



IMMIGRATION AND PUBLIC LAW

GOLDSMITH
CHAMBERS

Brexit, Withdrawal Agreement & EU Settlement Scheme – 9th February 2021

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INTRODUCTION

- ▶ Main headlines & deadlines of the EU Settlement Scheme (Samina & Sarah)
- ▶ Making sense of the transitional arrangements that apply from 1st January 2021 (Samina & Sarah)
- ▶ What to watch out for when advising on EUSS (All)
- ▶ Key concerns facing EU citizens and their family members under the Withdrawal Agreement (Luke)
- ▶ Shortcomings of the UK's implementation of the Withdrawal Agreement (Luke)

HEADLINES & DEADLINES

- ▶ **WITHDRAWAL DATE** – 11pm, **31st January 2020**
- ▶ Withdrawal Agreement **IMPLEMENTATION PERIOD**: until **31st December 2020**
- ▶ Deadline for applications is 30 June 2021 (with exceptions) – **GRACE PERIOD**
- ▶ Eligibility is governed by Appendix EU to the Immigration Rules
- ▶ EU Settlement Scheme casework guidance
- ▶ Also refer to Appendix EU (Family Permit) for out of country applications.

Who needs to apply for (pre-) settled status ?

- ▶ Relevant EEA citizens (generally those resident in the UK before 11pm on 31st December 2020)
- ▶ Non-EEA family members (including those with retained rights) – unless “close family members” they generally also need to have been residing in the UK before 31st December 2020.
- ▶ People with a derivative or *Zambrano* Right to Reside
- ▶ Family members of qualifying British citizens (‘Surinder Singh’ cases) – note extended deadline in some cases.
- ▶ Family members of dual British/EEA nationals who exercised Free Movement rights in the UK prior to naturalizing and who retained their EEA nationality after acquiring British citizenship.
- ▶ For more details on applications from family members - Watch out for the next webinars in our Brexit series!

Current problems with family members...

- ▶ **'Close Family Members'** – **Grace period** applies – see transitional arrangements in later slides.
 - ❑ Spouses/civil partners of relevant EEA citizen – IF Marriage/partnership formed before 11pm on 31st December 2020
 - ❑ Direct descendants (e.g. child/ grandchild) of relevant EEA citizen or of their spouse/civil partner
 - It's NOT necessary for children aged 21+ to continue to be dependent in order to **keep pre-settled** status or to get settled status
 - BUT there seems to be a gap for children aged 21+ who were issued Residence Card prior to 21. When applying for first time for pre-settled status, need to show dependency under Appendix EU – so contradiction there, go to Withdrawal Agreement itself and prepare for challenge.
 - ❑ Dependent parent/grandparent (or other dependent relative in the ascending line) of the EEA citizen (or their spouse/civil partner)
 - It's NOT necessary to continue to be dependent to **keep pre-settled** status or to get settled status.

Current problems with family members...

- ▶ **'Extended family members'** known as dependent relatives – **Grace period** applies only for those with relevant documents already or pending application/appeal submitted before 31.12.2020 – see transitional arrangements in later slides.
 - Durable Partners
 - Needs to have been recognized under Regulations 2016 otherwise, tricky and needs more consideration – see later webinars.
 - All others
 - NB: Under Appendix EU, extended family members need a 'relevant document' i.e. a residence document issued under the [Immigration \(European Economic Area\) Regulations 2016](#), evidencing their status as such a family member.
 - As mentioned, if they applied for the document before 11pm on 31st December 2020, and were issued with it afterwards, they will be deemed to have held it immediately before 11pm on 31st December 2020 - See also - *Ammari (EEA appeals - abandonment) Tunisia* [\[2020\] UKUT 124 \(IAC\) \(2 March 2020\)](#) for pending appeals.
 - They will have needed this document before 11pm on 31st December 2020 in order to be eligible to apply for settled or pre-settled status – if no such application pending/no such application submitted, it is now too late.
 - The definitions of 'Dependent relative' in Appendix EU is wider than 'Extended Family Member' (excluding durable partners) e.g. children of a durable partner – *how will then produce a relevant document now ?*
 - See also *Kunwar (EFM – calculating periods of residence)* [\[2019\] UKUT 63 \(IAC\)](#) and *Secretary of State for the Home Department v Aibangbee* [\[2019\] EWCA Civ 339](#) for 2016 Regulations and relevant documents being gateway to residence/permanent residence and arguably pre/settled status.

A little more about family members of qualifying British Citizens, inc. *Surinder Singh* route

- 'Qualifying British citizen' in definition - Annex 1 of Appendix EU.
- Relationship before BREXIT - MUST have been exercising Treaty Rights in EU by 31st December 2020 and MUST return before 29th March 2022.
- Relationship after BREXIT (after 31st January 2020) – MUST have returned before 31st December 2020.
- For dependent relatives, relationship if formed after BREXIT - MUST have returned return by 31st December 2020.

BRITISH NATIONALS: EU Settlement Scheme: family member of a qualifying British citizen, 15th November 2019 guidance - [12] & [24]

DUAL NATIONALS: Settlement Scheme: EU, other EEA and Swiss citizens and their family members, 19th January 2021 guidance

Some statistics

- ▶ [EU Settlement Scheme statistics](#)
- ▶ [Quarterly Statistics up to September 2020](#)

The latest headline figures, derived from internal management information show that:

- overall, the total number of applications received up to 31 December 2020 was 4,881,100
- overall, the total number of applications concluded up to 31 December 2020 was 4,488,700

Total number of applications as of 31 December 2020

4.88 million

Total number of concluded applications as of 31 December 2020

4.49 million

Total number of applications by nation as of 31 December 2020

England	Scotland	Wales	Northern Ireland
4,413,900	243,600	80,700	78,500

Concluded applications by outcome type as of 31 December 2020

Settled	Pre-settled	Refused	Withdrawn or void	Invalid
54%	43%	0.8%	1%	1%
(2,422,100)	(1,936,500)	(33,700)	(47,400)	(49,100)

A bit on application process

- ▶ No requirement for applicant to have been exercising a Right to Reside for the qualifying five year period – for settled-status purposes. **Focus is on residence.**
- ▶ The same – no requirement to currently ‘exercise Treaty Rights’ for pre-settled status purposes.
- ▶ So someone can be entitled to pre/settled status even if they would not have had the Right to Reside under the EEA Regulations.
- ▶ **Online application/Mobile App** except for Surinder Singh returns
- ▶ If **lack of ID** or special needs that mean cannot apply online/mobile app, paper application.
- ▶ **Delays** in application process.
- ▶ **No physical document** issued for EEA nationals.
- ▶ General lack of awareness that relevant nationals have to apply under Scheme.

Transitional Arrangements

- ❖ Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 repeals the retained EU law relating to free movement with explicit repeals for certain legislations and general repeal of anything else relevant in Schedule 1, para 6. Different Regulations for commencement and no saving provisions in the Act itself.
- ❖ 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') and the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 (SI 2019/745) preserve certain parts of the EEA Regulations 2016.
- ❖ The revocation of the EEA Regulations is subject to transitional provisions set out in three Statutory Instruments:
- ❖ EEA Transitional Regulations - most relevant Sch 3 (immigration) and Sch 4 (access to benefits and services).
- ❖ 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**'.
- ❖ Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 ('Citizens' Rights Restriction Regulations') (SI 2020/1210) covers EU deportations.
- ▶ **EXCEPTIONS:** Some family members of the EU citizen/British citizen living in another EU member state who are not in the UK by 31st December 2020 may still be able to apply, if for example, there was a pre-existing familial relationship on or before this date – see previous slides.

Transitional Arrangements in a bit more detail

- ▶ None of these statutory instruments preserve all of the 2016 Regulations. Each preserves a different set (subject to amendments) and to complicate matters further, different provisions are preserved for social security purposes as opposed to immigration.
- ❖ EEA Transitional Regulations - most relevant Sch 3 for immigration – covers: deportation and exclusion orders, pending applications for documentation under the EEA Regulations 2016, existing appeal rights and appeals
- ❖ Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ('Citizens' Rights TP Regulations') - regulates status of those who had not, as at IP completion date, been given leave under Appendix EU. Regulates until June 2021 with what is known as the '**GRACE PERIOD REGULATIONS**' with some of the provisions of the EEA Regulations 2016 applying (until June 2021 and while valid application/appeal pending).
- ❖ Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 ('Citizens' Rights Restriction Regulations') (SI 2020/1210) covers EU deportations - designed to apply the 'old' law in relation to deportation of those previously covered by the 2016 EEA Regulations where the conduct complained of took place prior to IP completion date.
- ❖ No saving provisions for EFM's and who did not apply under the 2016 Regulations before IP completion date.

Transitional Arrangements - pending Regs appeals...

- ❖ **Grants under the EUSS & ongoing EEA appeals with Ammari (EEA appeals - abandonment) Tunisia [2020] UKUT 124 (IAC) (2 March 2020)**
 - i. Under the 2000 and 2006 EEA Regulations there was provision for appeals brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 to be treated as abandoned where an appellant was issued with documentation confirming a right to reside in the United Kingdom under EU law. Following the changes to the 2002 Act brought about by the Immigration Act 2014 that abandonment provision was revoked and never replaced.
 - ii. There has never been provision under any of the EEA Regulations for an appeal against an EEA decision brought under those Regulations to be treated as abandoned following a grant of leave to remain or the issuance of specified documentation confirming a right to reside in the United Kingdom under EU law.
 - iii. It follows that a grant of leave to remain following an application under the EU Settlement Scheme does not result in an appeal against an EEA decision brought under the 2016 EEA Regulations being treated as abandoned.
- ❖ Pursuing an appeal under the Regulations may have advantages when it comes to proving legality of residence in citizenship applications.

A little bit on Brexit impacts in other areas...

- ❖ **R (Fratila and Tanase) v Secretary of State for Work and Pensions** [2020] EWCA Civ 1741 - interaction between Appendix EU and social security benefits, whether pre-settled status is confirmation of right to reside in the UK for benefits purposes and whether a refusal to recognize it as such was discriminatory.
- ❖ Majority CoA decision agreed that “*once a right of residence [like pre-settled status] had been established... discrimination was prohibited outright*”.
- ❖ Split in judgments means that likely Supreme Court will step in... and effects of judgment stayed for now.
- ❖ Other challenges on grounds of **discrimination** – see [JCWI campaign](#).
- ❖ **Digital document** campaign...
- ❖ **The New Third Country Rules** relating to asylum claims and returns – look out for our webinar on 25th March 2021 @3pm – book [here](#).

What to expect for EU Citizens' Rights in 2021

Submissions to the Independent Monitoring Authority



4 February 2021

Implementation of the Withdrawal Agreement

Those who have not applied to the EU Settlement Scheme

- We don't know how many people are left to apply
- Consequences for those who miss the deadline and 'reasonable grounds'
- Those who do not know they need to apply
- Those who know they need to apply but are struggling to do so
- Those who want to apply but are not allowed to



Implementation of the Withdrawal Agreement

Those who have applied but are awaiting grant of status

- Long waiting times with bad legislative choices, leaves many without legal protection
 - Rights for people with pending applications are varied and not equal
 - Those applying after the deadline have no rights until a final decision is made
- Consequences for these groups



Implementation of the Withdrawal Agreement

Those who have been granted (pre-) settled status

- Not all status is equal
- The barriers facing those with pre-settled status
 - Access to services and automatic loss of rights
- Applications for NI No
- Lack of physical proof of EU SS




Implementation of the Withdrawal Agreement

Recommendations - a summary

- Legislative reform to meet commitments set out in the Withdrawal Agreement
- Secure GFO and organisations supporting EU citizens
- Better intelligence
- Extend the grace period deadline to accommodate information deficits and pandemic impact
- Fix the problems currently raised by the digital-only approach



What next for us ?

- ▶ Watch out for our next Brexit-themed webinar with Amarjit Seehra joining as well - Booking link [here](#) – 18th February 2021 at 3pm.
- ▶ We will be looking at delay, what to do if an EUSS application is refused, impact of Covid-19 pandemic, absences from the UK and more.
- ▶ Further opportunity to share experiences and ask questions to make sense of it all.
- ▶ [Donations to the3million](#) for today and for next time if you're joining – 

Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

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