

**RIGHT TO RESIDE – THE CITIZENS’ RIGHTS
(APPLICATION DEADLINE AND TEMPORARY
PROTECTION) (EU EXIT) REGULATIONS 2020 – IS, JSA,
ESA & SPC**

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Introduction

- 1 Amendments are being made to the Immigration (European Economic Area) Regulations 2016 (“the Imm (EEA) Regs 2016”), and are being introduced by the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (commonly known as “the Grace Period SI”). These amendments come into force on IP completion day¹ (defined as 11pm on 31.12.20²).

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

- 2 The deadline by which applications for EUSS leave must be made is 30.6.21¹. The grace period² is therefore the period beginning at 11 pm on 31.12.20 and ending with the application deadline of 30.6.21.



Note: For guidance on EUSS, please see DMG 073490 et seq.

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

2 Reg 3(5)(a)

- 3 These amendments save relevant legislation relating to EU freedom of movement for the duration of the grace period, for EEA nationals and their family members who, prior to the end of the transition period, have not yet been granted EUSS leave.

Note: This is to comply with the UK's commitment under the Withdrawal Agreement (and the corresponding provisions under the EEA-EFTA separation agreement and Swiss citizens' rights agreement) ¹, namely that "the deadline for submitting the application [to the EUSS] shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period."

1 Withdrawal Agreement, Art 18(1)(b); EEA EFTA Separation Agreement, Art 17(1)(b); Swiss Citizens' Rights Agreement, Art 16(1)(b)

Background

- 4 As part of the Immigration and Social Security Coordination Act 2020, the Home Office is bringing free movement for EEA nationals and their family members to an end as of 11pm on 31.12.20 ("IP completion day", which is more commonly referred to as the end of the transition period). Subsequently, the Imm (EEA) Regs 2016, which transpose the EU Citizens' Rights Directive 2004/38, will be revoked in their entirety on that day. As part of the UK's departure from the EU, the UK and EU agreed to protect those EEA nationals who are in scope of the Withdrawal Agreement. Accordingly, the EU (Withdrawal) Act 2018 and EU (Withdrawal Agreement) Act 2020 requires that a body of retained EU law is created to protect those that are in scope of the Withdrawal Agreement. Also, as reference to the Imm (EEA) Regs 2016 needs to continue in relation to EEA nationals and their family members who are already in the UK before the end of the transition period, the Home Office is drafting secondary legislation to save the Imm (EEA) Regs 2016 so that they continue to apply in certain situations, for certain purposes, and with some modifications.
- 5 The first amendments drafted by the Home Office are within this Grace Period SI (captured within this Memo), which is relevant to EEA nationals and, in certain cases, their family members who, prior to the end of the transition period, have not yet been granted EUSS leave. This may be because they have not yet applied for EUSS leave, or because they have an application pending.
- 6 The second amendments drafted by the Home Office are made within the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving,



Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (colloquially referred to as the “Home Office Consequential SI”), which should be read in conjunction with this statutory instrument. The Home Office Consequential SI saves the Imm (EEA) Regs 2016 and other relevant legislation (with modifications) for the purposes of holders of limited leave to enter or remain under the EUSS (pre-settled status). The Home Office Consequential SI also revokes and makes various consequential amendments to other legislation.

Note: Please see separate ADM & DMG Memo guidance in relation to the “Home Office Consequential SI” – Memo DMG 25/20 & Memo ADM 29/20.

Definitions

EEA document

- 7 “EEA document” means¹
1. an EEA family permit² **or**
 2. a registration certificate³ **or**
 3. a residence card⁴.

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

Family member

- 8 “family member”¹
1. has the same meaning as defined in the specified legislation² (see DMG 072900) that had effect immediately before 11 pm on 31.12.20 **and**
 2. includes an extended family member as defined in the specified legislation³ (see DMG 073293) that had effect immediately before 11 pm on 31.12.20 if that person
 - 2.1 immediately before 11 pm on 31.12.20 satisfied the condition of being a durable partner⁴ **or**
 - 2.2 holds a valid EEA document (see paragraph 7 above) (regardless of whether that document was issued before or after 11pm on 31.12.20).

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



Relevant family member

- 9 “Relevant family member”, in relation to a person (“P”), means¹ a family member who
1. was a family member of P immediately before 11 pm on 31.12.20 **or**
 2. is P’s child **and**
 - 2.1 the child’s other parent is a relevant person or has EUSS leave to enter or remain in the UK **or**
 - 2.2 the child’s other parent is a British citizen **or**
 - 2.3 P has sole or joint rights of custody of the child in the circumstances set out in the last point of specified legislation² **or**
 - 2.4 P falls within specified legislation³ **or**
 3. becomes a family member of P after 11 pm on 31.12.20 by virtue of being issued with an EEA document (see paragraph 7 above) **or**
 4. is the spouse or civil partner of P, and P is a national of Switzerland.

1 The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(6)(f) – (i);

2 Withdrawal Agreement, Art. 10(1)(e)(iii); EEA EFTA separation agreement, Art.9(1)(e)(iii);

3 Swiss citizens’ rights agreement, Art.10(1)(e)(iii)

Relevant person

- 10 “Relevant person” means¹ a person who does not have (and who has not, during the grace period, had) EUSS leave to enter or remain in the UK and who
1. immediately before 11 pm on 31.12.20
 - 1.1 was lawfully resident i.e. exercising a qualifying right to reside² in the UK **or**
 - 1.2 had a right of permanent residence³ in the UK **or**
 2. is not a person who falls within sub-paragraph 1. but is a relevant family member of a person who immediately before 11 pm on 31.12.20
 - 2.1 did not have EUSS leave to enter or remain in the UK **and**
 - 2.2 either



2.2.a was lawfully resident i.e. exercising a qualifying right to reside⁴
in the UK **or**

2.2.b had a right of permanent residence⁵ in the UK.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 3(6)(j) – (k);

2 Imm (EEA) Regs 2016; 3 Reg 15; 4 Imm (EEA) Regs 2016; 5 Reg 15

Grace period

11 Certain provisions of the Imm (EEA) Regs 2016 will continue to apply (despite their revocation) during the grace period¹, to a relevant person who does not have (and who has not, during the grace period, had) EUSS leave to enter or remain in the UK and who

1. resided lawfully in the UK (i.e. exercised any qualifying right to reside) immediately before 11 pm on 31.12.20 **or**
2. had a right of permanent residence in the UK by virtue of the Imm (EEA) Regs 2016 at any point in the 5 years preceding 11 pm on 31.12.20 **or**
3. are relevant family members of such persons at **1.** and **2.** above.

Note: Within **3.** above, a “relevant family member” is defined so that in most cases, they need to be a family member immediately before 11pm on 31.12.20. However, for the full definition of “relevant family member”, please see paragraph 9 above.

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

Applications which have not been finally determined by the application deadline

12 Provision¹ is made for individuals who have made an application for EUSS leave on or before the application deadline (30.6.21), but whose application has not been finally determined by that date. The amendment provides that certain provisions of the Imm (EEA) Regs 2016 continue to apply to such individuals until their application has been finally determined. This period of time is referred to as the “relevant period²”.

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

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

2 Reg 4(6)(b); 3 Reg 4(7)

13 Provision is made for those individuals who have



1. made an in-time application for EUSS leave to enter or remain in the UK on or before the application deadline¹ **and**
 - 1.1 whose EUSS leave has either not been granted yet **or**
 - 1.2 who have an appeal pending**and**
2. by virtue of the Imm (EEA) Regs 2016² they
 - 2.1 resided lawfully in the UK (i.e. any qualifying right to reside) immediately before 11pm on 31.12.20³ **or**
 - 2.2 had a right of permanent residence in the UK at any point in the 5 years preceding 11pm on 31.12.20⁴.

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

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

Note 3: The relevant savings may continue to apply to these individuals until well after 30.6.21. The provisions⁶ saved in the Grace Period SI continue to apply to such individuals until their application is successful or the individual has exhausted any rights of appeal that they may have i.e. is finally determined.

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

2 Reg 4(2)(b); 3 Reg 4(2)(b)(i); 4 Reg 4(2)(b)(ii); 5 reg 4(6)(a); 6 Reg 4(7)

Imm (EEA) Regs 2016 savings

- 14 Paragraphs 16 – 33 below, together with Appendix 1, specifies the provisions¹ of the Imm (EEA) Regs 2016 that continue to apply (despite their revocation), identifying those which are modified and those which are covered by DMG guidance. The modifications ensure that the Imm (EEA) Regs 2016 continue to operate appropriately after 11 pm on 31.12.20 and reflect a number of judgments as to how those Regulations should be interpreted and applied (for example: the UT judgments of KH² (on the unlawful application of GPoW to retained workers – see paragraphs 22 – 24 below) and HK³ (on allowing Surinder Singh rights to those who've obtained permanent residence in another host State – see paragraphs 27 – 29 below).

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, regs 5 – 10;

2 KH v Bury MBC and SSWP [2020] UKUT 50 (AAC); 3 HK v SSWP (PC) [2020] UKUT 73 (AAC)



Table: Imm (EEA) Regs 2016 provisions that continue to apply

- 15 This table at **Appendix 1** identifies the Imm (EEA) Regs 2016 provisions that continue to apply under the Grace Period SI and whether the particular regulation/Schedule is modified.

General Interpretation

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

1. “or any other right conferred by EU Treaties²” or
2. “or the EU Treaties³”

are to be omitted⁴.

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

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

- 17 Within the definition of “EEA decision¹”, the words “a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card” are omitted².

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

- 18 Within the definition of “EEA State¹”, the words “, other than the United Kingdom” are omitted so far as relevant to things done after exit day².

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

Continuity of residence

- 19 This provision¹ continues to take effect² with no modifications.

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



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

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

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

Worker or self-employed person who has ceased activity

- 21 This provision¹ continues to take effect² with no modifications.

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

Qualified person

- 22 A person who is no longer self-employed continues to be treated as a self-employed person, provided that certain conditions are met¹ (see DMG 072862). One of those conditions is that the person satisfies condition E². This condition is amended to omit the words “*and having a genuine chance of being engaged*”³. This amendment reflects the UT judgment of KH⁴. From 11pm on 31.12.20, DMG guidance at 072864 **2.** should be disregarded.

Note: Although guidance within this SI comes into force at 11 pm on 31.12.20, DMs should already be applying the effects of the KH judgment, which took effect from 4.2.20 – see Memo DMG 27/20 & Memo ADM 31/20 – Retaining Worker Status and the Genuine Prospect of Work Test.

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

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

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



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

Note: Although guidance within this SI comes into force at 11 pm on 31.12.20, DMs should already be applying the effects of the KH judgment, which took effect from 4.2.20 – see Memo DMG 27/20 & Memo ADM 31/20 – Retaining Worker Status and the Genuine Prospect of Work Test.

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

Family members

- 25 This provision¹ continues to take effect² with no modifications.

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

Extended family member

- 26 Where an extensive examination of the personal circumstances of the claimant is required¹, the criteria², of *whether an EEA national would be deterred from exercising their free movement rights if the application was refused*, is omitted³ from the examination.

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

Family members and extended family members of British citizens

- 27 DMG guidance at 073254 advises that, if certain conditions are satisfied, family members of British citizens have the same EU law rights of residence as they would if they were a family member of an EEA national¹. An amendment² is made to the end of this provision, to insert the words “*and BC is to be treated as satisfying any requirement to be a qualified person*”. This gives effect to the recent UT judgment of HK³ (on allowing Surinder Singh rights to those who've obtained permanent residence in another host State).

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



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

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

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

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

Dual national: national of an EEA State who acquires British citizenship

- 30 This provision¹ continues to take effect² with no modifications.

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

Family member who has retained a right of residence

- 31 Within this provision¹, the words “*the initiation of proceedings for*” are omitted².

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

Derivative right to reside

- 32 Guidance at DMG 073466 provides advice relating to primary carers of a British citizen¹. From 11pm on 31.12.20, DMG 073466 3.2² is amended to read “an EEA state or Switzerland”³.

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

Effect on other legislation

- 33 Specified legislation¹ is modified to omit² reference to “a qualifying EEA State residence card” from the list of documents used for the purposes of satisfying a requirement to produce a visa³.

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



Entitlement to benefits and public services

- 34 These amendments¹ ensure that the Imm (EEA) Regs 2016 provisions saved (with their modifications within paragraphs 16 to 33 above) continue to apply for the purposes of benefits and public services legislation. This is where the relevant DWP income-related benefits legislation is listed (which includes amongst others, IS, JSA(IB), ESA(IR), SPC & Social Fund funeral payments) so that the Imm (EEA) Regs 2016 are saved for the purposes of applying that DWP legislation².

Note 1: An amendment is made to the Grace Period SI, by the Home Office Consequential SI³, which provides that the Imm (EEA) Regs 2016 continue to apply, with a modification, for the purposes of entitlement to a social fund funeral payment. The Social Fund Maternity and Funeral Expenses (General) Regulations are added to the list of benefits¹ detailed within this SI.

Note 2: The saved Imm (EEA) Regs 2016 provisions are saved only for the individuals who come within the personal scope of the Grace Period SI⁴. Anyone who does not satisfy these conditions is not within the scope of the SI, regardless of their situation during the grace period itself, or at the time at which they make their application for benefits.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 11;

2 IS (Gen) Regs, reg 21AA; JSA Regs, reg 85A; ESA Regs, reg 70; SPC Regs, reg 2; SFMFE (Gen) Regs, reg 7;

3 The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, reg 49; 4 The Citizens' Rights (Application Deadline and

Temporary Protection) (EU Exit) Regulations 2020, regs 3 & 4

Other savings – PSICs

- 35 These amendments¹ specify provisions of other legislation that continue to apply, where appropriate with modifications. This includes specified legislation² which specifies that individuals with a right to enter or remain in the UK by virtue of legislation such as the Imm (EEA) Regs 2016 do not require leave to enter or remain under the Immigration Act 1971. This enables individuals within the personal scope to continue to reside lawfully in the UK.

1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 12;

2 Immigration Act 1988, s 7

- 36 The other significant legislative provision saved for those within the personal scope of the Grace Period SI¹ is the exception for EEA nationals from the definition of "PSIC"².

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

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



- 37 A PSIC is not entitled to (amongst other benefits) IS, JSA(IB), ESA(IR) or SPC¹. The opening words within the definition of a PSIC² are that the definition relates to a person “who is not a national of an EEA state”. As the Immigration and Social Security Coordination Act 2020 is repealing the words “who is not a national of an EEA State”, thereby repealing the exception for EEA nationals which prevented them from becoming a PSIC, these amendments³ save these words, but only for those individuals within the personal scope⁴ of the SI.

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

“Immediately before IP completion day”

- 38 The phrase “immediately before IP completion day” is used within this Grace Period SI. “IP completion day” is defined as 11pm on 31.12.20¹. However, the phrase “immediately before IP completion day” is not defined, and so should be given its ordinary everyday meaning. This has the effect that anyone without EUSS leave and without any qualifying right to reside immediately before 11pm on 31.12.20, is in the UK unlawfully. Such persons will therefore not be within personal scope of the Grace Period SI, and will become out of scope of DMs being able to apply the Imm (EEA) Regs 2016 to those persons. This is so, even if that person has previously been in the UK lawfully under EU law. Effectively, it is their status “immediately” before IP completion day that should be taken into account.

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

- 39 This means that those currently eligible for EUSS leave and present in the UK before 11pm on 31.12.20, but without EUSS leave and not exercising a qualifying right to reside immediately before 11pm on 31.12.20, would not be covered by the savings during the grace period and therefore would be in the UK unlawfully. Consequently, they would be ineligible for IS, JSA, ESA, SPC or a social fund funeral payment, regardless of whether they are exercising a right to reside under the Imm (EEA) Regs 2016, at the point of making their claim for benefits. The DM will therefore need to determine whether the claimant was exercising a qualifying right to reside immediately before 11pm on 31.12.20, as well as determining their right to reside status at the date of their claim.
- 40 The same result (in paragraph 39 above) applies to those who have made an EUSS application, but for whom that application is pending¹. If they are not exercising an EEA right to reside immediately before 11pm on 31.12.20, they would be unable to access benefits even if they are exercising one on the date they make their claim for benefits. This is regardless of any Home Office delay in processing their application, or if the application is being appealed because of a mistake made by Home Office.

Once indefinite leave to remain (settled status) or limited leave to remain (pre-settled status) is obtained, that status is not retroactive. This means that claims for benefits cannot be back-dated and paid during the time the person did not have EUSS leave.

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

- 41 Whether an individual becomes a Person Subject to Immigration Control¹ ("PSIC") is key for those persons falling out of the scope of the Grace Period SI. Once free movement has been repealed at 11pm on 31.12.20, anyone without EUSS leave is a PSIC, unless they are in scope of the Grace Period SI saving of the words "who is not a national of an EEA State". This means that anyone not within the personal scope² of the SI (i.e. anyone not exercising a qualifying right to reside immediately before 11pm on 31.12.20) becomes a PSIC at 11pm on 31.12.20.

Note: Where there is uncertainty as to whether the claimant falls within scope of the Withdrawal Agreement and/or the Grace Period SI, those cases should be submitted to DMA Leeds as part of our new escalation process. A revised template for submitting such cases can be found [here](#).

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

Evidencing status

- 42 Where a question arises as to whether the Imm (EEA) Regs 2016 continue to apply to a person, it is for that person to show that they do. In effect, the evidentiary burden is on the person making the benefit claim to show they are within the scope of the Grace Period SI¹. However, where the claimant cannot provide documentary evidence, DMs should be mindful of utilising additional records² available to them, and taking a pragmatic approach in cases where for example, domestic violence is an issue (DMG 073446), so the claimant cannot provide anything other than oral evidence to demonstrate their residency status. It must be remembered that a claimant's oral statement is evidence (DMG 01400), and where that oral evidence is the only evidence available, the DM must decide on the balance of probability (DMG 01343) whether the claimant has discharged the burden of proof (DMG 01405 et seq).

*1 The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 13;
2 Department for Social Development v Kerr [2004] UKHL 23*



ANNOTATIONS

Please annotate the number of this memo (26/20) against DMG paragraphs:

072862; 072864; 072900 (Heading); 073084; 073086; 073090; 073092; 073254;
073259; 073261; 073293; 073466; 073490 (Heading)

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E19, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 04/19](#) - Obtaining legal advice and guidance on the Law.

DMA Leeds: December 2020

The content of the examples in this document (including use of imagery) is for illustrative purposes only

APPENDIX 1

**The Imm (EEA) Regs 2016 provisions that continue to apply during
the Grace Period**

Imm (EEA) Regs 2016	SI reg no	Modified	Memo para number(s)
Reg 2 General Interpretation	Reg 5(a)(i) – (iv)	Yes	16 - 18
Reg 3 Continuity of residence	Reg 5(b)	No	19
Reg 4 Worker, Self- employed person etc	Reg 5(c)	Yes	20
Reg 5 Worker or self- employed person who has ceased activity	Reg 5(d)	No	21
Reg 6 Qualified person	Reg 5(e)(i) – (iii)	Yes	22 - 24
Reg 7 Family Member	Reg 5(f)	No	25



Reg 8 Extended Family Member	Reg 5(g)	Yes	26
Reg 9 Family members and extended family members of British citizens	Reg 5(h)(i) – (iii)	Yes	27 – 29
Reg 9A Dual nationals	Reg 5(i)	No	30
Reg 10 Family member who has retained the right of residence	Reg 5(j)	Yes	31
Regs 11 – 15 Residence rights	Reg 6(a) – (e)	Yes	Not covered within DMG guidance
Regs 16	Reg 6(f)(i) – (ii)	Yes	32
Reg 21 - 30	Reg 6(g) & (h) Reg7(1) &(2) Reg 8(a) & (b)	Yes	Not covered within DMG guidance
Reg 31	Reg 8(c)	No	



Reg 32	Reg 8(d)	Yes	Not covered within DMG guidance
Reg 33	Reg 8(e)	No	
Reg 34	Reg 8(f)(i) – (ii)	Yes	Not covered within DMG guidance
Regs 35 – 42	Reg 9(a) – (h)	No	
Sch. 2	Reg 9(i)	Yes	Not covered within DMG guidance
Reg 43 Sch. 3 Effect on other legislation	Reg 10(a) Reg 10(c)	No yes	33
Reg 45	Reg 10(b)	Yes (in so far as it relates to Sch. 4, Part 1)	Not covered within DMG guidance
Sch. 4, Part 2	Reg 10(d)	No	
Sch. 6	Reg 10(e)	Yes	Not covered within DMG guidance
Sch. 7	Reg 10(f)	No	Not covered within DMG guidance