



Home Office

Free Movement Rights: family members of British citizens

Version 6.0

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About this guidance

This guidance tells Home Office staff how to consider, after 30 June 2021, whether a person had (or, if saved provisions continue to apply, has) a right of residence under regulation 9 of the [Immigration \(European Economic Area\) Regulations 2016](#) as the direct or extended family member of a British citizen. This includes where a valid application for EEA residence documentation has been made by a direct or extended family member of a British citizen and either has not been decided or is subject to appeal proceedings.

This guidance applies solely to those direct or extended family members of British citizens where the British citizen previously exercised Treaty rights under EU law in an EEA member state or Switzerland and was resident in the UK before the end of the transition period at 23:00 Greenwich Mean Time (GMT) on 31 December 2020. The guidance does not apply to those family members of British citizens where the British citizen was not resident in the UK by 23:00 GMT on 31 December 2020, as they cannot benefit from saved free movement rights. They may, however, be eligible to apply for an EU Settlement Scheme (EUSS) family permit or for status under the EUSS itself. For further information see the EU Settlement Scheme: family member of a qualifying British citizen guidance.

Throughout this guidance document, any reference to the 'EEA Regulations' includes both the Immigration (European Economic Area) Regulations 2016 and all subsequent amendments up to and including amendments made as a result of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

Contacts

If you have any questions about the guidance and your line manager or senior caseworker cannot help you or you think that the guidance has factual errors, then email the EEA Citizens' Rights & Hong Kong Unit.

If you notice any formatting errors in this guidance (broken links, spelling mistakes and so on) or have any comments about the layout or navigability of the guidance, then you can email the Guidance Rules and Forms team.

Publication

Below is information on when this version of the guidance was published:

- version **6.0**
- published for Home Office staff on **17 February 2022**

Changes from last version of this guidance

- Removing references to the requirement for returning British citizens to be a qualified person or a person with a right of permanent residence in the UK

following the reported determination of the Upper Tribunal in the case of *HK v SSWP (PC)* [2020] UKUT 73 (AAC)

- Reflecting [ZA \(Reg 9. EEA Regs; abuse of rights\) \[2019\] UKUT 281](#)
- Reflecting the revocation of the Immigration (European Economic Area) Regulations 2016 at the end of the transition period (23:00 GMT on 31 December 2020) by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020
- Reflecting the Immigration (European Economic Area) (Amendment) Regulations 2019 (SI 2019/55)

Related content

[Contents](#)

Related external links

[Free Movement of Persons Directive \(2004/38/EC\)](#)

[Immigration \(European Economic Area\) Regulations 2006](#)

[Immigration \(European Economic Area\) Regulations 2016](#)

[Free Movement of Persons Directive \(2004/38/EC\)](#)

[Immigration \(European Economic Area\) \(Amendment\) Regulations 2019](#)

[The Citizens' Rights \(Application Deadline and Temporary Protection\) \(EU Exit\) Regulations 2020](#)

Ending EU free movement rights

From the end of the transition period at 23:00 GMT on 31 December 2020, the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 revoked the Immigration (European Economic Area) Regulations 2016.

This means that, subject to the exceptions outlined within this chapter of guidance, EU free movement rights under Directive 2004/38/EC – and the rights derived from Article 21 of the Treaty on the Functioning of the European Union for family members of British citizens returning from the EEA or Switzerland, to which the Directive applies by analogy – ceased to have effect in the UK from that date and time. Unless an EU, EEA or Swiss citizen or their family member falls within scope of the exceptions outlined within this chapter, they will be unable to rely on a right of residence and must instead have an alternative legal basis upon which to remain in the UK.

Throughout this chapter:

- the EU Settlement Scheme will be referred to as the ‘EUSS’
- the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 will be referred to as ‘the 2020 Act’
- the Immigration (European Economic Area) Regulations 2016 will be referred to as ‘the EEA Regulations’
- the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 will be referred to as ‘the 2020 Regulations’
- the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 will be referred to as ‘the Consequential SI’
- Directive 2004/38/EC will be referred to as ‘the Free Movement Directive’
- EU, EEA and Swiss citizens will be collectively referred to as ‘EEA nationals’, with all elements of this guidance applying equally to EU, EEA and Swiss citizens unless otherwise stated

Saved provisions

While the 2020 Act brought EU free movement in the UK to an end at the end of the transition period, Schedule 3 to the Consequential SI and Part 3 of the 2020 Regulations saved some provisions of the EEA Regulations. The saved provisions allowed for:

- consideration of applications for EEA family permits and documentation confirming a right of residence under the EEA Regulations where those applications were validly made before 23:00 GMT on 31 December 2020
- consideration of applications for EEA family permits under the EEA Regulations where those applications were validly made by 30 June 2021 by direct family members or by extended family members who are durable partners or their children

- rights of appeal for certain decisions under the EEA Regulations, with necessary modifications according to the specific situation, and continuing rights until any appeal has been finally determined

All documentation issued under the saved provisions of the EEA Regulations between 23:00 GMT on 31 December 2020 and the end of 30 June 2021 only confirmed a right to enter or reside (as appropriate) under EU free movement law until the end of 30 June 2021, after which those rights ceased to exist in the UK. The only exception to this is where a person who had a right to reside under the EEA Regulations at the of the transition period had made an application to the EUSS by 30 June 2021 and that application remained outstanding after that date – in this case, that person will continue to benefit from a saved right to enter or reside until their application is concluded, including the final determination of any resulting appeal.

Applications for documentation made under the EEA Regulations

Schedule 3 to the Consequential SI allows for the consideration of applications for documentation under regulation 12 or Part 3 of the EEA Regulations.

These documents are:

- EEA family permits
- Registration certificates
- Residence cards
- Documents certifying permanent residence
- Permanent residence cards
- Derivative residence cards

Applications for residence documentation can only be considered where they were validly made before 23:00 GMT on 31 December 2020. Applications for EEA family permits can only be considered where they were validly made before the end of 30 June 2021 (unless the applicant is an extended family member other than a durable partner or the child of a durable partner, in which case the deadline was 23:00 GMT on 31 December 2020).

For the purposes of this guidance, an application is ‘validly made’ if it was submitted, in accordance with regulation 21 of the EEA Regulations, to UK Visas and Immigration by the relevant deadline. The timing of the application will be taken from the post mark on the envelope if you are considering a paper application form, or from the date and time the application is received into Access UK if you are considering an online application. An applicant does not need to have enrolled biometrics by the relevant deadline for it to be considered ‘validly made’ for the purposes of the Consequential SI.

An application must still meet the minimum evidential requirements under regulation 21 for it to be accepted as a valid application under the EEA Regulations.

Applications which do not meet the validity requirements of regulation 21 or which are received after the relevant deadline must be rejected as invalid.

Where an application for one of the above documents was validly made by the relevant deadline, you must consider that application in accordance with the EEA Regulations.

Where the application does not meet the requirements set out in the EEA Regulations, the application must be refused. The applicant must be notified of the reasons for refusing the application and whether there is a right to appeal to the First-tier Tribunal.

Continuing to have a right under the EEA Regulations

Part 3 of the 2020 Regulations saves the rights of admission and residence for those reliant upon those rights prior to 23:00 GMT on 31 December 2020, where the holder continues to satisfy the qualifying criteria for those rights.

Once such an EEA national (or their family member) has been granted pre-settled or settled status under the EUSS, their saved rights under the EEA Regulations will cease to exist as they will no longer be a 'relevant person' as defined in the 2020 Regulations.

Until the EEA national (or their family member) has been granted status under the EUSS, and in order to continue to rely on residence rights under the EEA Regulations, they will still need to satisfy the conditions of those Regulations as outlined within this guidance and other related chapters.

Any decisions taken to determine whether a right of residence exists under the EEA Regulations must be taken in accordance with those Regulations.

For example:

- Mr. A. is a USA citizen married to a British citizen who was working as a doctor in France until the couple moved to the UK in 2018. He made a valid application for status under the EUSS on 29 June 2021. As a family member of a British citizen in the UK who previously undertook genuine and effective employment in an EEA member state while they resided there together, Mr. A. had a right of residence in the UK as he satisfied regulation 9 of the EEA Regulations. The 2020 Regulations allowed Mr. A. to keep his right of residence under the EEA Regulations until 30 June 2021 and, as his EUSS application was made but not decided by that date, until that application (and any appeal) is determined
- Mrs. B. is a Russian citizen married to, and living with, a British citizen in Finland. Her British citizen spouse has permanent residence status in Finland under the Free Movement Directive. Mrs. B. wished to travel to the UK for the first time on 7 March 2021, having never been resident here. She wanted to travel alone with her spouse remaining in Finland. As she was not resident with her spouse in the UK by the 31 December 2020 deadline, she cannot rely on the saved provisions of the EEA Regulations to provide a right of residence

upon her arrival and so she needed to seek an alternative basis to enter and stay under the Immigration Rules

- Mr. C. is a Cameroonian citizen and Mrs. D. is his British citizen spouse. Mr. C. and Mrs. D. were resident in Portugal for 2 years before returning to the UK, but Mrs. D. was not a qualified person or a person with a right of permanent residence in Portugal before they returned to the UK in June 2020. Despite being resident in the UK for 6 months prior to 31 December 2020, Mrs. D. does not meet the criteria of regulation 9 as she had never exercised Treaty rights in an EEA member state. Consequently, Mr. C. did not meet the requirements of the EEA Regulations and he did not qualify for a right of residence under the saved provisions

Rights of appeal

The 2020 Regulations save the rights of appeal provided in the EEA Regulations for existing appeals against adverse regulation 9 decisions.

For further guidance on rights of appeal see the [current rights of appeal](#) guidance.

Related content

[Contents](#)

Related external links

[Free Movement of Persons Directive \(2004/38/EC\)](#)

[Immigration \(European Economic Area\) Regulations 2006](#)

[Immigration \(European Economic Area\) Regulations 2016](#)

[Free Movement of Persons Directive \(2004/38/EC\)](#)

[Immigration \(European Economic Area\) \(Amendment\) Regulations 2019](#)

[The Citizens' Rights \(Application Deadline and Temporary Protection\) \(EU Exit\)](#)

[Regulations 2020](#)

[Rights of appeal guidance](#)

Introduction

This section gives you an overview of the conditions to be met when a family member or an extended family member of a British citizen applies for a residence card in the UK. These are often described as ‘Surinder Singh’ cases.

Applications for in-country residence documentation (registration certificates, residence cards, documents certifying permanent residence and permanent residence cards – not family permits) considered using this guidance must have been made before 23:00 GMT 31 December 2020.

The conditions are set out in regulation 9 of the [Immigration \(European Economic Area\) Regulations 2016](#) (the EEA Regulations). The conditions reflect the Court of Justice of the European Union (CJEU) judgments in the cases of:

- [Surinder Singh \(C-370/90\)](#)
- [Eind \(C-291/05\)](#)
- [O and B \(C-456/12\)](#)
- [S and G \(C-457/12\)](#)
- [Banger \(C-89/17\)](#)

For further information on the judgments, see: [CJEU cases of Surinder Singh and Eind](#) and [CJEU cases of O and S](#).

The conditions in regulation 9 also reflect relevant domestic case law, including:

- [ZA \(Reg 9. EEA Regs; abuse of rights\) \[2019\] UKUT 281](#)
- [HK \(India\) \(EWCA C9/2019/0763\)](#)
- [HK v SSWP \(PC\) \[2020\] UKUT 73 \(AAC\)](#)

From 29 March 2019, applicants can be either a family member or an extended family member of a British citizen, this is in light of the Banger judgment and subsequent changes to the EEA Regulations.

If the conditions are met, a family member or an extended family member of a British citizen will be treated as if they are the family member or extended family member of a European Economic Area (EEA) national under the [EEA Regulations](#).

Family members who came under regulations [9\(1\) or 9\(1A\) of the Immigration \(European Economic Area\) Regulations 2016](#) (as amended) prior to 23:00 GMT on 31 December 2020 will, if they meet the criteria outlined by this guidance, have continued to have rights of residence as the family member of a British citizen until 30 June 2021 or until the outcome of an EUSS application made by them by that date (and of any appeal).

Where a regulation 9(1) family member’s application for a residence card, or their appeal against a decision to refuse their application, is decided in the applicant’s

favour after 30 June 2021, please see EU Settlement Scheme: family member of a qualifying British citizen for guidance on implementing those decisions.

Burden and standard of proof

When deciding whether or not an application for a residence card meets the relevant requirements of regulation 9 of the EEA Regulations, the burden of proof is on the applicant to show to the civil law standard (the balance of probabilities) that they would have had a right to reside under the [EEA Regulations](#) had they not been revoked, subject to the saved provisions, on 31 December 2020.

If, however, you are asserting any abuse or misuse of EU free movement rights, or restricting a right under the EEA Regulations, the burden of proof shifts to you to prove, on the balance of probabilities, that such an abuse or misuse has occurred or that the criteria for restriction are met.

Extended family members

Extended family members of British citizens within this guidance must satisfy the conditions of regulation 8 of the EEA Regulations in the host member state and, where appropriate, continue to do so in the UK.

They will then only have had a right of residence in the UK under regulation 9 of the EEA Regulations where they had applied for, and been issued with, a document confirming their right of residence in the UK as the extended family member of a British citizen. Such extended family members will then have been considered to be family members in accordance with regulation 7(3) of the EEA Regulations during the grace period from 1 January 2021 to 30 June 2021 (or until the outcome of an EUSS application made by them by 30 June 2021 and of any appeal).

Where an extended family member's application for a residence card, or their appeal against a decision to refuse their application, is decided in the applicant's favour after 30 June 2021, please see EU Settlement Scheme: family member of a qualifying British citizen for guidance on implementing those decisions.

Further information on the definition of extended family members referenced throughout this guidance can be found at extended family members of EEA nationals.

Rights during the grace period

Where a person of any nationality (other than British) met the criteria of regulation 9 immediately before the end of the transition period at 23:00 GMT on 31 December 2020, and was considered to be a family member of a British citizen who previously exercised Treaty rights in an EEA member state or Switzerland (and in the case of extended family members held a registration certificate or residence card or had a right of permanent residence on that basis), they will have had a saved right to reside under the EEA Regulations during the grace period from 1 January 2021 to 30

June 2021 (or until the outcome of an EUSS application made by them by 30 June 2021 and of any appeal).

Conditions for issuing residence documentation

Until the end of 30 June 2021, and for applications made by 23:00 GMT on 31 December 2020, you must have issued a residence card to the family member, or may have issued a residence card to an extended family member, of a British citizen who had made a valid application for such a document if:

- the British citizen exercised free movement rights as a worker, self-employed person, self-sufficient person or student in an EEA member state or Switzerland immediately before returning to the UK, or had acquired the right of permanent residence in that host country
- the family member or extended family member and British citizen resided together in the EEA member state or Switzerland and that residence was genuine
- the extended family member's residence in the EEA member state or Switzerland was lawful
- the family member or extended family member met these conditions for the entire period relied upon
- the purpose of the residence in the EEA member state or Switzerland was not to avoid any UK immigration law applying to non-EEA nationals (for example the [Immigration Rules](#))
- there was no reason to refuse the application on grounds of public policy, public security or public health

Guidance on each of these conditions is given in the next section: [Assessing the application](#).

Now that 30 June 2021 has passed, it is no longer appropriate to issue residence documentation. Where, following this guidance, an application for residence documentation is assessed as meeting the relevant requirements, please see EU Settlement Scheme: family member of a qualifying British citizen for guidance on how to implement that decision.

Transitional arrangements

All decisions made on or after 25 November 2016 must be made in line with this guidance. This is so even where:

- a family permit was issued before 25 November 2016
- the residence card application was made before 25 November 2016

Decisions taken in respect of extended family members of British citizens on or after 29 March 2019 must be taken as though the amendments to the EEA Regulations were in force at all times relevant to those decisions.

When deciding the application, you will need sufficient evidence to consider:

- whether the residence in the EEA member state or Switzerland was genuine
- whether the purpose of that residence was to avoid any UK immigration law applying to non-EEA nationals (for example the Immigration Rules)

If you have insufficient evidence, perhaps because it has been submitted without, or on an old version of, the application form, you should write to the applicant for the additional evidence using the template provided.

In general, applicants should be given 10 working days to submit the requested additional evidence. The deadline can be extended if the applicant provides a good reason why more time is needed. This will normally be where the requested evidence cannot be provided within 10 working days for reasons that are beyond the applicant's control.

If the time limit to submit the requested evidence passes without response from the applicant, a decision should be taken on the evidence that is available, including any information already recorded on Home Office files or systems. You may draw any factual inferences about a person's entitlement to a right to reside if, without good reason, a person fails to provide the additional evidence requested.

Where the applicant has applied using an application form which does request the information listed above, you should make a decision based on the information provided without writing out for additional information.

See also [Residence under the 2006 Regulations](#) for guidance on whether residence in the UK prior to 25 November 2016 was in accordance with the Immigration (European Economic Area) Regulations 2006 (the 2006 regulations).

Application in respect of children

Under [section 55 of the Borders, Immigration and Citizenship Act 2009](#), the Home Office has a duty to have regard to the need to safeguard and promote the welfare of children who are in the UK. In respect of this guidance, **the section 55 duty means you need to identify and act on any concerns about the welfare of any children** of whom you become aware while considering a residence card application. For more information, see: Safeguard and promote child welfare.

If an application for a residence card is to be refused because the applicant does not satisfy the conditions set out in this guidance, the duty under [section 55](#) does not change that analysis.

Related content

[Contents](#)

Related external links

[Free Movement of Persons Directive \(2004/38/EC\)](#)

Extended Family Members of EEA nationals guidance

Assessing the application

This section tells you how to assess whether the family member or extended family member of a British citizen would have been entitled to a residence card if the route had not closed after 30 June 2021.

The stages of assessing the application are as follows:

- [stage 1](#): verify the family member's or extended family member's eligibility to apply and British citizen's eligibility to sponsor the application
- [stage 2](#): establish whether the British citizen exercised free movement rights in the European Economic Area (EEA) member state or Switzerland
- [stage 3](#): determine whether residence in the EEA member state or Switzerland was genuine
- [stage 4](#): determine the purpose of the residence in the EEA member state or Switzerland
- [stage 5](#): obtain additional information if needed
- [stage 6](#): decide the application

You must assess whether the applicant met the relevant requirements at 23:00 GMT on 31 December 2020 and whether there has been any material change in circumstances since then. For more on this, see: [stage 6](#): decide the application.

Related content

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Related external links

[Free Movement of Persons Directive \(2004/38/EC\)](#)

Stage 1: verify the family member's or extended family member's eligibility to apply and British citizen's eligibility to sponsor the application

This section details the first stage of assessing whether the family member or extended family member of a British citizen would have been entitled to a document confirming a right of residence in the UK if the route had not closed after 30 June 2021.

The first stage of assessing the application is to consider whether the family member or extended family member was eligible to apply for a document confirming a right of residence in the UK and whether the British citizen was eligible to sponsor the family member or extended family member under the [Immigration \(European Economic Area\) Regulations 2016](#) (the EEA Regulations).

Application date

The residence card or permanent residence card application must have been validly made before 23:00 GMT on 31 December 2020.

Where this is not the case, the application must be rejected.

For further information see: [Ending EU free movement rights](#).

Evidence of identity

The application must include evidence of identity and nationality for both the applicant and the British citizen sponsor. This must be in the form of a valid passport for both or (in the case of an applicant who is an EEA national) their valid national identity card, except that alternative evidence of identity and nationality may be accepted where the person is unable to obtain or produce the required document due to circumstances beyond their control (see Processes and procedures for EEA documentation applications).

If there is not sufficient evidence of identity or nationality, you must reject the application.

Assessing whether the British citizen is a qualified person in the UK

The determination of the Upper Tribunal in *HK v SSWP (PC)* [2020] UKUT 73 (AAC), means that a British citizen returning from an EEA member state or Switzerland is no longer required to meet the criteria of a qualified person on their return to the UK.

This change was given effect by regulation 5(h) of the 2020 Regulations and paragraph 6(1)(h) of Schedule 3 to the Consequential SI.

Evidence of relationship

The applicant must provide evidence of their relationship as a family member or extended family member of the British citizen sponsor. The evidence must show the relationship existed before 23:00 GMT on 31 December 2020, and continues to exist where saved provisions continue to apply, and must be provided as follows, for:

- a spouse – a marriage certificate
- a civil partner – a civil partnership certificate
- a direct descendant (child, grandchild, step-child or adopted child) – documents which name the British citizen sponsor or their spouse or civil partner as the parent, for example:
 - a full birth certificate
 - a legal adoption document
- a relative in the ascending line (parent, grandparent) – documents which show the full ascending line, for example:
 - a father or mother must produce their child's birth certificate naming them as the parent
 - a grandfather or grandmother must produce their child's birth certificate naming them as the parent, and their grandchild's birth certificate, which names their parent

Marriage or civil partnership

You must decide if the marriage or civil partnership is legally valid. For guidance, see the validity of marriages section in the Direct family members guidance. You must also decide if the marriage or civil partnership is a marriage or civil partnership of convenience. For guidance, see the marriages or civil partnerships of convenience section in the Direct family members guidance.

If you decide to refer a case to a senior caseworker because a marriage or civil partnership interview is necessary, you should first consider the rest of the application in line with this guidance. This is because after considering stages 3 and 4 you may identify other aspects of the application that should also be covered at the interview.

If the application does not include sufficient evidence of relationship (except where a marriage or civil partnership interview is necessary) in order to make a decision, you must seek to obtain additional information or evidence under stage 5. If the applicant fails to provide sufficient evidence of relationship, you must reject the application as invalid.

If the application includes sufficient evidence of relationship, or a marriage or civil partnership interview is necessary, you can go to [stage 2](#) to establish whether the

British citizen exercised free movement rights in the EEA member state or Switzerland.

Related content

[Contents](#)

Related external links

[Immigration \(European Economic Area\) Regulations 2016](#)

[Free Movement of Persons Directive \(2004/38/EC\)](#)

Stage 2: establish whether the British citizen exercised free movement rights in the EEA host country

This section details the second stage of assessing whether the family member or extended family member of a British citizen would have been entitled to a document confirming a right of residence in the UK if the route had not closed after 30 June 2021.

The second stage of assessing the application is to consider whether the British citizen, before 23:00 GMT on 31 December 2020, exercised free movement rights in the European Economic Area (EEA) member state or Switzerland (referred to in this guidance as ‘the EEA host country’). For a list of EEA countries, see: [EEA and Swiss nationals: Free movement rights](#).

You must have considered the application under [stage 1](#) before moving on to stage 2.

The applicant must provide proof that the British citizen either:

- lived and exercised free movement rights as a worker, self-employed person, self-sufficient person or student (‘a qualified person’) in the EEA host country immediately before returning to the UK by 23:00 GMT on 31 December 2020
- acquired the right of permanent residence in the EEA host country following 5 years’ residence as a qualified person before returning to the UK by 23:00 GMT on 31 December 2020

Qualified person

The application must include evidence that the British citizen was the equivalent of a qualified person in the EEA host country during their extended right of residence, which means residence of longer than 3 months. British citizens who stayed in the EEA host country for no more than 3 months were not able to sponsor family members’ or extended family members’ residence in the UK under the EEA Regulations (before they were revoked on 31 December 2020 subject to certain saved provisions).

Presenting a registration certificate issued by the EEA host country would not, without further evidence, be sufficient to demonstrate that the British citizen was the equivalent of a qualified person there. You must consider whether the evidence provided shows that the British citizen exercised free movement rights as a:

- worker – for example, employment contract, wage slips, letter from employer
- self-employed person – for example, contracts, invoices, or audited accounts with bank statements, and evidence of paying tax and other deductible contributions

- self-sufficient person – for example, bank statements
- student – for example, a letter from the school, college or university

If the British citizen was a worker or self-employed person, their activity must have been genuine and effective and not marginal or ancillary.

If they were a self-sufficient person or student, they must also provide proof they held comprehensive sickness insurance for themselves and any family members.

For these purposes, the British citizen will not have been the equivalent of a qualified person in the EEA host country for any period where they were a jobseeker.

For guidance on assessing whether the British citizen was the equivalent of a qualified person in the EEA host country, see: EEA nationals qualified persons.

You must also be satisfied that the right of residence had not lapsed due to excess absence from the EEA host country, or been restricted by the EEA host country (e.g. due to deportation or exclusion measures), before the British citizen returned to the UK.

Service in HM Forces

A posting as a member of HM Forces (as defined in the Armed Forces Act 2006) in an EEA host country can satisfy the conditions of being a ‘worker’ for the purposes of assessing whether the British citizen is a qualifying British citizen.

The Sovereign Base Areas of Akrotiri and Dhekelia on the island of Cyprus are a British Overseas Territory and are not to be considered part of an EEA host country for the purposes of this guidance.

Right of permanent residence

If it is claimed in the application that the British citizen had acquired the right of permanent residence in the EEA host country, the application must include evidence of this.

Presenting an Article 19 card (document certifying permanent residence for EEA nationals who are not nationals of the EEA host country) would not usually, without the underlying evidence showing the residence and exercise of free movement rights covering the 5 year period, be sufficient to demonstrate that the British citizen had acquired a right of permanent residence in the EEA host country. This is to ensure the British citizen met the underlying requirements of the Free Movement Directive, irrespective of whether the EEA host country may have issued residence documentation based on more favourable national provisions.

You must consider the evidence provided in line with the guidance. See the rights of permanent residence for qualified persons section in the Qualified persons guidance.

You must also be satisfied that the right of permanent residence had not lapsed due to excess absence from the EEA host country, or been restricted by the EEA host country (e.g. due to deportation or exclusion measures), before the British citizen returned to the UK.

If the application does not include sufficient evidence that the British citizen exercised free movement rights in the EEA host country in order to make a decision, you must seek to obtain additional information or evidence under stage 5.

If the application includes sufficient evidence you can go to [stage 3](#) to determine whether residence in the EEA host country was genuine.

Related content

[Contents](#)

Related external links

[Immigration \(European Economic Area\) Regulations 2016](#)
[Free Movement of Persons Directive \(2004/38/EC\)](#)

Stage 3: determine whether residence in the EEA host country was genuine

This section details the third stage of assessing whether the family member or extended family member of a British citizen would have been entitled to a document confirming a right of residence in the UK if the route had not closed after 30 June 2021.

The third stage of assessing the application is to consider whether the residence of both the British citizen and the family member or extended family member in the European Economic Area (EEA) host country, by 23:00 GMT on 31 December 2020, was genuine.

You must have considered the application under [stage 1](#) and [stage 2](#) before moving on to stage 3.

Stages 3 and 4 work together to ensure that the residence of the British citizen and the family member or extended family member in the EEA host country was genuine rather than artificial and was not an abuse of rights designed to circumvent UK immigration law.

What does genuine residence mean?

‘Genuine residence’ for these purposes means residence in the EEA host country by both the British citizen and the family member or extended family member which was both:

- real, substantive or effective
- pursuant to and in conformity with the conditions set out in Article 7(1) and (2) or Article 16(1) and (2) of the Free Movement Directive to enable the qualifying British citizen and their family member to create or strengthen family life in the EEA host country

“Real, substantive or effective residence” means a period of time in which the British citizen moved to the EEA host country and was resident there, with their family member or extended family member, in compliance with Article 7 or Article 16 of the Free Movement Directive. For this to be satisfied, the British citizen must have moved past their initial (3 month) right of residence period and either pursued an activity which, under EU law, gave them the right to reside in that EEA host country for longer than 3 months or have acquired a right of permanent residence there.

You have already accepted, under [stage 2](#), that the British citizen exercised free movement rights in the EEA host country as either a qualified person or a person with a right of permanent residence.

If the evidence shows the British citizen was a qualified person or a person with a right of permanent residence in the EEA host country, you must consider whether

this was a genuine, or an artificial, exercise of free movement rights. As the CJEU said in [O and B](#), it is for the Secretary of State ‘to determine whether [the British citizen] settled (more accurately, ‘installed themselves’ – not to be confused with ‘settled’ within the meaning of the Immigration Act 1971) and, therefore, genuinely resided in the host Member State and whether, on account of living as a family during that period of genuine residence, Mr O. and Mr B. enjoyed a derived right of residence in the host Member State pursuant to and in conformity with Article 7(2) or Article 16(2) of Directive 2004/38’ (paragraph 57). As the Upper Tribunal put it in [ZA \(Reg 9. EEA Regs; abuse of rights\) \[2019\] UKUT 281](#), ‘there must [have been] substance to the residence’ (paragraph 44).

When considering this, you cannot generally take into account the motives of the people who moved to the EEA host country, except in the limited sense of whether they intended to exercise their EU free movement rights in that EEA host country. In ZA, the Upper Tribunal said, ‘Where the jurisprudence of the Court of Justice refers to residence being “genuine”, it does not import with it a consideration of the motives behind that residence in the abuse of rights sense. Rather, it is a qualitative evaluation of the residence which needs to be undertaken. It is in that sense that the intentions are relevant in the sense of what it was that the individuals who moved to another member state intended to do? Did they intend properly to exercise Treaty rights or was it, for example, simply an extended holiday or was it a fixed-term employment of short duration where the person concerned retained an official address with her parents as in Knoch?’ (paragraph 47).

For example, if the British citizen intended to pursue an employment opportunity in an EEA host country, and moved to that country in order to do so, genuine residence will usually have been achieved if the British citizen engages with that employment opportunity (or another available opportunity, including any of the qualifying categories outlined within Article 7 of the Free Movement Directive).

You must closely examine the facts of each individual case. For example, it is possible for a British citizen to have intended to remain in the EEA host country on a short-term basis, but then to have remained there for a longer period while pursuing other activity. If that other activity meant that they had a right of residence for longer than 3 months in accordance with Article 7 or a right of permanent residence in accordance with Article 16 of the Free Movement Directive, notwithstanding the British citizen’s original intentions, their residence must be considered genuine and in accordance with EU law.

Equally, if the British citizen stated their original intention was to move to that EEA host country permanently, but they returned to live in the UK before they acquired a right of permanent residence in that host country, the simple fact they did not achieve their original intention does not necessarily detract from the genuineness of their residence. It must always be considered on a case-by-case basis.

Factors to consider

Regulation 9(3) of the EEA Regulations sets out a number of factors which may help you consider whether the residence and exercise of free movement rights in the EEA host country was genuine:

- the length of the applicant and British citizen's joint residence in the EEA host country
- the nature and quality of the applicant and British citizen's accommodation in the EEA host country, and whether was the British citizen's principal residence
- the degree of integration in the EEA host country of the applicant and the British citizen
- whether genuine family life was created or strengthened during the joint residence of the applicant and the British citizen in the EEA host country
- whether the applicant's first lawful residence in the EEA or Switzerland with the qualifying British citizen was in the EEA host country

This is not an exhaustive list of factors. You must conduct a rounded assessment of all the relevant information and evidence available to you to decide whether the residence and exercise of free movement rights in the EEA host country was genuine or artificial.

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Length of joint residence in the EEA host country

When considering whether the residence in the EEA host country was genuine, you must consider (together with all other relevant information and evidence) the length of joint residence in the EEA host country.

The applicant must provide evidence that they met the definition of family member or extended family member (see [‘Family member’ or ‘extended family member’ status](#)) during joint residence in the EEA host country and resided with the British citizen in the EEA host country while the British citizen was in a position equivalent to that of a qualified person or a person with a right of permanent residence. This might include a mortgage or tenancy agreement in both their names, or correspondence from official or otherwise credible sources, such as payslips, household bills or bank statements addressed to each of them at the same address.

You should only accept that the applicant and the British citizen resided together for as long as the evidence demonstrates. For example, if they claim to have lived together for 2 years, but the evidence only covers a 3-month period, then you can only accept that they lived together for 3 months.

Generally, the longer the period of joint residence in the EEA host country while the British citizen was in a position equivalent to that of a qualified person or a person with a right of permanent residence, the more likely it is that the residence was genuine. For example, joint residence in the EEA host country for a period of 4 years while the British citizen was a worker is more likely to have been genuine than joint residence for 4 months while the British citizen was first on holiday and then briefly a student.

It is important to consider the length of joint residence in the EEA host country together with all other relevant factors to establish if the residence was genuine. You must not refuse an application solely based on a short period of joint residence in the EEA host country if the other evidence points to the residence being genuine.

Principal residence

When considering whether the residence in the EEA host country was genuine, you must consider (together with all other relevant information and evidence) the nature and quality of accommodation in the EEA host country and whether it was the British citizen's principal residence.

For example, a mortgaged home or rented accommodation is more likely to indicate genuine residence than living at a hotel or a bed and breakfast or short stays with friends.

The principal residence is the place and country where the British citizen's life is primarily based. There is no requirement for the EEA host country to be the British citizen's sole place of residence, and there is no requirement to have severed ties with the UK.

It is important to consider the nature and quality of accommodation and principal residence together with all other relevant factors to establish if the residence in the EEA host country was genuine. An application must not be refused solely based on this factor if other evidence points to the residence being genuine.

Degree of integration in the EEA host country

When considering whether the residence in the EEA host country was genuine, you must consider (together with all other relevant information and evidence) the degree of the applicant's and the British citizen's integration in the EEA host country.

The more evidence there is of integration in the EEA host country, the more likely it is that the residence there was genuine.

However, integration is not a requirement, and there is no requirement to have severed ties with the UK or for the British citizen's ties to the EEA host country to be stronger than those to the UK. This means that an application must not be refused based on an absence of evidence of integration if other evidence points to the residence in the EEA host country being genuine.

When considering the degree of integration in the EEA host country of the applicant and the qualifying British citizen, the relevant questions you may consider include:

- if the family includes any children, whether they were born or lived in the EEA host country and, if so, did they attend school there and were they otherwise involved in the local community?
- were there any other family members resident in the EEA host country and were they working or studying there or otherwise involved in the local community?
- how did the family member or extended family member spend their time in the EEA host country – is there evidence they worked, volunteered, studied or contributed to the community in any other ways?
- did the family member or extended family member immerse themselves into the life and culture of the EEA host country, for example:
 - did they buy property there?
 - did they speak the language?
 - were they involved with the local community?
 - did they own a vehicle that was taxed and insured there?
 - were they registered with the local health service, a general practitioner (GP), a dentist?

This is not an exhaustive list and the applicant may provide alternative evidence of integration. However, the more of these factors present in a case, the more likely it is that the joint residence of the applicant and the qualifying British citizen in the EEA host country was genuine.

It is important to consider the degree of integration together with all other relevant factors to establish if the residence in the EEA host country was genuine. An application must not be refused solely based on this factor if other evidence points to the residence in the EEA host country being genuine.

‘Family member’ or ‘extended family member’ status during joint residence in the EEA host country

A family member or extended family member of a British citizen must have been lawfully resident in the EEA host country. For the purposes of this assessment, ‘lawful residence’ means any of the following:

- they were a national of the EEA host country (e.g. a French citizen resident in France)
- they were an EEA national exercising their free movement rights in the EEA host country (e.g. a German citizen who was a worker in Spain)

- they had a right of residence in the EEA host country as the Article 2(2) (of the Free Movement Directive) family member of a British citizen that was not disputed or restricted by the authorities of the EEA host country
- they were issued with documentation under EU free movement law by the EEA host country as the British citizen's extended family member that has not been cancelled, revoked or otherwise invalidated
- they were granted leave to enter or remain (or an equivalent) under the domestic law of the EEA host country that has not been curtailed, revoked or otherwise invalidated

If an extended family member of a British citizen was not lawfully resident in the EEA host country, they are not eligible for a document confirming their right of residence and you must refuse the application.

You must be satisfied that the applicant had the status of 'family member' or 'extended family member' during all or part of their joint residence with the qualifying British citizen in the EEA host country. The applicant must have been lawfully resident in the EEA host country for any period during which they were an 'extended family member'.

Genuine family life created or strengthened in the EEA host country

You must consider whether genuine family life was created or strengthened during the joint residence of the applicant and the qualifying British citizen in the EEA host country.

It is not necessary that genuine family life between the British citizen and their family member must have existed prior to the British citizen's exercise of free movement rights in the EEA host country; it is possible for this genuine family life to have been created after the British citizen had already moved there. In order for the family member to have a right of residence in the UK (if the route had not closed after 30 June 2021), you must be satisfied that genuine family life between them and the British citizen was created or strengthened (or both created and strengthened) during the time spent resident together in the EEA host country.

Factors which may indicate that genuine family life was created include:

- where a marriage was contracted or a civil partnership was formed, provided it was not a marriage or civil partnership of convenience
- where a partnership becomes durable (i.e. akin to a marriage or civil partnership – normally after two years' cohabitation: see the 'Assessing family relationship' section of Appendix EU: EU, other EEA and Swiss citizens and family members)
- by a child's birth or adoption which is recognised in UK law, which then established a family relationship, for example between parent and child

Factors which may indicate that genuine family life was strengthened include:

- the passage of time once genuine family life has been created
- other major life events, such as the birth or adoption of a child by two people who are married, in a civil partnership or in a durable partnership

EEA documentation issued before 1 January 2014

For guidance on the transitional provisions that applied to family members or extended family members of British citizens issued with EEA documentation before 1 January 2014, and whether you need to see additional evidence of genuine residence in those cases, see [Residence under the 2006 Regulations](#) and [Genuine residence in the EEA host country](#).

If the application does not include sufficient evidence that the residence in the EEA host country was genuine, you must either:

- write to the applicant for further information ([stage 5](#))
- refer the case to a senior caseworker to consider inviting the applicant for a credibility interview ([stage 5](#))

If you decide you need additional information, and the family member or extended family member is a non-EEA national, you should still go to [stage 4](#) before you go to [stage 5](#), as you may find you also need additional information relating to the purpose of the residence. If the family member or extended family member is an EEA national, you should go straight to [stage 5](#) as stage 4 does not apply to them.

If the application includes sufficient evidence that the residence in the EEA host country was genuine, you can go to [stage 4](#) if the applicant is a non-EEA national or [stage 6](#) if they are an EEA national.

Related content

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Related external links

[Immigration \(European Economic Area\) Regulations 2016](#)
[Free Movement of Persons Directive \(2004/38/EC\)](#)

Stage 4: determine whether the purpose of the residence in the EEA host country was to circumvent UK immigration law

This section details the fourth stage of assessing whether the family member or extended family member of a British citizen would have been entitled to a residence card if the route had not closed after 30 June 2021.

The fourth stage of assessing the application is to consider whether the purpose of the residence in the European Economic Area (EEA) host country was to avoid any UK immigration law applying to non-EEA nationals to which the family member or extended family member would otherwise have been subject. For example, the requirements in Appendix FM to the UK's domestic [Immigration Rules](#) under which non-EEA national family members or extended family members can apply to reside in the UK with a British citizen or otherwise settled person.

This stage only applies where the family member or extended family member is a non-EEA national. You must not consider this stage if the applicant is an EEA national.

You must have considered the application under [stage 1](#), [stage 2](#) and [stage 3](#) before moving on to stage 4.

This stage is designed to tackle an abuse of EU free movement rights. As the CJEU reconfirmed in O and B, 'the scope of Union law cannot be extended to cover abuses' (paragraph 58).

If refusing on this basis, under regulation 9(4)(a) of the EEA Regulations, the burden of proof is on the Secretary of State to prove the abuse. It is not sufficient to conclude that the applicant has not shown that an abuse has not taken place.

To prove abuse, you must be satisfied on the balance of probabilities that both:

- despite formal observance of the conditions laid down by EU free movement law, the purpose of that law was not achieved
- there was an intention to obtain a material advantage from EU free movement law to which the family member or extended family member would not otherwise have been entitled (i.e. a right of residence in the UK under EU free movement law and/or access to the EU Settlement Scheme) by artificially creating the conditions laid down for obtaining it

Purpose of EU free movement law was not achieved

When considering whether the purpose of EU free movement law was or was not achieved, despite formal observance of the conditions laid down by that law, you must consider whether both:

- the British citizen's intentions and actions achieved the purpose of Article 21 of the Treaty on the Functioning of the European Union (TFEU) and of the Free Movement Directive, which is the enjoyment, by those who hold EU citizenship (or citizenship of another EEA member state or Switzerland), of the right to move and reside freely within the territory of the EEA or Switzerland (for these purposes a British citizen who resided in an EEA member state or Switzerland before the end of the transition period on 31 December 2020 is to be regarded as an EU citizen, notwithstanding that the UK left the EU on 31 January 2020)
- the intentions and actions of the family member or extended family member achieved the purposes set out in paragraphs (5) and (6) of the Free Movement Directive's preamble, namely:
 - 'The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality'
 - 'In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'

You must closely examine the facts of each individual case. For example, it is possible for a British citizen to have intended to remain in the EEA host country on a short-term basis, but then to have remained there for a longer period while pursuing other activity. If that other activity meant that they had a right of residence for longer than 3 months in accordance with Article 7 or a right of permanent residence in accordance with Article 16 of the Free Movement Directive, notwithstanding the British citizen's original intentions, their residence must be considered genuine and in accordance with EU law.

Equally, if the British citizen stated their original intention was to move to that EEA host country permanently, but they returned to live in the UK before they acquired a right of permanent residence in that host country, the simple fact they did not achieve their original intention does not detract from the genuineness of their residence. Provided they met the conditions for a right of residence of more than 3 months under the Free Movement Directive, and did not satisfy those conditions artificially in order to obtain an unfair advantage from their EU free movement rights, their residence in the EEA host country must still be considered genuine.

Intention to obtain a material advantage

When considering whether there was an intention to obtain a material advantage from EU free movement law to which the family member or extended family member would not otherwise have been entitled (i.e. a right of residence in the UK under EU free movement law and/or access to the EU Settlement Scheme) by artificially creating the conditions laid down for obtaining it, you must consider whether or not, on the balance of probabilities, all of the following are true:

- had the joint residence in the EEA host country not taken place, the family member or extended family member would have been subject to UK immigration laws
- the joint residence in the EEA host country was for the sole purpose of obtaining a material advantage
- the British citizen and the family member or extended family member artificially created the conditions for the family member or extended family member to obtain that advantage

Subject to UK immigration laws

When assessing whether there was an intention to obtain a material advantage, you must first consider whether the family member or extended family member would have been subject to UK immigration laws. If they would not have been subject to UK immigration laws – because, for example, they would have had another basis for admission to or residence in the UK under the EEA Regulations – it is unlikely there would have been any material advantage from the joint residence in the EEA host country.

For example:

- Mrs. E. is an Australian citizen who came to the UK as the spouse of a French citizen, enjoyed a right of residence on that basis, and later became a family member who retained a right of residence. 2 years later, she married Mr. E., a British citizen. They decided to spend their first year of marriage in Portugal, and they both quickly found genuine and effective employment in a hotel. On return to the UK, Mrs. E. had a right of residence by virtue of regulation 9 of the EEA Regulations, but she did not gain a material advantage from residing in Portugal with Mr. E. because she already had a right of residence under the EEA Regulations before she moved to Portugal
- Mr. F. is a Russian citizen who has been in the UK unlawfully for 5 years before travelling to Ireland with Miss G., a British citizen. If Mr. F. satisfies the criteria to return to the UK under regulation 9 of the EEA Regulations, he will have gained a material advantage from his joint residence in Ireland with Miss G. This alone does not demonstrate that any abuse has taken place: you must continue to consider the facts of the individual case in accordance with the guidance in the rest of this section

Sole purpose

If you have assessed that the joint residence in the EEA host country created a material advantage for the family member or extended family member, you must go on to consider whether the sole purpose of the joint residence was in order to obtain that material advantage.

In other words, did the British citizen and the family member or extended family member reside together in the EEA host country for the sole purpose of allowing the family member or extended family member to enter or reside in the UK under EU free movement law in circumvention of UK immigration laws, for example, to avoid the requirement to apply for entry clearance or leave to remain under Appendix FM to the Immigration Rules?

In most cases, EU law does not permit consideration of the intention of the person seeking to benefit from a right to reside (as confirmed by the CJEU in [Akrich C-109/01](#)). However, in order to assess whether someone is abusing their EU free movement rights, you must consider what they intended to do in the EEA host country and whether that intention was solely to gain that material advantage, contrary to the spirit of EU free movement law. As set out in the guidance on stage 3, family members have a right of entry to and residence in the EEA host country, and extended family members have the right of facilitation, in order that an EEA national is not deterred from exercising their EU free movement rights. That family members and extended family members can return to the UK under EU free movement law is a consequence of that law, not the purpose of it.

An example of such abuse of rights could be where the British citizen and a non-EEA national family member seek to meet the minimum requirements of the genuine residence requirements in the EEA host country, with the sole intention of returning to the UK and circumventing domestic Immigration Rules.

Before making a decision on these grounds, you must be satisfied that the British citizen did not intend to exercise their rights as an EEA national (including during the transition period, where those rights were still available to British citizens notwithstanding the loss of EU citizenship as a consequence of the UK's exit from the EU). You must also be satisfied that the sole reason for the movement to the EEA host country was in order to obtain an advantage contrary to the spirit of EU free movement law.

This part of the assessment may include, but may not be limited to:

- the family member's or extended family member's immigration history – including previous applications for leave to enter or remain in the UK and whether they previously resided lawfully in the UK with the British citizen
- if they have never made an immigration application, the reason the family member or extended family member did not to apply to join the British citizen in the UK before the British citizen moved to the EEA host country
- the timing and reason for the British citizen moving to the EEA host country
- the timing and reason for the family member or extended family member moving to the EEA host country

- the timing and reason for the family unit returning to the UK

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None of these factors is determinative, and you must not refuse an application solely on the basis that the family member or extended family member has previously:

- not made an application for leave to enter or remain in the UK
- been refused leave to enter or remain in the UK
- remained in the UK beyond the expiry of a period of leave to enter or remain
- been removed or deported from the UK

For example:

- Mr. H. is a South Korean citizen who came to the UK as a visitor and applied for leave to remain as a student. This application was refused because he did not hold the correct entry clearance. He decided to pursue his studies in the USA instead, where he met Mr. I., a British citizen whose employer had posted him to work there. They began a relationship, and 2 years later, Mr. H. accompanied Mr. I. on his next work posting to Norway. Mr. H. applied for and was issued with an EEA residence card in Norway as Mr. I.'s durable partner. They returned to the UK together on completion of Mr. I.'s 1-year work posting. Although Mr. H.'s student application was refused some years ago, there is nothing to suggest that Mr. H. and Mr. I.'s residence in Norway was for the purpose of enabling Mr. H. to circumvent UK immigration laws
- Mr. J. is an Albanian citizen who came to the UK 10 years ago, successfully claimed asylum using a false Kosovan identity, and naturalised as a British citizen. During his prosecution for an unrelated fraud, his true identity was established, and the subsequent nullification of his British citizenship was upheld by the courts. On completion of his prison sentence, Mr. J. was granted immigration bail while Immigration Enforcement applied for an emergency travel document and to enable his Article 8 ECHR claim to be

considered. He was placed on reporting conditions but absconded. He met and married Ms K., a British citizen, and they moved to Ireland together. Ms. K. had lived and worked for the same company in Manchester for 25 years and requested a 6-month leave of absence to live in Ireland straight after marrying Mr. J. There is nothing to suggest Ms. K. would ever have relocated to Ireland if she had not married Mr. J. and Mr. J. had not been seeking a means to remain in the UK, and they returned to the UK after 3 months and one day in Ireland – the bare minimum to engage regulation 9 of the EEA Regulations – and Mr. J. immediately applied for an EEA residence card. In this case, it is reasonable to conclude that it is more likely than not that the joint residence in Ireland was for the sole purpose of Mr. J. gaining a material immigration advantage to which he would not otherwise have been entitled

If you have assessed that the joint residence in the EEA host country created a material advantage for the family member or extended family member, and that the sole purpose of the joint residence was in order to obtain that material advantage, this is an insufficient basis to refuse the application: you must continue to consider the facts of the individual case in accordance with the guidance in the rest of this section.

Artificial creation of conditions to obtain that advantage

If you assess that the family member or extended family member gained a material advantage from residing with the British citizen in the EEA host country, and that that advantage was the sole purpose for the joint residence, you must go on to consider whether the conditions for obtaining that advantage were artificially created.

The ‘conditions for obtaining that advantage’ mean:

- the requirements of Article 21 TFEU and the Free Movement Directive which enabled the British citizen to exercise EU free movement rights in the EEA host country and, if applicable, gave the family member a right of residence or the extended family member the right of facilitation in the EEA host country (this will not be applicable if the family member or extended family member was lawfully resident in the EEA host country on another basis, for example if they were a citizen of that country or if they had the equivalent of leave to remain under that country’s domestic immigration laws)
- the requirements of Article 21 TFEU (until 31 December 2020) and regulation 9 of the EEA Regulations which (until 31 December 2020 or, if the saved provisions applied, until 30 June 2021 or the outcome of an application to the EU Settlement Scheme made by then and of any appeal) may have given the family member a right of residence or extended family member a right of facilitation in the UK

In [ZA \(Reg 9. EEA Regs; abuse of rights\) \[2019\] UKUT 281](#), the Upper Tribunal considered what ‘artificially creating the conditions to obtain the advantage’ means:

‘67. In a marriage of convenience, once the parties are lawfully married, the non-EEA partner obtains a large bundle of rights not only the right of residence, but to work, to set up in business and in some cases to obtain

social support. Other procedural rights accrue also. But a legal relationship or status, marriage, has been brought into being for no purpose other than to secure those rights which accrete to that status. It is where the gaining of those rights is the predominant purpose that it becomes abusive.

68. In contrast, where an EEA national goes to another member state and takes employment, he undertakes work for pay. Taxes are paid, and the right of residence necessary to do all of that is exercised. As the case law makes clear, the intentions of a person taking work are not relevant; such a system whereby a host state would have to examine motives would be contrary to the Directive.

69. If, however, an entirely artificial step in the process were introduced, such as a British citizen working notionally for an Irish company but posted to work exclusively in the United Kingdom (analogous to the position in Cadbury-Schweppes) it might be different.

70. In summary, the doctrine of abuse of rights can apply only where it is shown by the [Secretary of State] that there was no genuine (as properly construed) exercise of the Treaty right to free movement and where there was an intention to use an artificial constructed arrangement. Both elements have to be demonstrated by the [Secretary of State].'

If, after consideration of all the information and evidence available, you are satisfied on the balance of probabilities that both:

- despite formal observance of the conditions laid down by EU free movement law, the purpose of that law has not been achieved
- there was an intention to obtain a material advantage from EU free movement law to which the family member or extended family member would not otherwise have been entitled (i.e. a right of residence in the UK under EU free movement law and/or access to the EU Settlement Scheme) by artificially creating the conditions laid down for obtaining it

or that these criteria do not apply, you can go to [stage 6](#) to decide the application.

If the application does not include sufficient information or evidence to make a decision under stage 4, you must either:

- write to the applicant for further information or evidence ([stage 5](#))
- refer the case to a senior caseworker to consider inviting the applicant for a credibility interview ([stage 5](#))

Related content

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[Immigration \(European Economic Area\) Regulations 2016](#)
[Free Movement of Persons Directive \(2004/38/EC\)](#)

Stage 5: obtain additional information or evidence if needed

This section details the fifth stage of assessing whether the family member or extended family member of a British citizen would have been entitled to a residence card if the route had not closed after 30 June 2021.

You only need to consider the fifth stage of assessing the application if you think there is not enough information or evidence to decide the application.

You do not need to consider this stage if you already have enough information and evidence to decide the application.

You must have considered the application under [stage 1](#), [stage 2](#), [stage 3](#) and [stage 4](#) before moving on to stage 5.

Burden and standard of proof

If deciding whether additional information or evidence is needed, the burden of proof is on you to show there is reasonable doubt that the applicant would have had a right to reside under the [Immigration \(European Economic Area\) Regulations 2016](#) (the EEA Regulations) if they had not been revoked, subject to saved provisions, on 31 December 2020. If you can demonstrate that there are sufficient reasons to have reasonable doubt, then the burden of proof is on the applicant to show that the conditions of regulation 9 would be met, if regulation 9 still existed.

Seeking additional information or evidence

If you think you need additional information or evidence to decide the application, then you can either:

- write to the applicant asking them to provide additional information or evidence
- request that they attend a credibility interview

Written requests

In general, applicants should be given 10 working days to submit the additional information or evidence requested. The deadline can be extended if the applicant provides a good reason why more time is needed. This will normally be where the requested additional information or evidence cannot be provided within 10 working days for reasons that are beyond the applicant's control.

If you write to the applicant for additional information or evidence and the applicant does not respond, you should decide the application based on the available information and evidence. You may draw any factual inferences about a person's entitlement to a right to reside if, without good reason, a person fails to provide the additional information or evidence requested.

If you write out for further information or evidence but the response, taken together with the information and evidence provided with the application, does not show that it is more likely than not that the conditions are met, you should consider whether a credibility interview is necessary.

Credibility interviews

Credibility interviews should be considered only if either:

- any additional information or evidence required cannot be obtained by writing to the applicant
- having received the applicant's response to a written request for additional information or evidence, you still do not have enough information and evidence to decide the application

All requests for a credibility interview must be approved by a senior caseworker.

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The form submitted to the senior caseworker must:

- set out why you consider an interview is needed
- state the evidence submitted in support of the application
- list any particular areas of questioning you want the applicant to be asked

The senior caseworker will consider the evidence and decide if it is appropriate for a credibility interview to be arranged. If there is insufficient evidence, they will return the case to you. You must then make a decision without a credibility interview.

If the senior caseworker agrees to recommend a credibility interview, the case will be allocated to a caseworker on the Permanent Migration Interviewing team (PMINT) who is trained to conduct credibility interviews.

Once PMINT have finished the interview process the case will be referred back to you to make a decision.

You may draw any factual inferences about a person's entitlement to a right to reside (had the route not closed after 30 June 2021) if, without good reason, a person fails to:

- provide the additional information or evidence requested
- attend an interview on at least 2 occasions, if so invited

This means that if there is other information or evidence to suggest that the person would not have had a right to reside (had the route not closed after 30 June 2021), combined with the failure by that person to provide information or evidence to substantiate their claim, it can be considered on the balance of probabilities that the person does not meet the requirements of the [EEA Regulations](#).

You must not decide that a person would not have had a right to reside (had the route not closed after 30 June 2021) solely on the basis that the person failed to comply with a request to provide additional information or evidence or to attend an interview. There must be additional grounds to suggest there was no right to reside. In practice, these will be usually be the grounds which prompted the request for additional information or evidence or to attend an interview.

Once you have completed this stage (if applicable) you must move on to [stage 6](#) to decide the application.

Related content

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Related external links

[Immigration \(European Economic Area\) Regulations 2016](#)

[Free Movement of Persons Directive \(2004/38/EC\)](#)

Stage 6: decide the application

This section details the sixth stage of assessing whether the family member or extended family member of a British citizen would have been entitled to a residence card if the route had not closed after 30 June 2021.

The sixth stage of assessing the application is making the decision.

You must have considered the application under [stage 1](#), [stage 2](#), [stage 3](#), [stage 4](#) and [stage 5](#) before moving on to stage 6.

You must assess whether the applicant met the relevant requirements of regulation 9 of the EEA Regulations at 23:00 GMT on 31 December 2020 and whether there has been any material change in circumstances since then. In other words, you must be satisfied that the requirements were met before the end of the transition period and would continue to be met at the date of decision, had the route not closed after 30 June 2021.

Restriction of rights

If you conclude that the requirements of regulation 9 are met, you must be certain there are no reasons to refuse the application either:

- On the grounds of public policy, public security or public health in relation to conduct committed before 23:00 on 31 December 2020. For further information, see: EEA decisions on grounds of public policy and public security
- On the ground that the applicant's presence in the UK is not conducive to the public good in relation to conduct committed after 23:00 GMT on 31 December 2020. For further information, see: Deporting foreign nationals on conducive grounds

If the requirements of regulation 9 are not met, then any criminality or other adverse conduct will be considered under the UK's purely domestic immigration laws.

Issuing a residence card

If the conditions are met to the civil law standard (the balance of probabilities), and there are no grounds of public policy, public security or public health, or non-conducive grounds, justifying refusal, then the applicant would have had a right to reside under the [Immigration \(European Economic Area\) Regulations 2016](#) (the EEA Regulations) and, had the route not closed after 30 June 2021, you would have been obliged to issue a residence card.

However, it is no longer appropriate to issue a residence card. Where, following this guidance, an application for residence documentation is assessed as meeting the relevant requirements, please see EU Settlement Scheme: family member of a qualifying British citizen for guidance on how to implement that decision.

Refusing to issue a residence card

If the conditions are not met to the civil law standard (the balance of probabilities), or there are grounds of public policy, public security or public health in relation to conduct committed before 23:00 on 31 December 2020 or non-conductive grounds for conduct committed thereafter, justifying refusal, then you must refuse the application. You must not make a separate or additional decision under the [EEA Regulations](#) based on the abuse of a right to reside (because there cannot be an abuse of a right which does not exist).

Right of appeal

The applicant can appeal against a decision to refuse to issue a residence card if the conditions of regulation 36 are met. For guidance see: [Rights of appeal: European decisions](#).

Where there is a right of appeal, it is not suspensive of removal. See: [Ahmed, R \(on the application of\) v SSHD \(EEA / s.10 appeal rights: effect \(IJR\) \[2015\] UKUT 436 \(IAC\) \(24 July 2015\)](#).

Consequences of a refused application

The applicant will be liable to removal under section 10 of the Immigration and Asylum Act 1999, on the basis that they require leave to enter or remain in the UK but do not have it. For further guidance see: Detention and removals (chapters 46 to 62).

If and when removal is enforced, the applicant will be subject to a bar on entering the UK under the [Immigration Rules](#) for 10 years. This is in accordance with [paragraph 9.8.1. of the rules](#).

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Related external links

[Immigration \(European Economic Area\) Regulations 2016](#)

[Free Movement of Persons Directive \(2004/38/EC\)](#)

[Immigration Rules](#)

EEA decisions on grounds of public policy and public security

Deporting non-EEA foreign nationals

Retained rights of residence

This section tells you how to assess an application from a family member of a British citizen (or a person who was the family member of a British citizen) for a residence card in cases where the applicant claims to have retained a right of residence in the UK (had the route not closed after 30 June 2021).

You must first consider if a person previously had a right of residence in the UK as a family member of a British citizen. You should consider whether the evidence shows they meet the requirements. See: [Assessing the application](#). If they meet the requirements, they may be able to retain a right of residence in certain circumstances. See: Free Movement Rights: retained rights of residence.

See also [Residence under the 2006 Regulations](#) for guidance on whether residence in the UK prior to 25 November 2016 was in accordance with the Immigration (European Economic Area) Regulations 2006.

Domestic violence

If the applicant tells you they cannot provide evidence about their British citizen sponsor because their relationship broke down due to domestic violence, you must take a pragmatic approach. For more information, see: the domestic violence section in the Direct family members of EEA nationals guidance.

Restriction of rights

If you conclude that the requirements of regulation 9 are met, you must be certain there are no reasons to refuse the application either:

- On the grounds of public policy, public security or public health in relation to conduct committed before 23:00 on 31 December 2020. For further information, see: EEA decisions on grounds of public policy and public security
- On the ground that the applicant's presence in the UK is not conducive to the public good in relation to conduct committed after 23:00 GMT on 31 December 2020. For further information, see: Departing non-EEA foreign nationals

If the requirements of regulation 9 are not met, then any criminality or other adverse conduct will be considered under the UK's purely domestic immigration laws.

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Related external links

[Immigration \(European Economic Area\) Regulations 2016](#)

[Free Movement of Persons Directive \(2004/38/EC\)](#)

EEA decisions on grounds of public policy and public security

Deporting non-EEA foreign nationals

Permanent residence

This section tells you how to assess an application from a family member of a British citizen, made by 23:00 GMT on 31 December 2020, for a document confirming their right of permanent residence.

You must first consider if a person meets the requirements showing they are a family member of a British citizen, in circumstances where the British citizen is treated as though they were an EEA national. See: [Assessing the application](#).

Continuous residence in the UK for 5 years

You must make sure the applicant, their British citizen sponsor and any family members included in the application had been lawfully resident in the UK for a continuous period of 5 years. A person can only continue to accrue time towards their continuous period of 5 years until 30 June 2021, unless they have made an application to the EUSS by the deadline of 30 June 2021 in which case they can continue to accrue time after this date because they have saved residence rights.

Family members of British citizens who are claiming a right of permanent residence on the basis that the British citizen is a worker or self-employed person who has ceased activity are not required to have completed 5 years' residence in the UK. Where family members are not relying on the British citizen having ceased activity, you must not consider whether or not the British citizen has been the equivalent of a 'qualified person' or a person with a right of permanent residence whilst residing in the UK.

For information on calculating the continuous residence period, see the assessing continuous residence section of: European Economic Area nationals: qualified persons.

See also [Residence under the 2006 Regulations](#) for guidance on whether residence in the UK prior to 25 November 2016 was in accordance with the Immigration (European Economic Area) Regulations 2006.

Domestic violence

If the applicant says they cannot provide evidence about their British citizen sponsor because their relationship broke down due to domestic violence, you must take a pragmatic approach. For more information, see: the domestic violence section in the Direct family members of EEA nationals guidance.

Restriction of rights

If you conclude that the requirements of regulation 9 are met, you must be certain there are no reasons to refuse the application either:

- On the grounds (or on serious or imperative grounds, if applicable) of public policy, public security or public health in relation to conduct committed before 23:00 on 31 December 2020. For further information, see: [EEA decisions on grounds of public policy and public security](#)
- On the ground that the applicant's presence in the UK is not conducive to the public good in relation to conduct committed after 23:00 GMT on 31 December 2020. For further information, see: [Deporting non-EEA foreign nationals](#)

If the requirements of regulation 9 are not met, then any criminality or other adverse conduct will be considered under the UK's purely domestic immigration laws.

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