



IMMIGRATION AND PUBLIC LAW

**GOLDSMITH  
CHAMBERS**

# Unravelling Difficulties in the EU Settlement Scheme & its Processes – 18<sup>th</sup> February 2021

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# INTRODUCTION & RELEVANT TIMESCALES

- ▶ What is a Relevant Document and when/who needs it ? (Sarah Pinder)
- ▶ A closer look at Durable Partners and COVID-19 – ‘qualifying periods’ (Sarah Pinder)
- ▶ Rights during and beyond the ‘Grace Period’ (Luke Piper)
- ▶ Administrative Review and Appeals (Amarjit Seehra)

## Relevant periods

- |                                 |  |
|---------------------------------|--|
| ❖ 31 January 2020               | Exit day                                   |
| ❖ 31 January – 31 December 2020 | Transitional period                        |
| ❖ 31 December 2020 (11pm)       | Implementation period (IP) completion day  |
| ❖ 1 January 2021 – 30 June 2021 | Grace period                               |
| ❖ 1 July 2021 onwards           | EUSS ends but there are several exceptions |

# “Relevant documents” – what & when?

- ▶ What is a **relevant document** ? See Annex 1 – definitions in Appendix EU ‘relevant document’ definition, includes:
  - (a)(i)(aa) Document issued by the UK under the EEA Regulations
  - (a)(i)(bb) Other evidence where the applicant is a family member of a relevant person of Northern Ireland and dependent relative/durable partner
  - (a)(ii) Document or other evidence equivalent issued by the Islands through relevant legislation to the Islands;
  - (a)(iii) Biometric residence card issued with grant of LTE/LTR (i.e. pre-settled status) under Appendix EU
  - (a)(iv) Entry Clearance in the form of EUSS Family Permit granted under Appendix EU (Family Permit).
- ❖ See also caveats in (b)-(d) of ‘relevant document’ Annex 1 definition – that should not have been subsequently revoked or fell to be so because relationship/dependency never existed or had ceased; has not expired or otherwise ceased to be effective (with exceptions relating to dependent relative and durable partners if renewal application)

# “Relevant documents” – what & when?

- ▶ When do you need a **relevant document** in Appendix EU ? See Annex 1 – various relationship/category definitions in Appendix EU, includes:
  - “**Dependent relative**” -
    - Relative (other than a spouse/civil partner/durable partner/child/dependent parent) of sponsoring person – i.e. EFM other than durable partners, who for the relevant period was, a dependant of the sponsoring person, a member of their household or in strict need of their personal care on serious health grounds; or
    - Person who is subject to non-adoptive legal guardianship order in favour of their sponsoring person; or
    - Person under the age of 18 years who is the direct descendant of the durable partner of their sponsoring person; or has been adopted by the durable partner of their sponsoring person, in accordance with a relevant adoption decision; and
    - Holds a relevant document as dependent relative of their sponsoring person for period of residence relied upon (exceptions for family member of qualifying British citizen if SSHD is satisfied that reasonable grounds for the person’s failure to meet the deadline to which that sub-paragraph refers & if applied for relevant documents before 31.12.2020 and not yet issued).
  - “**Durable partners**” – see next slide.

# DURABLE PARTNERS – A special category

See [Annex 1 – definition in Appendix EU](#):

## If resident in UK before 11pm on the 31st December 2020:

- ▶ A relevant document for the period of residence relied upon, **AND**
- ▶ Evidence which satisfies you that the durable partnership remains durable at the date of application (or did so for the period of residence relied upon) – e.g. evidence of cohabitation, evidence of joint finances etc...
- ▶ Only exception if applied for relevant document before 31.12.2020 and not yet issued.

## If joining on or after 1 January 2021:

- ▶ Not in durable relationship with relevant EEA national, living in UK at any time before specified date (aaa).
- ▶ If were a durable partner of relevant EEA national and were previously resident in the UK without relevant document then you can rely on section (aaa), **BUT** need to have had another lawful basis for their stay in the UK (as expressly excluded otherwise)..
- ▶ If you were a durable partner of relevant EEA citizen who was resident in the UK without relevant document, and NO other lawful basis of stay, YOU CAN make an application **BUT** only if continuous qualifying period of residence has subsequently broken, e.g. through an absence from the UK of more than 6 months, or if a ‘supervening event’ has occurred (relying on section (bbb) or (ccc)).

# DURABLE PARTNERS – A special category (2)

**If married between January-June 2021:**

- ▶ Entitled to apply as a spouse

BUT

Evidence required to show that:

- ▶ Were in a durable partnership pre-January 2021 shown by a *‘relevant document’*.

# COVID-19 - continuous qualifying period

## Will your continuous qualifying period be affected if you were impacted by Covid-19 public health restrictions?

- ▶ Absences from the UK of up to 6 months in any 12-month period (regardless of the reason for absence(s) and no need to provide additional information or evidence in support of application) – **NO**.
- ▶ A single absence from the UK of more than 6 months but not more than 12 months will not break your continuous qualifying period – **if COVID related**.
- ▶ The EUSS allows for a single absence up to 12 months for an important reason, including serious illness and study – **but this is not defined further** and see *Here for Good* call for information.
- ▶ Self-isolating – **in certain circumstances can be considered**.
- ▶ Absence of more than 12 months – **YES unless PR/settled status**.

Important to refer to: [Guidance for EUSS applicants in or outside the UK who have been affected by restrictions associated with coronavirus](#)

# COVID-19 - continuous qualifying period

- ▶ An 'important reason' for a **single absence** of more than 6 months, **and up to 12 months** from the UK, includes where:
  - Ill with coronavirus yourself,
  - Sharing a house with someone ill with coronavirus,
  - Required to self-isolate as a result of being, or being in contact with someone who is, in a vulnerable or high-risk category.
- ▶ Need a supporting letter from a doctor outlining the details and the dates ill / in quarantine / self-isolating.
- ▶ More than one absence of over 6 months, and an absence of more than 12 months: breaks continuity of residence, even if the absence is caused by public health restrictions.

# **What to expect for EU Citizens' Rights in 2021**

**Rights During and Beyond the 'Grace Period'**



**18 February 2021**

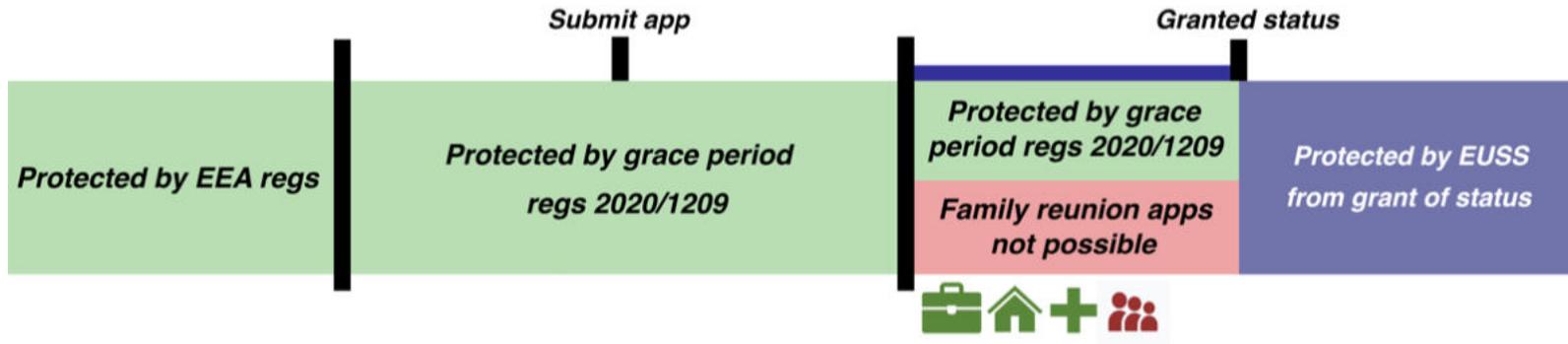
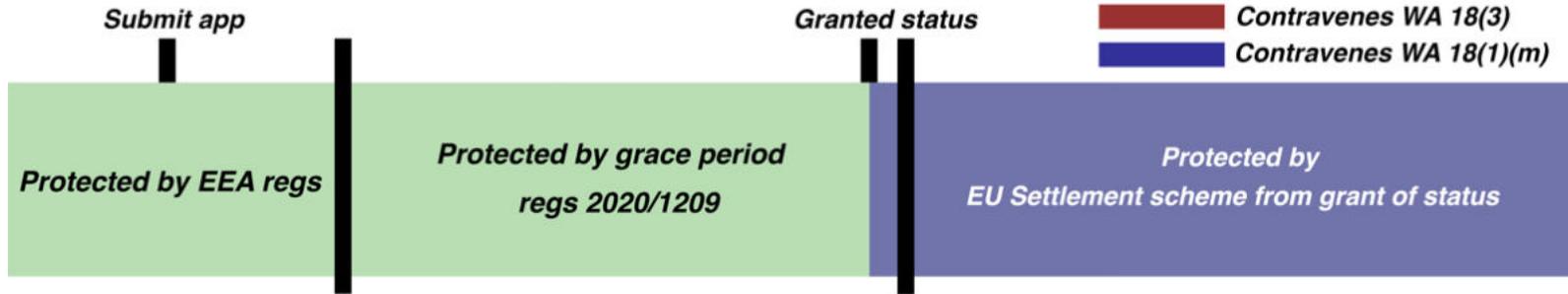
# Statutory Framework

## What are the key pieces of law we should be concerned about?

- Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020
- Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020/1309) ('EEA Transitional Regulations')
- Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ('Citizens' Rights TP Regulations') - regulates status until June 2021 known as the 'Grace Period Regulations'.



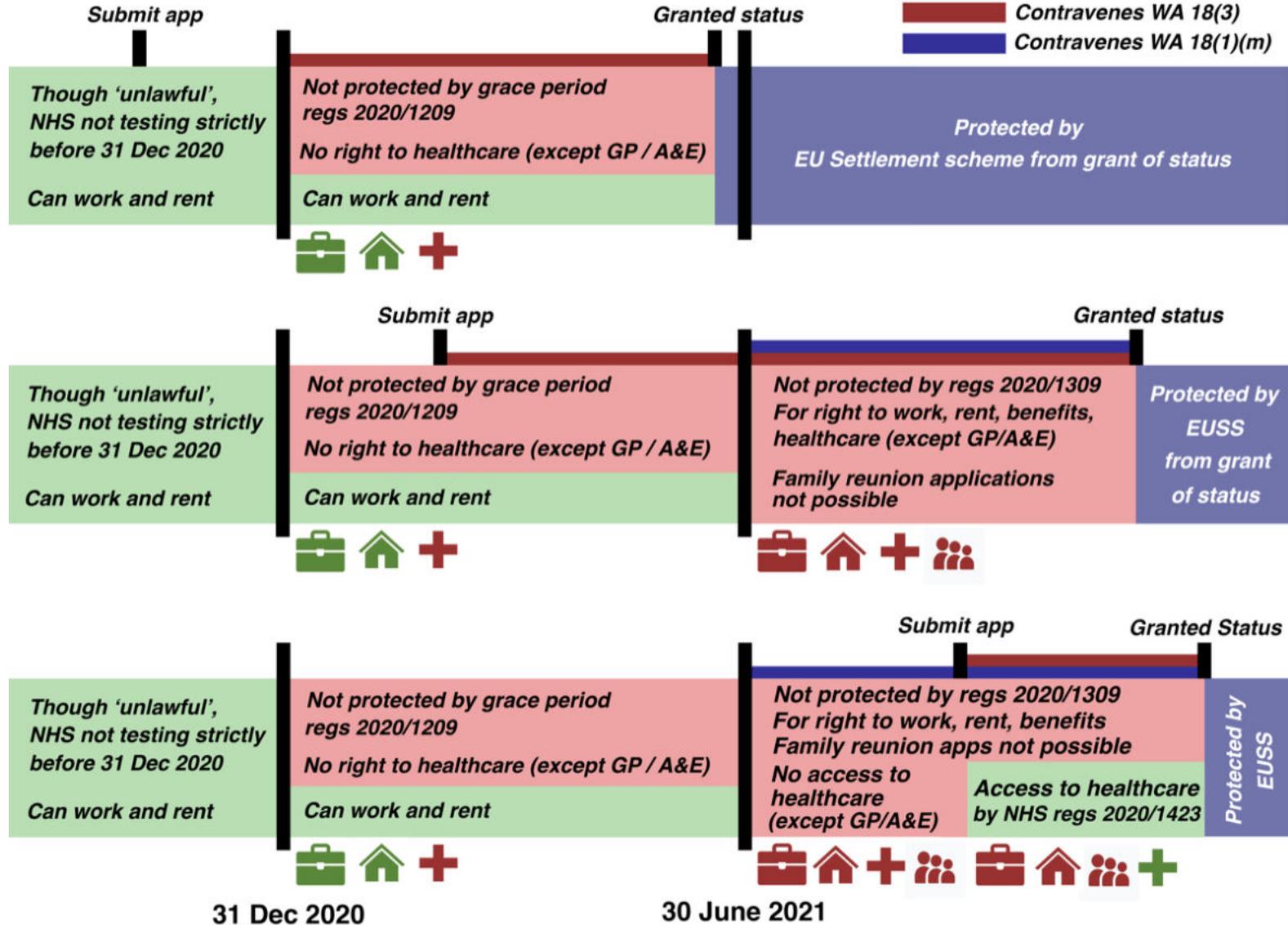
Person who was exercising treaty rights at end of transition



31 Dec 2020

30 June 2021

Person who was not exercising treaty rights at end of transition (e.g. self-sufficient without private health insurance)



# Implementation of the Withdrawal Agreement

## What are the problems with the Government's approach?

- Grants of status should mean full rights
- Those with pending applications should have full rights until a decision is made
- Rights during the grace period need urgent clarification
- Grants of status to those who apply late should have retrospective effect



# ADMINISTRATIVE REVIEW & APPEAL RIGHTS

General overview in the context of the scheme and relevant sources of information

## ➤ **Administrative Review**

- Appendix AR (EU)
- Immigration rules
- Time limits
- Caseworker guidance

## ➤ **Appeal rights**

- 2020 regulations
- Time limits
- Grounds of appeal
- Caseworker guidance

# General overview

- ▶ See Appendix EU guidance as to the approach that should be taken
  - *Paragraph 1.15 of the Statement of Intent on the EU Settlement Scheme published on 21 June 2018 states: The Home Office will work with applicants to help them avoid any errors or omissions that may impact on the application decision. Caseworkers will have scope to engage with applicants and give them a reasonable opportunity to submit supplementary evidence or remedy any deficiencies where it appears a simple omission has taken place. A principle of evidential flexibility will apply, enabling caseworkers to exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens. User-friendly guidance will be available online to guide applicants through each stage of the application process.*
- ▶ You may have a right to make an AR application **and** a right of appeal
- ▶ If you pursue the AR application and you are unsuccessful, time for appealing the original decision will run from the AR decision
- ▶ Time limit for making an AR application in the UK is different
- ▶ £80 charge for AR application – may be refunded if successful

# Administrative Review Applications – Appendix AR (EU)

## Headlines

- ▶ Unlike Appendix AR you can provide new evidence or information with the AR application under Appendix AR (EU)
- ▶ If the original decision is withdrawn you may have a further review (AR (EU) 2.2, paragraph 34N (2A) rules)
- ▶ Time limit for submitting the application in the UK - 28 days instead of 14 days
- ▶ Paragraph 34X of the rules – withdrawal of applications
  - Application not withdrawn if you leave the UK but consider potential consequences if you are subject to immigration control e.g. section 3C leave
- ▶ Guidance suggests you can make a new application while your AR application is being considered but paragraphs 34X (4) and (5) of the rules do not support the guidance

# What is an eligible decision?

- ▶ Set out in Appendix AR (EU) 1.1
- ▶ Includes refusals to grant status under Appendix EU (e.g. EU11, EU14), refusals to grant settled status instead of pre-settled status, leave under scheme is cancelled, leave to enter under Appendix EU (Family Permit) cancelled because of change in circumstances
- ▶ Application must be made in accordance with paragraphs 34N-S of the rules (Immigration rules – Part 1: leave to enter or stay in the UK - *Specified forms and procedures in connection with applications for administrative review*)
- ▶ Decision can be maintained or withdrawn with a new refusal
  - ▶ New refusal where material reasons are incorrect / additional reasons
- ▶ Cannot apply for AR (AR (EU) 1.2) where refusal is based on suitability / validity (EU15 and EU16 – e.g. deportation order, false information provided)

# Time Limits Under Appendix AR (EU)

## Time limits to make an application under AR (EU) (see paragraph 34R (1A) rules)

- ▶ 28 days after receipt of the decision where the Applicant is in the UK / 7 days after receipt of the decision if in detention / 28 days after receipt of the decision if overseas
- ▶ Note - decisions served in accordance with Appendix SN by email generally considered received on the day sent
- ▶ Paragraph 34R(3) of the rules - discretion to accept an out of time application where unjust not to waive the time limit and made as soon as reasonably practicable
- ▶ Gov.website indicates a decision usually within 28 days

# Grounds of challenge

- ▶ AR (EU) 2.1
  - failed to apply or incorrectly applied Appendix EU
  - failed to apply or incorrectly applied the published guidance
  - information or evidence that was not before the decision-maker showing that the applicant qualifies for a grant / different grant of leave under Appendix EU
- ▶ AR (EU) 4.1 confirms the Home Office will not seek to remove an Applicant where an AR is pending (see 4.2 for when an AR is pending)
- ▶ You can submit new information or evidence (AR (EU) 2.3)
- ▶ You may be contacted for further information or evidence (AR (EU) 2.4)
- ▶ If you are refused, you may have a right of appeal depending on when your application was made

# Rights of appeal - headlines

- ▶ Immigration (Citizens' Rights Appeals) (EU exit) Regulations 2020 came into force on **exit day** i.e. 31.01.2020
- ▶ Right of appeal where valid application under Appendix EU / EU (Family permit) on or after 11pm, 31.01.2020
- ▶ Right of appeal in other circumstances (e.g. variation or cancellation of leave to enter or remain granted under the residence scheme immigration rules) where the decision is made on or after exit day i.e. 11pm, 31 January 2020
- ▶ Schedule 4 to the regulations amends section 3C Immigration Act 1971 to extend leave while an appeal could be brought or is pending
- ▶ Schedule 2 refers to provisions from the 2002 Act retained for appeals under the regulations but subject to certain modifications

# Rights of appeal

- ▶ Right of appeal in certain circumstances (regulations 3-7)
- ▶ **Generally includes the following where the application is made on or after exit day**
  - refusal to grant leave to enter or remain
  - grant of a lesser status (e.g. grant of pre-settled instead of settled status)
  - refusal of entry clearance under Appendix EU (Family Permit)
- ▶ **Where the decisions is made on or after exit day**
  - vary or cancel leave to enter or remain
  - revocation of ILE/R
  - decision to make a deportation order (but may be certified)
  - cancel or revoke entry clearance (or cancel, vary or refuse leave to enter)

# Pending appeals

- ▶ Chapter 3 of the regulations on procedural matters and certification
- ▶ Appeal considered abandoned where status granted – unless ILE/R has not been granted or is cancelled or revoked and notice of appeal given (regulations 13(3) and (4))
- ▶ Provides for a right of appeal where a person has been granted pre-settled status instead of settled status
- ▶ Generally suspensive unless certified under regulations 15 (national security) or 16 (deportation)
- ▶ Regulation 13(5) – appeal not abandoned if you leave the UK but note potential consequences under s.3C if you are subject to immigration control

# Time limits for appealing

- ▶ Schedule 4 makes amendments to primary and subordinate legislation
- ▶ FTT and UT rules amended
- ▶ Time limits
  - 14 days after the decision is sent if in the UK (Rule 19(3B)(a) of the FTT rules)
  - 28 days after the decision is received if outside the UK (Rule 19(3B)(b))
- ▶ However, if you are applying for AR, time runs from when the AR decision is sent / received (Rule 19 (3C) and (3D) FTT rules)

# Grounds of appeal

- ▶ **Decision breaches any right or is not accordance with:**
  - ▶ Rights under the withdrawal agreement / EEA EFTA separation agreement / Swiss Citizens' rights agreement
  - ▶ Relevant domestic legislation (e.g. residence scheme immigration rules, section 76 Nationality Immigration Asylum Act 2002)

# Grounds of appeal continued...

## **Regulation 8**

*8.—(1) An appeal under these Regulations must be brought on one or both of the following two grounds.*

*(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—*

*(a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,*

*(b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement, or*

*(c) Part 2 of the Swiss citizens' rights agreement (11).*

*(3) The second ground of appeal is that—*

*(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;*

*(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;*

*(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);*

*(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be).*

*(4) But this is subject to regulation 9.*

# Sources of information

## **Legislation**

- [Withdrawal Act 2020 & Withdrawal agreement](#)
- [Immigration \(Citizens' Rights Appeals\) \(EU Exit\) Regulations 2020](#)
- [The Citizens' Rights \(Application Deadline and Temporary Protection\) \(EU exit\) regulations 2020](#)
- [The Citizens' Rights \(Restrictions of Rights of Entry and Residence\) \(EU Exit\) Regulations 2020](#)

## **Home Office Guidance**

- [Administrative review: EU Settlement Scheme guidance](#)
- [Rights of appeal guidance](#)
- [EU Settlement Scheme: EU, other EEA and Swiss Citizens and their family members 19.1.21](#)
- [EU Settlement scheme guidance \(general page\)](#)

## **Government websites**

- [Immigration rules – Appendix EU](#)
- [Immigration rules – Appendix EU \(Family Permit\)](#)
- [Immigration rules - Appendix AR \(EU\)](#)
- [Immigration rules – specified forms and procedures in connection with applications for administrative review](#)
- [Apply to the EU Settlement Scheme](#)
- [See also Coronavirus \(COVID–19\) guidance for applicants\)](#)
- [Administrative review - gov.uk guidance & visas-immigration.service guidance](#)

# What next for us ?

- ▶ Watch out for our next Brexit-themed webinar – looking at Appendix EU (Family Permit) in more detail and going forward when pre-settled status has been granted - **Booking link [here](#) – 30<sup>th</sup> March at 3pm.**
- ▶ [Donations to the3million](#) for today and for next time if you're joining –



# Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

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