virtue of having exercised their right of free movement in the European Economic Area/Switzerland immediately before the end of the transition period, and who have not yet made an application for United Kingdom immigration status under the European Union Settlement

Scheme, and for their relevant family members, the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 saves their existing residence rights in the United Kingdom for the duration of the Grace Period¹. The deadline by which applications for European Union Settlement Scheme leave must be made is the end of 30.6.21² (see **Note 2** below). The Grace Period³ is therefore the period beginning immediately after 11pm on 31.12.20 and ending with the application deadline of the end of 30.6.21.

Note 1: To be "lawfully resident" means more than simply being in the United Kingdom. The person must have exercised **any** right to reside under the Immigration (European Economic Area) Regulations 2016⁴ before the end of the transition period. Where there is uncertainty as to whether the claimant falls within scope of the Withdrawal Agreement and/or the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, those cases may be submitted to Decision Making Services for further advice.

Note 2: See Note 4 to paragraph 7 relating to late applications. See paragraph 27 for applications yet to be finally determined, or paragraph 28 for where an appeal against an in-time application is pending.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(2);
2 reg 2; 3 reg 3(5)(a); 4 Imm (EEA) Regs 2016, reg 4, 5, 6, 7, 8, 9, 9A, 10, 13, 14, 15 & 16

3. The Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 also makes provision to preserve access to benefits and services (subject to eligibility) for the duration of the Grace Period¹. The protections provided for in the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 also apply where an individual makes an application to the European Union Settlement Scheme before the deadline, but the application has not been finally determined by the deadline² (see paragraph 27). Also the deadline of the end of 30.6.21 does not apply where an appeal against an in-time application is pending (see paragraph 28). Those rights are protected until the appeal is finally determined, which could be much later than the end of 30.6.21.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3; 2 reg 4

BACKGROUND

4. As part of the Immigration and Social Security Coordination Act 2020, the Home Office brought free movement for European Economic Area citizens and their family members to an end as of 11pm on 31.12.20 ("Implementation Period completion day", which is more commonly referred to as the end of the transition period). Subsequently, the Immigration (European Economic Area) Regulations 2016, which transpose the European Union Citizens' Rights Directive 2004/38, were revoked in their entirety on that day. As part of the United Kingdom's

departure from the European Union, the United Kingdom and European Union agreed to protect those European Economic Area citizens who are in scope of the Withdrawal Agreement. Accordingly, the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 requires that a body of retained European Union law is created to protect those that are in scope of the Withdrawal Agreement. Also, as reference to the Immigration (European Economic Area) Regulations 2016 needs to continue in relation to European Economic Area citizens and their family members who are already in the United Kingdom before the end of the transition period, the Home Office drafted secondary legislation to save the Immigration (European Economic Area) Regulations 2016 so that they continue to apply in certain situations, for certain purposes, and with some modifications.

5. The first amendments drafted by the Home Office are within the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 (captured within this Memo), which are relevant to European Economic Area citizens and, in certain cases, their family members who, were lawfully resident before the end of the transition period, and have not yet been granted European Union Settlement Scheme leave. This may be because they have not yet applied for European Union Settlement Scheme leave, or because they have an application pending (see paragraph 27). Consequently, where a claim to Carer's Allowance / Disability Living Allowance / Attendance Allowance is made on or after 11pm on 31.12.20, and the European Economic Area national claimant has not yet applied for European Union Settlement Scheme leave, the decision maker will need to consider whether the claimant has been exercising any right to reside under the Immigration (European Economic Area) Regulations 2016 (or was deriving a treaty right from a family member) prior to 11pm on 31.12.20, in order to determine whether they fall within scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 (see paragraphs 20 - 21 for further guidance).
6. The second amendments drafted by the Home Office are made within the Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (European Union Exit) Regulations 2020, which should be read in conjunction with the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020. The Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (European Union Exit) Regulations 2020 saves the Immigration (European Economic Area) Regulations 2016 and other relevant legislation (with modifications) for the purposes of holders of limited leave to enter or remain under the European Union Settlement Scheme (pre-settled status). The Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (European Union Exit)

Regulations 2020 also revokes and makes various consequential amendments to other legislation.

Note: Please see separate ADM & DMG Memo guidance in relation to the Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (European Union Exit) Regulations 2020 for Carer's Allowance, Disability Living Allowance, Attendance Allowance and Personal Independence Payment – DMG Memo Vol 2/89 & ADM Memo 8/21.

EUROPEAN UNION SETTLEMENT SCHEME

7. The Government established the European Union Settlement Scheme under Appendix European Union to the Immigration Rules. The European Union Settlement Scheme provides a basis, consistent with the Withdrawal Agreement, the European Economic Area European Free Trade Association Separation Agreement and the Swiss Citizens' Rights Agreement, for European Economic Area citizens (and their family members), who were lawfully resident in the United Kingdom prior to 11pm on 31.12.20, to apply for the United Kingdom immigration status which they will need to live and work in the United Kingdom after that date. Those Agreements now have effect in United Kingdom law through the European Union (Withdrawal Agreement) Act 2020. Consequently, European Economic Area citizens and their family members should apply to the European Union Settlement Scheme by 30.6.21, to obtain their United Kingdom immigration status if they wish to continue living and working in the United Kingdom as they have been, after the end of the transition period. This includes holders of a European Economic Area permanent right of residence. The immigration status granted under the European Union Settlement Scheme is either
 1. indefinite leave to enter (where the application is made outside the United Kingdom) or indefinite leave to remain (where the application is made within the United Kingdom) (also referred to as "settled status") **or**
 2. limited leave to enter (where the application is made outside the United Kingdom) or limited leave to remain (where the application is made within the United Kingdom) (also referred to as "pre-settled status"). This cohort also need to be exercising their European Union Treaty right.

Note 1: Any European Economic Area citizen (or their family member) who has not yet applied for European Union Settlement Scheme leave should be signposted to the Home Office.

Note 2: Newly arriving European Economic Area citizens and their family members who are not protected by the Agreements will be subject

to United Kingdom immigration control and their treatment aligned with non-European Economic Area citizens in the immigration system.

Note 3: Those who are not exercising any right to reside at 11pm on 31.12.20 are not protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020. However, they can continue to apply for European Union Settlement Scheme leave until the end of 30.6.21, but the granting of that leave is not retroactive (see paragraph 12).

Note 4: As required by the Withdrawal Agreement, the Government has committed to accepting late applications from those with reasonable grounds for missing the end of 30.6.21 application deadline for applying for European Union Settlement Scheme leave to enter or remain. If a late application is made for European Union Settlement Scheme leave, the Home Office will consider whether there were reasonable grounds for making a late application.

8. European Economic Area citizens (and their family members) who resided in the United Kingdom by 11pm on 31.12.20 and who have had no serious criminal record may be granted
 1. indefinite leave to enter or remain (settled status) where they have lived in the United Kingdom for at least five year's continuous residence **or**
 2. limited leave to enter or remain (pre-settled status) where they have lived in the United Kingdom for less than five years.

Note: When granting European Union Settlement Scheme limited leave to enter or remain (pre-settled status), the Home Office does not apply the condition that the person granted that leave has no recourse to public funds.

European Union Settlement Scheme family members

9. A family member of a European Economic Area citizen will not be able to derive rights from that European Economic Area citizen's status under the European Union Settlement Scheme. This is because European Union Settlement Scheme leave is granted under United Kingdom Immigration Rules which do not provide for derived or derivative rights. The family member may be eligible for settled status or pre-settled status under the European Union Settlement Scheme in their own right.

“IMMEDIATELY BEFORE IMPLEMENTATION PERIOD COMPLETION DAY”

10. The phrase “immediately before Implementation Period completion day” is used within the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020. “Implementation

Period completion day” is defined as 11pm on 31.12.20¹. However, the phrase “immediately before Implementation Period completion day” is not defined, and so should be given its ordinary everyday meaning. This has the effect that anyone without European Union Settlement Scheme leave and without **any** right to reside under the Immigration (European Economic Area) Regulations 2016 immediately before 11pm on 31.12.20, becomes a “Person Subject to Immigration Control” pursuant to section 115(9) of the Immigration and Asylum Act 1999, because they need leave and do not have it, and because such persons are not within personal scope of the Citizens’ Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, and will become out of scope of decision makers being able to apply the Immigration (European Economic Area) Regulations 2016 or any other savings under the Citizens’ Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, such as the exception for European Economic Area nationals from being a person subject to immigration control at section 115(9) of the Immigration and Asylum Act 1999, to those persons. This is so, even if that person has previously been in the United Kingdom lawfully under European Union law. Effectively, it is their status “immediately” before Implementation Period completion day that should be taken into account.

Note: Where there is uncertainty as to whether the claimant falls within scope of the Withdrawal Agreement and/or the Citizens’ Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, those cases may be submitted to Decision Making Services.

¹ *European Union (Withdrawal Agreement) Act 2020, s 39*

Example 1

Marco is an Italian national who claimed Carer’s Allowance from 17.3.21. At that time, he had been living in the United Kingdom for 3 years but has not yet applied to the European Union Settlement Scheme.

The decision maker must first establish whether Marco is protected by the Citizens’ Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 – was he lawfully resident immediately before 11pm on 31.12.20? The decision maker considers whether Marco was exercising any right to reside as defined by the Immigration (European Economic Area) Regulations 2016 and is able to establish that Marco was in genuine and effective work that started 1.6.19 and ended on 31.3.20. He claimed Universal Credit shortly afterwards and was deemed to retain worker status but ceased claiming in early January.

It is clear that Marco would only have been able to retain worker status for 6 months in normal circumstances. However, due to COVID-19 Universal Credit didn’t carry out a review of his habitual residence test,

nor is it possible to show from the information available that Marco has established another right to reside. Records show that Marco has continued to look for work so has maintained a link with the labour market.

The decision maker determines that in the circumstances Marco can be treated as having been lawfully resident in the United Kingdom immediately before 11pm on 31.12.20 and is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 until the end of 30.6.21. This is because Marco had a clear right to reside in the United Kingdom until shortly before the end of the transition period and although it would normally have ended, exceptional conditions have meant that no review action has been taken. In addition, Marco continued to maintain his link with the United Kingdom labour market while claiming Universal Credit.

Marco is not a person subject to immigration control but will still need to satisfy the remaining elements of the residence and presence test.

Example 2

Nils is a Norwegian national who has recently started part-time work in February 2021. He came to the United Kingdom for the first time in May 2020. He has made a claim to Carer's Allowance from February 2021 but has not yet applied to the European Union Settlement Scheme.

The decision maker must first establish whether Nils is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 - was he lawfully resident immediately before 11pm on 31.12.20? The decision maker considers whether Nils was exercising any right to reside as defined by the Immigration (European Economic Area) Regulations 2016 and is able to establish that Nils had an Initial Right to Reside from May to August 2020.

However, since that time it has not been possible to show that Nils has been exercising any right to reside as defined by the Immigration (European Economic Area) Regulations 2016. He clearly stated that he has not been actively seeking genuine and effective work before the end of the transition period, so had not gained jobseeker status. He has never previously worked in the United Kingdom. The decision maker has considered the conditions of being treated as a self-sufficient person, but the information and evidence provided by Nils does not indicate that he should be treated as having been self-sufficient. He is not a student. He has been staying with friends but has no family in the United Kingdom.

The decision maker determines that Nils should not be treated as having been lawfully resident immediately before 11pm on 31.12.20. Nils is not protected by the Citizens' Rights (Application Deadline and Temporary

Protection) (European Union Exit) Regulations 2020, so is a person subject to immigration control until granted status by the Home Office.

Example 3

Carlotta is a Maltese national who has lived in the United Kingdom for 4 years but has not yet applied to European Union Settlement Scheme. She made a claim to Carer's Allowance in April 2021. The decision maker must first establish whether Carlotta is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 - was she lawfully resident immediately before 11pm on 31.12.20? The decision maker considers whether Carlotta was exercising any right to reside as defined by the Immigration (European Economic Area) Regulations 2016 and is able to establish that Carlotta previously claimed Income Support and passed the habitual residence test for Income Support on the basis that she retained worker status under the St Prix rules. She retained worker status because she was in the late stages of pregnancy or had recently given birth, and had reported that she intended returning to work.

Worker status can only be retained in this way for the reasonable period of 52 weeks, following the cessation of work. Under normal circumstances Carlotta would have been required to show a different right to reside from the end of the 52 weeks, in her case 31.10.20. However, Income Support have not carried out any review of the habitual residence test between 31.10.20 and the change of address in April 2021.

The decision maker establishes that Carlotta has been actively seeking genuine and effective work but has been unsuccessful due to the lockdown.

The decision maker determines that in the circumstances Carlotta can be treated as having been lawfully resident in the United Kingdom immediately before 11pm on 31.12.20 and is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 until the end of 30.6.21. This is because she had a clear right to reside in the United Kingdom until shortly before the end of the transition period and although it would normally have ended, exceptional conditions have meant that no review action has been taken. In addition, Carlotta has continued to maintain her link with the United Kingdom labour market so the balance of probabilities is that she could be deemed to continue to retain worker status while looking for work.

Carlotta is not a person subject to immigration control but will still need to satisfy the remaining elements of the residence and presence test.

11. This means that those eligible for European Union Settlement Scheme leave and present in the United Kingdom before 11pm on 31.12.20, but without European Union Settlement Scheme leave and not exercising

any right to reside immediately before 11pm on 31.12.20, would not be covered by the savings during the Grace Period. Consequently, they would be ineligible for Carer's Allowance / Disability Living Allowance / Attendance Allowance because they are a person subject to immigration control (see paragraphs 16 and 20). Therefore, to ascertain whether these saving apply, the decision maker will need to determine whether the claimant was exercising any right to reside immediately before 11pm on 31.12.20.

12. Similarly, those who are not exercising any right to reside immediately before 11pm on 31.12.20, and have made a European Union Settlement Scheme application, but that application is pending¹ would also not be covered by the savings during the Grace Period. This is regardless of any Home Office delay in processing their European Union Settlement Scheme application, or if the application is being appealed because of a mistake made by Home Office. Once indefinite leave to remain (settled status) or limited leave to remain (pre-settled status) is obtained, that status is not retroactive. This means that claims for benefits cannot be back-dated and paid during the time the person did not have European Union Settlement Scheme leave.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 4

RESIDENCE AND PRESENCE CONDITIONS

13. For the purposes of Carer's Allowance, Disability Living Allowance and Attendance Allowance, a claimant must satisfy prescribed conditions of residence and presence in Northern Ireland on any day included in the claim¹. A claimant must²
 1. be habitually resident in the common travel area **and**
 2. not be a person subject to immigration control (see DMG 070831 to 070834) or a person who is exempt from the exclusion of persons subject to immigration control for the purposes of Attendance Allowance, Disability Living Allowance and Carer's Allowance (see DMG 070836) **and**
 3. be present in Northern Ireland **and**
 4. subject to special rules relating to young children (see DMG 071718 to 071720), have been present in Northern Ireland for a period of (or periods totalling) not less than 104 weeks in the previous 156 weeks (see also TS v SSWP, EK V SSWP: [2020] UKUT284 (AAC)).

1 SS C&N (NI) Act 92, sec 64(1) & sec 71(6); 2 SS (AA) Regs (NI), reg 2(1); SS (DLA) Regs (NI), reg 2(1); SS (ICA) Regs (NI), reg 9(1)

PERSON SUBJECT TO IMMIGRATION CONTROL - EUROPEAN ECONOMIC AREA NATIONAL

14. A person subject to immigration control is not entitled to (amongst other benefits) Carer's Allowance, Disability Living Allowance and Attendance Allowance¹. Within paragraph 13 above, sub-paragraph 2. provides that one of the conditions of residence and presence that must be satisfied is that on any day of the claim, the claimant must not be a person subject to immigration control.

Person subject to immigration control meaning - prior to the end of the transition period

15. Prior to the end of the transition period (11pm on 31.12.20), the opening words within the definition of a person subject to immigration control¹ were that the definition related to a person "who is not a national of a European Economic Area state". Consequently, as European Economic Area nationals were excluded² within the definition of someone who was a person subject to immigration control, a European Economic Area national could not have fallen to be a person subject to immigration control.

1 Immigration and Asylum Act 1999, s 115(9); 2 s 115(1)

Person subject to immigration control meaning - after the end of the transition period

16. As of 11pm on 31.12.20, the definition¹ of "person subject to immigration control" has been amended² so that the reference to a European Economic Area national has been removed from that definition. This means that European Economic Area nationals can now fall within the definition of being a person subject to immigration control, until they are granted European Union Settlement Scheme leave or another type of leave to remain in the United Kingdom, by the Home Office. This has the effect, that with Carer's Allowance, Disability Living Allowance and Attendance Allowance claims made on or after 11pm on 31.12.20, decision makers must now determine whether a European Economic Area national is now a person subject to immigration control. The following paragraphs may help the decision maker to make that determination.

Note: Where the issue of a "backdating" request arises, the decision maker must consider the claimant's position "in respect of any day" that the person is claiming for. Consequently, this means that when assessing a claim, the decision maker will need to look at whether any of the days that the claimant is applying for, fell before the end of the transition period. If they did, then the decision maker will need to apply the relevant legislation (i.e. no Grace Period Statutory Instrument) for those days, then for any days for which the claimant is claiming from the end of transition period onwards, the decision maker will need to check

whether the claimant is in scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020.

1 Immigration and Asylum Act 1999, s.115(9); 2 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) Regulations 2020, reg 12(7)

Example 1

Erika is a Swiss citizen. She arrived in Cardiff on 15.3.21 and has not lived in the United Kingdom before. She joined her daughter Edith who is also Swiss and came to live in the United Kingdom on 5.1.21. Erika makes a claim to benefit in June 2021.

Switzerland is not a part of the European Economic Area but has a long standing agreement, meaning its citizens have the same rights as European Economic Area citizens. This is confirmed in the Swiss citizens' rights agreement.

The decision maker confirms that as although Erika is here to join a family member of a Swiss national, she does not have a European Economic Area Family Member entry clearance stamp in her passport as she came on a visa waiver. The decision maker considers whether Erika is a family member of a European Economic Area / Swiss citizen who is protected by the Withdrawal Agreement and currently exercising a right to reside.

As Edith first came to the United Kingdom after 1.1.21 she falls under the new points-based immigration system. There are no records of any earlier periods of residence in the United Kingdom on any departmental systems. Erika would be unable to derive a right through Edith.

The decision maker asks Erika whether she has been granted leave to remain by the Home Office. An evidence and enquiry form can be emailed to Home Office if necessary, where the information is not available from the Get Home Office Data function on Searchlight.

Because they both fall under the new points-based Immigration System, Erika will be a person subject to immigration control unless granted status by the Home Office.

Example 2

Adele is a German national who first came to the United Kingdom in 2010. She has not applied for status under the European Union Settlement Scheme. She makes a claim for benefit in March 2021.

Having first established that the United Kingdom is the competent state, the decision maker then needs to establish whether Adele was lawfully resident in the United Kingdom as at 11pm on 31.12.20. Lawful

residence means more than simply being in the United Kingdom. The claimant must have been exercising any right to reside under the Immigration (European Economic Area) Regulations 2016.

If the decision maker determines that Adele was exercising a right to reside as at 11pm on 31.12.20, she is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020. As she has been in the United Kingdom for over 5 years, Adele might have gained a permanent right to reside. This does not affect the requirement for her to apply to the European Union Settlement Scheme.

If Adele is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, she is not a person subject to immigration control. The decision maker can consider whether she is habitually resident in the United Kingdom at the date of claim and has been in the United Kingdom for 104 out of the past 156 weeks (the past presence test).

If she is not protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 and/or was not exercising a European Economic Area right to reside at the relevant dates of claim, Adele is a person subject to immigration control until granted a status under the European Union Settlement Scheme.

The Grace Period ends at the end of 30.6.21. If Adele has not applied for European Union Settlement Scheme leave by that time she becomes a person subject to immigration control.

European Economic Area national with European Union Settlement Scheme leave at end of the transition period

17. The alignment provisions within the Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (European Union Exit) Regulations 2020 (see paragraph 6 above) may impact families as a result of the need for individuals to meet the eligibility criteria under the appropriate immigration route, rather than being able to move to the United Kingdom under free movement rules as they did prior to the end of the transition period. However, those changes will not impact those who are lawfully resident in the United Kingdom by the end of the transition period, and who are entitled to apply under the European Union Settlement Scheme, which includes provision for holders of European Union Settlement Scheme status to be joined by their qualifying family members (i.e. those family members where the relationship has already been established by the end of the transition period).
18. The Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and

Transitory Provisions) (European Union Exit) Regulations 2020 saves the Immigration (European Economic Area) Regulations 2016 and other relevant legislation (with modifications) for the purposes of European Economic Area nationals and their qualifying family members who have been granted European Union Settlement Scheme limited leave to remain (pre-settled status) by the end of the transition period. Consequently, European Economic Area nationals and their family members with European Union Settlement Scheme leave (whether settled or pre-settled status) do not fall into the definition of being a person subject to immigration control.

Note: In general, the Home Office apply the condition of having no recourse to public funds when granting limited leave to enter or remain. However, European Union Settlement Scheme limited leave (pre-settled status) does not carry the condition of the person having no recourse to public funds. This has the effect that European Union Settlement Scheme limited leave to enter or remain does not therefore fall within the definition¹ of person subject to immigration control.

¹ *Immigration and Asylum Act 1999, s 115(9)(b)*

19. The residence and presence conditions (paragraph 13 4.) require that the claimant is not a person subject to immigration control. Until 11pm on 31.12.20, European Economic Area nationals were exempt from the person subject to immigration control definition. From 11pm on 31.12.20, the exemption from the person subject to immigration control definition will only be saved for 6 months for those
1. with an in-time application pending under the European Union Settlement Scheme (however, see **Note** below) **or**
 2. who have acquired a right of permanent residence **or**
 3. exercising any right to reside at the end of the transition period.

Note: The savings within the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 may be saved for longer than 6 months, until an application is finally determined (see paragraph 27), or where an appeal against an in-time application is pending (see paragraph 28). Also, see **Note 4** to paragraph 7 in respect of late European Union Settlement Scheme applications.

¹ *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(5)(c)*

Example 1

Ella has made a claim to benefit. She is a Romanian citizen.

During the claims process Ella states that she has been granted status under the European Union Settlement Scheme. She provides her

notification showing the date the status was awarded and a share code. The staff member completing the habitual residence test gather records this information and completes the referral to the habitual residence test decision maker.

Having established that the United Kingdom is the competent state, the habitual residence test decision maker checks Ella's status using the share code. This shows that she has settled status. As this is Indefinite Leave to Remain, Ella can access benefits on the same basis as a British Citizen.

Because Ella has recently returned from 6 months abroad, the habitual residence test decision maker will need to determine whether she has regained her habitual residence since her return and whether she satisfies the past presence test / Genuine Sufficient Link test.

Example 2

Lotte made a claim to benefit from January 2021. She is a citizen of the Netherlands who returned to the United Kingdom in September 2020.

She previously lived in the United Kingdom from age 6 to age 18. She lived with her parents and her father, who is also a citizen of the Netherlands, worked throughout that time. It is clear that Lotte acquired a permanent right to reside, having been a family member of a European Economic Area national qualified person for a continuous period of 5 years.

When Lotte was 18, her parents separated and Lotte returned to the Netherlands with her mother. That was in December 2016. Lotte didn't return to the United Kingdom for anything other than a holiday until September 2020, when she returned to what she considers her home, having grown up and gone to school in the United Kingdom.

She was unable to find any work due to health problems. She's had a couple of small jobs but has not gained worker status. Although she has been living off savings, she doesn't fully satisfy the conditions to be treated as self-sufficient.

It is clear from the information provided to the decision maker that Lotte has lost her permanent right to reside through absence from the United Kingdom of over 2 years (see DMG 073368), that she was not exercising a right to reside within the meaning of the Immigration (European Economic Area) Regulations 2016 as at the end of the transition period and that she has not yet applied for leave under the European Union Settlement Scheme.

However, because Lotte had held a permanent right to reside within 5 years of returning to the United Kingdom and she was lawfully resident in the United Kingdom on 31.12.20, she is protected by the Citizens'

Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020¹. She will be treated as still having a permanent right to reside until the end of the Grace Period at the end of 30.6.21. She must apply for status under the European Union Settlement Scheme. If she does not do so, she will become a person subject to immigration control.

The decision maker signposts Lotte to the European Union Settlement Scheme. As Lotte is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, she will be able to access benefits during the Grace Period and will then require a review of her right to reside following the digital data matching exercise. It should be remembered that if Lotte has applied for European Union Settlement Scheme leave by the end of 30.6.21, but does not yet have that status, she continues to be protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 until her application is finally determined (see paragraph 27), or where an appeal against an in-time application is pending (see paragraph 28).

European Economic Area national with no European Union Settlement Scheme leave at end of the transition period

20. Where a claim to Carer's Allowance, Disability Living Allowance or Attendance Allowance is made on or after 11pm on 31.12.20, and the claimant is a European Economic Area national, who has not yet applied for European Union Settlement Scheme leave, the decision maker will need to consider whether the claimant has been exercising any right to reside (or was deriving a treaty right from a family member) prior to 11pm on 31.12.20. However, this determination is not made from the date of the claim. The decision maker only needs to establish whether the European Economic Area national has been exercising any right to reside immediately before the end of the transition period. This determination is made in order to establish whether that person is a person subject to immigration control or whether that person is protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020. If they are protected by the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 they are not a person subject to immigration control. This is because the amendments¹ within the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 specify provisions of other legislation that continue to apply, where appropriate, and with relevant modifications. This includes specified legislation² which provides that individuals with a right to enter or remain in the United Kingdom by virtue of legislation such as the Immigration (European Economic Area) Regulations 2016 do not require leave to enter or remain under the Immigration Act 1971. This enables individuals within the personal scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 to continue to

reside lawfully in the United Kingdom, as they did prior to the end of the transition period for the duration of the Grace Period.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 12(1)(i); 2 Immigration Act 1988, s 7

21. Consequently, whether an individual becomes a person subject to immigration control¹ becomes key for those persons falling out of the scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020. Now that free movement has been repealed from the end of the transition period, any European Economic Area national (and their family member) without European Union Settlement Scheme leave is a person subject to immigration control, unless they are in scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, which saves² the words "who is not a national of a European Economic Area State" within the definition of a person subject to immigration control. This means that for anyone
1. within scope³ of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 (i.e. anyone exercising any right to reside immediately before the end of the transition period), the savings within the Regulations continue to apply during the Grace Period. The decision maker can then go on to determine whether the person is actually habitually resident (see DMG 073707 - 073745) at the date of claim. United Kingdom competency, the past presence test or the criteria to establish Genuine and Sufficient Link should be applied as normal
or
 2. not falling within the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 (i.e. anyone not exercising any right to reside immediately before the end of the transition period), they become a person subject to immigration control at 11pm on 31.12.20. Consequently, they and their family members will have no access to (amongst others) Carer's Allowance, Disability Living Allowance or Attendance Allowance, until they and their family members fall within scope of the Withdrawal Agreement.

Note 1: Any European Economic Area citizen (or family member) who has not yet applied for European Union Settlement Scheme leave should be signposted to the Home Office.

Note 2: Where there is uncertainty as to whether the claimant falls within scope of the Withdrawal Agreement and/or the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit)

Regulations 2020, those cases may be submitted to Decision Making Services.

1 Immigration & Asylum Act 1999, s.115(9); 2 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 12(1)(i); 3 regs 3 & 4

Example 1

Bernard is a French national who moved from France to Wales to live on 29.12.20. He makes a claim to Attendance Allowance in March 2021.

The decision maker needs to check whether Bernard is receiving a French pension, or any other French Social Security benefit, to establish the competent state. Having established that the United Kingdom is the competent state, the decision maker can then look at European Union Settlement Scheme status.

As he has not applied for status under the European Union Settlement Scheme, the decision maker needs to consider whether Bernard is protected by the Withdrawal Agreement and/or the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, for the claim. The decision maker considers whether Bernard was lawfully resident in the United Kingdom as at 11pm on 31.12.20. Lawful residence means more than simply being in the United Kingdom. The claimant must have been exercising any right to reside under the Immigration (European Economic Area) Regulations 2016. There is no need to consider the length of the residence at this stage.

As Bernard was exercising an Initial Right of residence¹ (see DMG 073460) on 31.12.20, i.e. he was within 3 months of his first arrival in the United Kingdom, he is therefore protected by the Withdrawal Agreement and is not a person subject to immigration control.

The decision maker can then go on to consider whether Bernard was actually habitually resident (DMG 073707 - 073745) in the United Kingdom at the date of claim. However, due to his lack of time in the United Kingdom, Bernard cannot possibly pass the past presence test and therefore would have to satisfy whether he has a genuine and sufficient link to the United Kingdom.

The Grace Period ends at the end of 30.6.21. If Bernard has not applied for European Union Settlement Scheme leave by that time, he becomes a person subject to immigration control. However, decision makers should have regard to European Union Settlement Scheme applications which have not been finally determined by the application deadline date of the end of 30.6.21 (see paragraph 27), or where an appeal against an in-time application is pending (see paragraph 28).

1 Imm (EEA) Regs 2016, reg 13

Example 2

Dipti, born in Bangladesh, who is now a German national first came to the United Kingdom on 20.2.21. She is joining her husband, Delwar. Delwar is originally from Bangladesh but was naturalised as a Polish citizen some years ago. Delwar came to the United Kingdom in 2019.

Dipti makes a claim for Carer's Allowance in March 2021. She came into the United Kingdom on a visitor visa, as at that time she had not decided whether she wanted move to the United Kingdom. She has now decided to make the United Kingdom her home. Neither Dipti or Delwar have applied to the European Union Settlement Scheme.

Delwar provides sufficient information to show that he has been working part-time since July 2020 and is still in employment.

Having established that the United Kingdom is the competent state, the decision maker determines that the work is genuine and effective and that Delwar has worker status. As he was lawfully resident in the United Kingdom at 11pm on 31.12.20 he is protected by the Withdrawal Agreement but only for the Grace Period. By the end of 30.6.21 he must have applied to European Union Settlement Scheme.

The decision maker asks Dipti for information about the nature of her relationship to Delwar and, if they are married, the date of marriage. Dipti confirms that she and Delwar married in Bangladesh in June 2020. They can provide a marriage certificate confirming a legal relationship contracted under Bangladeshi law.

Because the relationship started before 11pm on 31.12.20 and Delwar was lawfully resident at the end of the Transition Period, at 11pm on 31 December 2020, Dipti can derive a right to reside from Delwar. She is not a person subject to immigration control, but will need to satisfy the other elements of the Residence and Presence Test.

The decision maker signposts Dipti to the European Union Settlement Scheme. She will be subject to a review of her right to reside following the digital data matching exercise at the end of the Grace Period. If she has not applied for European Union Settlement Scheme leave by that time, she will become a person subject to immigration control, and will have no access to benefits until granted an immigration status by the Home Office. However, decision makers should have regard to European Union Settlement Scheme applications which have not yet been finally determined by the application deadline date of the end of 30.6.21 (see paragraph 27), or where an appeal against an in-time application is pending (see paragraph 28).

DEFINITIONS

European Economic Area document

22. “European Economic Area document” means¹
1. a European Economic Area family permit² **or**
 2. a registration certificate³ **or**
 3. a residence card⁴.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(6)(a)-(c); 2 Imm (EEA) Regs 2016, reg 12; 3 reg 17; 4 reg 18

Family member

23. “Family member”¹
1. has the same meaning as defined in the specified legislation² (see DMG 072900) that had effect immediately before 11 pm on 31.12.20 **and**
 2. includes an extended family member as defined in the specified legislation³ (see DMG 073293) that had effect immediately before 11 pm on 31.12.20 if that person
 - 2.1 immediately before 11 pm on 31.12.20 satisfied the condition of being a durable partner⁴ **or**
 - 2.2 holds a valid European Economic Area document (see paragraph 22 above) (regardless of whether that document was issued before or after 11pm on 31.12.20).

Note: For the purposes of sub-paragraph 1. above, a family member is a spouse or civil partner, or direct descendants of the European Economic Area national, their spouse or civil partner, who are under the age of 21 or dependants of the European Economic Area national, their spouse or civil partner, or direct ascendant relatives of the European Economic Area national, their spouse or civil partner, who are dependants.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(6)(d) - (e); 2 Imm (EEA) Regs 2016, reg 7(1); 3 reg 8; 4 reg 8(5)

Relevant family member

24. “Relevant family member”, in relation to a person (“P”), means a family member who

1. was a family member of P immediately before 11 pm on 31.12.20
or
2. is P's child **and**
 - 2.1 the child's other parent is a relevant person or has European Union Settlement Scheme leave to enter or remain in the United Kingdom **or**
 - 2.2 the child's other parent is a British citizen **or**
 - 2.3 P has sole or joint rights of custody of the child in the circumstances set out in the last point of specified legislation²
or
 - 2.4 P falls within specified legislation³ **or**
3. becomes a family member of P after 11 pm on 31.12.20 by virtue of being issued with a European Economic Area document (see paragraph 22 above) **or**
4. is the spouse or civil partner of P, and P is a national of Switzerland.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(6)(f) - (i); 2 Withdrawal Agreement, art 10(1)(e)(iii); EEA EFTA separation agreement, art 9(1)(e)(iii); 3 Swiss Citizens' Rights Agreement, art 10(1)(e)(iii)

Relevant person

25. "Relevant person" means¹ a person who does not have (and who has not, during the Grace Period, had) European Union Settlement Scheme leave to enter or remain in the United Kingdom and who
 1. immediately before 11 pm on 31.12.20
 - 1.1 was lawfully resident i.e. exercising any right to reside² in the United Kingdom **or**
 - 1.2 had a right of permanent residence³ in the United Kingdom **or**
 2. is not a person who falls within sub-paragraph 1. but is a relevant family member of a person who immediately before 11 pm on 31.12.20
 - 2.1 did not have European Union Settlement Scheme leave to enter or remain in the United Kingdom **and**
 - 2.2 either

2.2.a was lawfully resident i.e. exercising any right to reside⁴ in the United Kingdom **or**

2.2.b had a right of permanent residence⁵ in the United Kingdom.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(6)(j) - (k); 2 Imm (EEA) Regs 2016; 3 reg 15; 4 Imm (EEA) Regs 2016; 5 reg 15

GRACE PERIOD

26. Certain provisions of the Immigration (European Economic Area) Regulations 2016 will continue to apply (despite their revocation) during the Grace Period¹, to a relevant person who does not have (and who has not, during the Grace Period, had) European Union Settlement Scheme leave to enter or remain in the United Kingdom and who

1. resided lawfully in the United Kingdom (i.e. exercised any right to reside) immediately before 11 pm on 31.12.20 **or**
2. had a right of permanent residence in the United Kingdom by virtue of the Immigration (European Economic Area) Regulations 2016 at any point in the 5 years preceding 11 pm on 31.12.20 **or**
3. are relevant family members of such persons at **1.** and **2.** above.

Note: Within **3.** above, a “relevant family member” is defined so that in most cases, they need to be a family member immediately before 11pm on 31.12.20. However, for the full definition of “relevant family member”, please see paragraph 24 above.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(2)

APPLICATIONS WHICH HAVE NOT BEEN FINALLY DETERMINED BY THE APPLICATION DEADLINE

27. Provision¹ is made for individuals who have made an application for European Union Settlement Scheme leave on or before the application deadline (the end of 30.6.21), but whose application has not been finally determined by that date. The provision provides that certain provisions of the Immigration (European Economic Area) Regulations 2016 continue to apply to such individuals until their application has been finally determined. This period of time is referred to as the “relevant period²”.

Note: “Finally determined” includes an application being successful or exhausting any rights of appeal that the individual may have³.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 4; 2 reg 4(6)(b); 3 reg 4(7)

28. Provision is made for those individuals who have
1. made an in-time application for European Union Settlement Scheme leave to enter or remain in the United Kingdom on or before the application deadline¹ **and**
 - 1.1 whose European Union Settlement Scheme leave has either not been granted yet **or**
 - 1.2 who have an appeal pending **and**
 2. by virtue of the Immigration (European Economic Area) Regulations 2016² they
 - 2.1 resided lawfully in the United Kingdom (i.e. exercised any right to reside) immediately before 11pm on 31.12.20³ **or**
 - 2.2 had a right of permanent residence in the United Kingdom at any point in the 5 years preceding 11pm on 31.12.20⁴.

Note 1: An in-time application is one which is valid under European Union Settlement Scheme, is made on or before the application deadline (the end of 30.6.21), and has not been withdrawn⁵.

Note 2: This does not include family members of those individuals, who may have a pending application.

Note 3: The relevant savings may continue to apply to these individuals until well after 30.6.21. The provisions⁶ saved in the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 continue to apply to such individuals until their application is successful or the individual has exhausted any rights of appeal that they may have i.e. is finally determined.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 4(2)(a); 2 reg 4(2)(b); 3 reg 4(2)(b)(i); 4 reg 4(2)(b)(ii); 5 reg 4(6)(a); 6 reg 4(7)

IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 SAVINGS

29. Paragraphs 31 - 48, together with Appendix 1, specifies the provisions¹ of the Immigration (European Economic Area) Regulations 2016 that continue to apply (despite their revocation), identifying those which are modified and those which are covered by DMG guidance. The modifications ensure that the Immigration (European Economic Area) Regulations 2016 continue to operate appropriately after 11 pm on 31.12.20 and reflect a number of judgments as to how those Regulations should be interpreted and applied (for example: the Upper Tribunal judgments of KH² (on the unlawful application of the Genuine Prospect of Work to retained workers – see paragraphs 37 - 39 below) and HK³

(on allowing Surinder Singh rights to those who've obtained permanent residence in another host State - see paragraphs 42 - 44 below).

Note: Although paragraphs 31 - 49 have no direct impact upon entitlement to Carer's Allowance, Disability Living Allowance or Attendance Allowance, disability and carers decision makers need to be aware of these amendments when considering whether a person falls within scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, regs 5 - 10; 2 KH v Bury MBC and SSWP [2020] UKUT 50 (AAC); 3 HK v SSWP (PC) [2020] UKUT 73 (AAC)

TABLE: IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 PROVISIONS THAT CONTINUE TO APPLY

30. This table at **Appendix 1** identifies the Immigration (European Economic Area) Regulations 2016 provisions that continue to apply under the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020 and whether the particular regulation/Schedule is modified.

General interpretation

31. Within the General Interpretation provision¹, after 11pm on 31.12.20, all references to the wording of either

1. "*or any other right conferred by European Union Treaties²*" or
2. "*or the European Union Treaties³*"

are to be omitted⁴.

Note: On or after exit day, but before 11pm on 31.12.20⁵, all instances of the words at **1.** & **2.** above should be read as though they were a reference to a right conferred by the European Union Treaties so far as they were applicable to and applicable in the United Kingdom by virtue of the Withdrawal Agreement⁶.

1 Imm (EEA) Regs 2016, reg 2; 2 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(a)(i); 3 reg 5(a)(ii); 4 reg 5(a)(i)(bb) & 5(a)(ii)(bb); 5 reg 5(a)(i)(aa) & 5(a)(ii)(aa); 6 Withdrawal Agreement, Part 4

32. Within the definition of "*European Economic Area decision¹*", the words "*a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card*" are omitted².

1 Imm (EEA) Regs 2016, reg 2; 2 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(a)(iii)

33. Within the definition of “European Economic Area State¹”, the words “, other than the United Kingdom” are omitted so far as relevant to things done after exit day².

1 *Imm (EEA) Regs 2016, reg 2*; 2 *The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(a)(iv)*

Continuity of residence

34. This provision¹ continues to take effect² with no modifications.

1 *Imm (EEA) Regs 2016, reg 3*; 2 *The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(a)(b)*

“Worker”, “self-employed person”, “self-sufficient person” and “student”

35. The definition of a self-employed person¹ is amended to mean a person who is established in the United Kingdom in order to pursue activity as a self-employed person “within the meaning of”² specified legislation³.

1 *Imm (EEA) Regs 2016, reg 4(1)(b)*; 2 *The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(c)*; 3 *TFEU, Art.49*

Worker or self-employed person who has ceased activity

36. This provision¹ continues to take effect² with no modifications.

1 *Imm (EEA) Regs 2016, reg 5*; 2 *The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(d)*

Qualified person

37. A person who is no longer working must continue to be treated as a worker, provided that certain conditions are met¹ (see DMG 073086 & 073090). One of those conditions is that the person satisfies condition B². This condition is amended³ to insert the words, “, *when determining whether the person is a jobseeker.*”. This amendment reflects the Upper Tribunal judgment of KH⁴. From 11pm on 31.12.20, DMG guidance at 073084 **2.**, 073086 **3.** and 073090 **3.** should read as “can provide evidence that they are seeking employment and when determining whether that person is a jobseeker, has a genuine chance of being engaged.”.

1 *Imm (EEA) Regs 2016, reg 6(2)(b) & 6(2)(c)*; 2 *reg 6(6)*; 3 *The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(e)(ii)*; 4 *KH v Bury MBC and SSWP [2020] UKUT 50 (AAC)*

38. A person who is no longer self-employed continues to be treated as a self-employed person, provided that certain conditions are met¹ (see DMG 072862). One of those conditions is that the person satisfies condition E². This condition is amended to omit the words “*and having a genuine chance of being engaged*”³. This amendment reflects the Upper

Tribunal judgment of KH⁴. From 11pm on 31.12.20, DMG guidance at 072864 should be disregarded.

Note: Although guidance within the Statutory Instrument came into force at 11 pm on 31.12.20, decision makers should already be applying the effects of the KH judgment, which took effect from 4.2.20 - see DMG Memo Vol 2/83 & ADM Memo 25/20 - Retaining Worker Status and the Genuine Prospect of Work Test.

1 *Imm (EEA) Regs 2016, reg 6(4)*; 2 *reg 6(4C)*; 3 *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(e)(i)*;
4 *KH v Bury MBC and SSWP [2020] UKUT 50 (AAC)*

39. DMG 073092 provides guidance on the circumstances when a person may not retain the status of worker, self-employed person or jobseeker for longer than the relevant period¹. This provision is amended to insert the words “, *where that person is a jobseeker*”². This amendment reflects the judgment of KH³. From 11pm on 31.12.20, guidance at DMG 073092 should be read as if “*where that person is a jobseeker*” is prefixed to the reference of having a genuine chance of being engaged.

Note: Although guidance within these regulations came into force at 11 pm on 31.12.20, decision makers should already be applying the effects of the KH judgment, which took effect from 4.2.20 - see DMG Memo Vol 2/83 & ADM Memo 25/20 - Retaining Worker Status and the Genuine Prospect of Work Test.

1 *Imm (EEA) Regs 2016, reg 6(7)*; 2 *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(e)(iii)*; 3 *KH v Bury MBC and SSWP [2020] UKUT 50 (AAC)*

Family member

40. This provision¹ continues to take effect² with no modifications.

1 *Imm (EEA) Regs 2016, reg 7*; 2 *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(f)*

Extended family member

41. Where an extensive examination of the personal circumstances of the claimant is required¹, the criteria², of whether a European Economic Area national would be deterred from exercising their free movement rights if the application was refused, is omitted³ from the examination.

1 *Imm (EEA) Regs 2016, reg 8(8)*; 2 *reg 8(8)(c)*; 3 *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(g)*

Family members and extended family members of British citizens

42. DMG guidance at 073254 advises that, if certain conditions are satisfied, family members of British citizens have the same European Union law rights of residence as they would if they were a family member of a

European Economic Area national¹. An amendment² is made to the end of this provision, to insert the words “*and British citizen is to be treated as satisfying any requirement to be a qualified person*”. This gives effect to the recent Upper Tribunal judgment of HK³ (on allowing Surinder Singh rights to those who’ve obtained permanent residence in another host State).

1 Imm (EEA) Regs 2016, reg 9(1); 2 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(h)(i); 3 HK v SSWP (PC) [2020] UKUT 73 (AAC)

43. DMG guidance at 073259 advises on factors that are relevant to determining whether residence in a European Economic Area State (other than the United Kingdom) is or was genuine¹. The amendment² to this provision omits sub-paragraph (a). From 11pm on 31.12.20, DMG guidance at 073259 **1.** should be disregarded.

1 Imm (EEA) Regs 2016, reg 9(3); 2 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(h)(ii)

44. DMG 073261 provides advice for the purposes of determining whether, when treating the British citizen as a European Economic Area national, the British citizen would be a qualified person¹. From 11pm on 31.12.20, DMG guidance at 073261 should be disregarded, as this specified legislation is omitted².

1 Imm (EEA) Regs 2016, reg 9(7); 2 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(h)(iii)

Dual national: national of a European Economic Area State who acquires British citizenship

45. This provision¹ continues to take effect² with no modifications.

1 Imm (EEA) Regs 2016, reg 9A; 2 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(i)

Family member who has retained a right of residence

46. Within this provision¹, the words “the initiation of proceedings for” are omitted².

1 Imm (EEA) Regs 2016, reg 10(5)(a); 2 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 5(j)

Derivative right to reside

47. Guidance at DMG 073466 provides advice relating to primary carers of a British citizen¹. From 11pm on 31.12.20, DMG 073466 **3.2**² is amended to read “a European Economic Area state or Switzerland”³.

1 Imm (EEA) Regs 2016, reg 16(5); 2 reg 16(5)(c); 3 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 6(f)(i)

Effect on other legislation

48. Specified legislation¹ is modified to omit² reference to “a qualifying European Economic Area State residence card” from the list of documents used for the purposes of satisfying a requirement to produce a visa³.

1 Imm (EEA) Regs 2016, reg 43 & Sch 3, para 3; 2 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 10(a) & (c); 3 Immigration and Asylum Act 1999, s 40(1)(b)

Entitlement to income-related benefits and public services

49. These amendments¹ ensure that the Immigration (European Economic Area) Regulations 2016 provisions saved (with their modifications within paragraphs 31 - 48 above) continue to apply for the purposes of benefits and public services legislation. This is where the relevant Departmental income-related benefits legislation is listed (which includes amongst others, Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance, State Pension Credit & Social Fund funeral payments) so that the Immigration (European Economic Area) Regulations 2016 are saved for the purposes of applying that legislation².

Note 1: An amendment is made to the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020, by the Immigration and Social Security Co-ordination (European Union Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (European Union Exit) Regulations 2020³, which provides that the Immigration (European Economic Area) Regulations 2016 continue to apply, with a modification, for the purposes of entitlement to a social fund funeral payment. The Social Fund Maternity and Funeral Expenses (General) Regulations (Northern Ireland) are added to the list of benefits¹ detailed within this Regulation.

Note 2: The saved Immigration (European Economic Area) Regulations 2016 provisions are saved only for the individuals who come within the personal scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020⁴. Anyone who does not satisfy these conditions is not within the scope of the Statutory Instrument, regardless of their situation during the Grace Period itself, or at the time at which they make their application for benefits.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 11; 2 UC Regs (NI) 16, reg 9; SFMFE (Gen) Regs (NI), reg 7; 3 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, reg 49; 4 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, regs 3 & 4

EVIDENCING STATUS

50. Where a question arises as to whether the Immigration (European Economic Area) Regulations 2016 continue to apply to a person, it is for that person to show that they do. In effect, the evidentiary burden is on the person making the benefit claim to show they are within the scope of the Citizens' Rights (Application Deadline and Temporary Protection) (European Union Exit) Regulations 2020¹. However, where the claimant cannot provide documentary evidence, decision makers should be mindful of utilising additional records² available to them, and taking a pragmatic approach in cases where for example, domestic violence is an issue (DMG 073446), so the claimant cannot provide anything other than oral evidence to demonstrate their residency status. It must be remembered that a claimant's oral statement is evidence (DMG 1400), and where that oral evidence is the only evidence available, the decision maker must decide on the balance of probability (DMG 1343) whether the claimant has discharged the burden of proof (DMG 1405 et seq).

¹ *The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 13;*

² *Department for Social Development v Kerr [2004] UKHL 23*

ANNOTATIONS

Please annotate the number of this memo (DMG Memo Vol 2/92) against DMG paragraphs:

072862; 072864; 072900 (Heading); 073084; 073086; 073090; 073092; 073254; 073261; 073293; 073466

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DECISION MAKING SERVICES

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APPENDIX 1

THE IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 PROVISIONS THAT CONTINUE TO APPLY DURING THE GRACE PERIOD

Immigration (European Economic Area) Regulations 2016	SI reg no	Modified	Memo para number(s)
Reg 2 General Interpretation	Reg 5(a)(i) – (iv)	Yes	31 - 33
Reg 3 Continuity of residence	Reg 5(b)	No	34
Reg 4 Worker, Self-employed person etc	Reg 5(c)	Yes	35
Reg 5 Worker or self-employed person who has ceased activity	Reg 5(d)	No	36
Reg 6 Qualified person	Reg 5(e)(i) – (iii)	Yes	37 - 39
Reg 7 Family Member	Reg 5(f)	No	40
Reg 8 Extended Family Member	Reg 5(g)	Yes	41
Reg 9 Family members and extended family members of British citizens	Reg 5(h)(i) – (iii)	Yes	42 - 44
Reg 9A Dual nationals	Reg 5(i)	No	45
Reg 10 Family member who has retained the right of residence	Reg 5(j)	Yes	46
Regs 11 – 15 Residence rights	Reg 6(a) – (e)	Yes	Not covered within DMG guidance
Regs 16	Reg 6(f)(i) – (ii)	Yes	47
Reg 21 - 30	Reg 6(g) & (h) Reg 7(1) & (2) Reg 8(a) & (b)	Yes	Not covered within DMG guidance

Immigration (European Economic Area) Regulations 2016	SI reg no	Modified	Memo para number(s)
Reg 31	Reg 8(c)	No	
Reg 32	Reg 8(d)	Yes	Not covered within DMG guidance
Reg 33	Reg 8(e)	No	
Reg 34	Reg 8(f)(i) – (ii)	Yes	Not covered within DMG guidance
Regs 35 – 42	Reg 9(a) – (h)	No	
Sch. 2	Reg 9(i)	Yes	Not covered within DMG guidance
Reg 43 Sch. 3 Effect on other legislation	Reg 10(a) Reg 10(c)	No Yes	48
Reg 45	Reg 10(b)	Yes (in so far as it relates to Sch 4, Part 1)	Not covered within DMG guidance
Sch. 4, Part 2	Reg 10(d)	No	
Sch. 6	Reg 10(e)	Yes	Not covered within DMG guidance
Sch. 7	Reg 10(f)	No	Not covered within DMG guidance