

# **Ways in which people can be lawfully resident in the UK**

## **This guidance is being revised**

Following a recent judgment of the Court of Justice of the European Union, the section headed 'Sufficiency of resource and comprehensive sickness insurance' is no longer up to date in respect of meeting the comprehensive sickness insurance requirement.

The page is in the process of being updated to reflect the judgment.



Department  
of Health &  
Social Care

# Guidance on implementing overseas visitor charging regulations

## Ways in which people can be lawfully resident in the UK

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# Ways in which people can be lawfully resident in the UK

## Overview

1. NHS foundation trusts, NHS trusts, local authorities exercising public health functions or any other person providing 'relevant services', including private providers and those from the voluntary, charitable and social enterprise sector (known as 'relevant bodies'), are required to identify, make and recover costs from overseas visitors where no exemption from charges apply. Commissioners are not required to use NHS funds to pay for overseas visitors that are not eligible to access relevant services for free.
2. 'Relevant services' are those provided or arranged under the 2006 NHS Act except for:
  - primary medical services provided under part 4 of that Act;
  - primary dental services provided under part 5 of that Act;
  - primary ophthalmic services provided part 6 of that Act; and
  - equivalent services provided under that Act.
3. Entitlement to relevant services without charge is principally based on being 'ordinarily resident' in the UK. An overseas visitor is any person who is not ordinarily resident in the UK. A person will only be ordinarily resident in the UK when that residence is lawful, adopted voluntarily, and for a settled<sup>1</sup> purpose as part of the regular order of their life for the time being, whether of short or long duration. A person who is considered ordinarily resident<sup>2</sup> in the UK must not be charged for relevant services.
4. Persons subject to immigration control must have indefinite leave to enter or remain in the UK in order to be considered ordinarily resident. For EEA/Swiss citizens and their family members this might be known as settled status.
5. However, EEA/Swiss citizens and their family members who do not have indefinite leave to enter or remain are capable of being considered ordinarily resident if:

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<sup>1</sup> The word 'settled' in the ordinary residence definition does not have the same meaning as for the purposes of UK immigration law.

<sup>2</sup> Section 39 of the Immigration Act 2014 sets out who is considered not to be ordinarily resident in Great Britain for the purposes of NHS charging provisions.

- a. They have been granted limited leave to enter or remain (pre-settled status) under the EU Settlement Scheme<sup>3</sup>; or
  - b. They are lawfully resident here for the time being, during the Withdrawal Agreement grace period (1 January 2021 - 30 June 2021), having been lawfully resident in the UK by the end of the transition period (31 December 2020).
6. Some relevant services are exempt from charge so they are free to all overseas visitors. These include diagnostic tests and investigations for certain diseases, and if positive, treatment for those diseases, and accident and emergency services. However, this does not include emergency treatment provided after admission to a hospital. Whilst primary care services, such as A&E, are free to all, secondary care services provided upon admission as an inpatient or at a subsequent outpatient appointment are chargeable.
7. Decisions on ordinary residence are a matter for the relevant body. For guidance on establishing whether someone is lawfully resident in the UK, please see [Confirming lawful residence](#).
8. This document sets out some of the ways in which a person can lawfully reside in the UK.

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<sup>3</sup> Where an application for status under the EU Settlement Scheme (Appendix EU to the Immigration Rules) has been made but not determined, that person may not be chargeable for relevant services after the grace period (ending on 30 June 2021) whilst their application is under consideration, however they would not be considered ordinarily resident until such point that their application is granted.

# Ordinary Residence

## British citizens and their family members

9. "British citizens" have an automatic right of abode in the UK. A British citizen who has been living abroad, or who is migrating to the UK for the first time, can therefore pass the ordinary residence test upon taking up settled residence in the UK. British citizens who are no longer living and settled in the UK cannot be said to be ordinarily resident in the UK.

## Family members of British citizens or settled persons

10. A non-UK national may seek to enter or remain in the UK on the basis of their family life with a person who has lawful residence in the UK.
11. Being "settled" in the UK is defined in an immigration context and means a person who has indefinite leave to enter or remain, meaning they are free from any restriction on the period for which they remain in the UK, or is an Irish national in the UK who is treated as a settled person by virtue of the Ireland Act 1949.
12. Some family members of British Citizens may be able to apply to the EU Settlement Scheme in their own right, please see the below sections for details.
13. A spouse, civil partner or unmarried partner (who has been in a relationship akin to marriage or civil partnership for a minimum of two years) of a person who is a British citizen or settled in the UK who applies to come to live with that person in the UK, will normally be granted a period of leave to enter for up to 33 months and must apply for leave to remain no more than 28 days before their leave to enter expires.
14. Leave to remain in the UK is normally granted for a period of no more than 30 months. Children are normally granted leave in line with the parent entering the UK. Other relatives are a separate immigration category - Adult Dependent Relatives (ADRs). ADRs who apply as the dependent of a settled person can be granted indefinite leave to enter. Therefore, they are not subject to the surcharge.
15. From 6 April 2015, unless an exemption or waiver applies, the applicant for leave to enter or remain in the UK for 6 months or more must pay the immigration health surcharge ("surcharge") to cover this period of time. The applicant will then be entitled to free NHS hospital treatment whilst their visa remains valid (with the exception of assisted conception services). Those who apply for ILR are not required to pay the surcharge. If granted ILR the applicant would be able to pass the ordinary residence test. Those granted leave to enter or remain in this way prior to 6 April 2015, but

without ILR, are likely to be exempt from charge under transitional arrangements (see Chapter 5 of Guidance on implementing the overseas visitor charging regulations, "the main guidance"). This will cover both those already living here and a small number of people arriving after 6 April 2015 who applied for leave to enter or remain here before this date.

16. Family members of those applicants may also be eligible to apply for ILR (settlement) after they have completed a minimum of 60 months with leave to enter or remain on the basis of family life.
17. A non-UK national can also be given leave to enter the UK by the Home Office to marry or become the civil partner of a British citizen or settled person. They usually have a visa for 6 months during which time they must marry/register the civil partnership. They will be directly chargeable during this period unless an exemption applies. After they have married or formed a civil partnership they can apply for leave to remain as a partner and at that point would be subject to the surcharge. The Home Office will usually grant that spouse/civil partner leave to remain for 30 months, followed by a further 30 months during which time they would be entitled to free NHS treatment in the same way as a resident whilst their visa is valid, and they can apply for ILR after 60 months<sup>4</sup>. Those granted leave to enter or remain as a partner in this way prior to 6 April 2015, but without ILR, will be exempt from charge under transitional arrangements (see Chapter 5 of main guidance).
18. Some visas allow a person entry to the UK to marry or become a person's civil partner, but they do not allow that person to live here. This will usually be marked as a visit visa and they must leave the UK by the end date of that visa. Such persons are therefore chargeable, unless an exemption applies (e.g. they are covered by a reciprocal healthcare agreement between the UK and their country of residence).

## **Non-EEA citizens protected by the UK's withdrawal from the EU**

19. In some circumstances, non-EEA family members of British citizens may have rights under the EU Withdrawal Agreement, the EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement (see derivative rights of residence sections below), where that family member has applied to the EU Settlement Scheme by 30 June 2021. These are known as 'Lounes' cases after the leading judgment of the Court of Justice of the European Union (CJEU). There are other, limited circumstances in which family

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<sup>4</sup> Those who applied to marry/take part on a civil partnership and then settle permanently with their UK-resident family member before 9 July 2012 will be covered by transitional arrangements. Such persons were, after marrying/registering their civil partnership, usually granted entry clearance for two years (with a spouse/civil partner visa) after which they could apply for ILR.

members of British citizens can apply to the EU Settlement Scheme, but they are not protected by the Withdrawal Agreements.

20. Where a person does not have status granted to them by the EU Settlement Scheme, or where they do not have rights granted to them by the Withdrawal Agreement whilst their application is considered, then they will be subject to the same requirements as non-EEA national family members, as outlined above.

## Family members of the people of Northern Ireland

21. The UK Government's commitments in the New Decade, New Approach agreement for the restoration of devolved government in Northern Ireland, January 2020, set out that family members of the people of Northern Ireland would be able to apply for UK immigration status on broadly the same terms as family members of Irish citizens.
22. This was delivered by Immigration Rules changes made on 24 August 2020. Since that date, eligible family members<sup>5</sup> (including EEA<sup>6</sup>, Swiss and non-EEA citizens) of relevant people of Northern Ireland<sup>7</sup> who are British citizens, Irish citizens or dual British and Irish citizens have been able to apply for status under the EUSS in the same way as eligible family members of EEA or Swiss citizens.
23. Overseas Visitor Managers (OVMs) therefore need to be aware that they may come across EEA, Swiss or non-EEA citizens with legitimate pre-settled or settled status based on their relationship with a relevant person of Northern Ireland. A person in this group will no longer have to pay the surcharge.
24. As this group is exempt from paying the surcharge, the Charging Regulations have been amended to provide a specific exemption to eligible family members of the people of Northern Ireland, to ensure they are not chargeable. To be exempt, an eligible family member must have been granted pre-settled or settled status under the EU Settlement Scheme as the family member of a relevant person of Northern Ireland or as a person who has retained a right of residence by virtue of a relationship with a relevant person of Northern Ireland (unless they fall into one of the other exemption categories) and be ordinarily resident in the UK. An eligible family member will not be required to have indefinite leave to remain (settled status) for the purpose of the

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<sup>5</sup> An eligible family member of a relevant person of Northern Ireland is the same as a relevant family member of an EEA citizen as defined in Appendix EU to the Immigration Rules. The Home Office will only grant pre-settled or settled status to someone who it is satisfied is an eligible family member.

<sup>6</sup> For the purpose of this guidance, EEA means European Union countries, Iceland, Lichtenstein and Norway.

<sup>7</sup> The definition of the People of Northern Ireland can be found in the statement of changes to the Immigration Rules, laid before Parliament on 14 May 2020. The Home Office will only grant pre-settled or settled status to the eligible family member of a relevant person of Northern Ireland if it is satisfied that the relevant person meets this definition.

ordinary residence test, however they must hold pre-settled status, if they do not. OVMs will therefore only need to consider the 'properly settled' criterion of the test. Further information of what it means to be 'properly settled' in the UK for the time being can be found in Chapter 3 of the main guidance.

25. To ensure parity with family members of people of Northern Ireland who are Irish citizens, OVMs will need to take similar account of the requirements applicable to family members of EEA citizens. A family member of a relevant person of Northern Ireland who is a British or dual British-Irish citizen must therefore:

- Have been granted pre-settled status, and be able to show that the person of Northern Ireland is in an equivalent position to an EEA or Swiss citizen who is exercising their Treaty rights before the end of the transition period - they must be the equivalent of a 'qualified person' or a person with a right of permanent residence under the Immigration (European Economic Area) Regulations 2016 even though those Regulations do not apply to them because they hold British citizenship; or
- Have been granted settled status under the EU Settlement Scheme.

## **EEA and Swiss citizens and their family members**

### **Living in the UK by the end of 2020**

26. The UK left the European Union (EU) on 31 January 2020 and the transition period ended on 31 December 2020. Through the transition period there were no changes to how EEA and Swiss citizens accessed healthcare in the UK.

27. The Withdrawal Agreement, EEA EFTA Separation Agreement and Swiss Citizens' Rights Agreement provide EEA/Swiss citizens who were living in the UK on or before 31 December 2020 with the right to continue to stay in the UK. It also provides family members of such citizens with the same right, provided the family relationship existed by 31 December 2020. EEA and Swiss citizens, and their family members must apply for UK immigration status through the EU Settlement Scheme (EUSS) on or before 30 June 2021, in order to remain lawfully resident in the UK. Where an EEA or Swiss citizen already has indefinite leave to remain, or they are an Irish citizen, they do not need to apply for EUSS, but they can do so if they wish.

Spouses and civil partners of Swiss citizens, where their relationship is formed after the 31 December 2020 will still be able join their partner in the UK until 31 December 2025 but must apply to the EUSS.

28. For guidance on the deadline to apply, please see Home Office guidance<sup>8</sup>.
29. Applicants to the EUSS will either be granted pre-settled (limited leave to enter or remain) or settled (indefinite leave to enter or remain) status.
30. Applicants for EUSS status before the end of the grace period (30 June 2021) must also demonstrate they were exercising those rights on or before 31 December 2020 and that those rights would continue to exist after that date in order to be able to access 'relevant services' without charge, providing they remain ordinarily resident in the UK.
31. Applicants for pre-settled or settled status after the grace period (ending on 30 June 2021), and who are eligible to apply for such leave, are able to access 'relevant services' without charge while their application is being considered by the Home Office. If leave is not granted, the person becomes chargeable for any 'relevant services' provided to them while their application was being processed. These persons are not considered to be ordinarily resident after the end of the grace period, but benefit from an exemption found in the Charging Regulations for late applications<sup>9</sup>.
32. Applicants granted settled status will be able to access 'relevant services' without charge, as long as they remain ordinarily resident in the UK.
33. OVMs should be aware, a person who has pre-settled status can be considered ordinarily resident, even though their permission to remain in the UK is time limited.

## **Students on a course that started before the end of the transition period**

34. Students from the EEA/Switzerland who were studying at an accredited Higher Education institute in the UK on or before 31 December 2020 can use their EHIC or PRC to cover medically necessary healthcare for the duration of their course. They must apply to the EU Settlement Scheme if their course extends beyond the 30 June 2021 and they wish to remain in the UK (unless they already have indefinite leave to remain).
35. Otherwise, they will need to make a successful application under the Student or Child Student route if they have continued on their course beyond 31 December 2020 and

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<sup>8</sup> Details can also be found in Annex 1 of Appendix EU of the Immigration Rules, under 'required date', [HC 813](#). [Note - these are a list of changes due to come in to effect as of 1 January 2021 and further guidance will be published]

do not otherwise have status in the UK that allows them to study (as a family member of a settled person, for example).

## Living in the UK after the end of the transition period

36. Where they are not the 'joining' family member of an EEA or Swiss citizen with EUSS status, EEA or Swiss citizens coming to live, work, or settle in the UK, on or after 1 January 2021 will be required to have an indefinite leave to remain in the UK in order to be considered ordinarily resident.
37. EEA or Swiss citizens coming to the UK who are intending to remain in the UK for longer than six months should have a valid visa, and have paid the surcharge, and therefore won't be chargeable for relevant services (except assisted conception services) in the same way as third country national surcharge payers.

## Students starting a course after the end of the transition period

38. An EEA or Swiss citizen aged 16 or 17 coming to study in the UK on or after 1 January 2021 will require entry clearance as a Student or as a Child Student<sup>10</sup>. Those aged 18 and over must apply under the Student route.
39. Students will also require permission to stay if they need to extend the period of time spent in the UK either to continue on their course or progress to a new one. EEA or Swiss citizens coming to the UK as students will be required to pay the surcharge<sup>11</sup>, and therefore they will not be chargeable for relevant services (except assisted conception services) in the same way as third country citizens who pay the surcharge. Students pay a reduced rate on the surcharge (£470 compared to £624).
40. An EEA or Swiss citizen under the age of 16, coming to the UK to study will require entry clearance as a Child Student in order to enter the UK, and will be required to pay the surcharge, also set at the reduced rate. Therefore, they will not be chargeable for relevant services (except assisted conception services).
41. Courses studied on the Student and Child Student routes must be delivered by a licenced student sponsor<sup>12</sup>.

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<sup>10</sup> Appendix Student, Appendix Child Student, and Appendix Short-term Student (English language) of the Immigration Rules set out further requirements for students coming to the UK from EEA/Swiss and third countries.

<sup>11</sup> Some students from EU countries may be eligible for a refund of their surcharge payment, from 2022. Further details will be made available in due course.

<sup>12</sup> A "course delivered by licenced student sponsor" is determined by the Home Office and remains subject to change.

42. An EEA or Swiss citizen aged 16 or older coming to study an English language course of up to 11 months with an accredited provider<sup>13</sup> can also apply under the Short-term Student (English language) route. They will be required to pay the surcharge at the reduced rate and therefore will not be chargeable for relevant services in the same way as third country citizens who pay the surcharge.

## Sufficiency of Resource and Comprehensive Sickness Insurance

43. An EEA or Swiss citizen and their family members, who were in the UK on or before 31 December 2020 where:

- they are not ordinarily resident in the UK;
- an exemption does not apply to them;
- they have not paid the surcharge when required to do so (and do not have an exemption or waiver from payment of the surcharge);
- is a student<sup>14</sup>; or
- is a self-sufficient person.

should have "sufficient resources" for themselves and their family members to prevent them becoming an unreasonable burden on the social assistance system of the UK.

44. Where that person must have "sufficient resources" for themselves and their family members, that person should also have "comprehensive sickness insurance" (CSI), and they should also hold CSI for their family members.

45. A person may be considered as having CSI if they have a comprehensive private health insurance policy.

46. A student who started their course before the end of the transition period (31 December 2020), who remains on that course and has pre-settled status, may require CSI to be considered to have "sufficient resources".

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<sup>13</sup> The definition of an accredited provider is set out in the Introduction of the Immigration Rules.

<sup>14</sup> For this purpose, "student" means where an exemption does not apply, does not have status under the EU Settlement Scheme or indefinite leave to remain (therefore cannot be considered to be ordinarily resident in the UK), or has not paid the surcharge.

## **Other residence rights which mean a person is lawfully resident in the UK**

47. Some Commonwealth citizens have an automatic right of abode in the UK the same as a British citizen and are free from immigration control. Therefore, if they are moving here to settle, they will likely pass the ordinary residence test.
48. Persons granted refugee status or humanitarian protection can reside lawfully in the UK. They are exempt from having to pay the surcharge. They are entitled to free NHS treatment under an exemption, and once they have indefinite leave to remain, they will be able to meet the ordinary residence test.
49. Other persons coming to temporarily reside in the UK under the immigration rules, such as those here for the purposes of refugee family reunion, elderly dependent relatives and other dependents coming for settlement, will either pay the surcharge or be exempt from that requirement, and for that reason will be entitled to free NHS hospital treatment whilst their visa, leave to remain or enter remains valid.

# Derivative Rights of Residence

50. A person residing in the UK on the basis of "Chen" or "Ibrahim and Teixeira" by 31 December 2020 is protected by the Withdrawal Agreements and must apply to the EUSS to secure their status.
51. A person residing in the UK on the basis of "Zambrano" by 31 December 2020 can also apply to the EU Settlement Scheme, although they are not protected by the Withdrawal Agreements. Where a person does not apply by 30 June 2021, they will become chargeable unless an exemption applies, or until such point as they have lawful residence, and can be deemed to be ordinarily resident in the UK, or they have paid the surcharge. Please see Home Office guidance for further information about those relying on Chen, Ibrahim and Teixeira or Zambrano.
52. The arrangements for those with "Surinder Singh" rights, who are also not protected by the Withdrawal Agreements, are treated differently, as follows:

Family members of UK citizens who have returned from the EEA or Switzerland by 31 December 2020 have until 30 June 2021 to apply to the EU Settlement Scheme.

Close family members of UK citizens returning from the EEA or Switzerland after 31 December 2020 will have until the 29 March 2022 to return to the UK and to apply to the EU Settlement Scheme (EUSS), where that relationship existed on 31 January 2020 and continues to do so.

After those dates, such family members returning to or coming to the UK will need to apply for immigration status under another category of the Immigration Rules, unless they are exempt from immigration control.

# Confirming lawful residence

53. The decision as to whether someone is ordinarily resident is for the relevant NHS body to make. This therefore means that relevant bodies will need to determine whether a person is “lawfully resident” as part of the test for ordinary residence.
54. The relevant NHS body must therefore confirm the identity of the individual, including their nationality, and review any immigration status documentation that may confirm their immigration status.
55. If an individual is not a British citizen and:
  - has evidence of indefinite leave to enter or remain, then you do not need to make any further checks as to lawful residence; or
  - has evidence of limited leave to enter or remain, then you need to consider whether that leave was granted:
    - under the EU Settlement Scheme, in which case you will need to confirm they are ordinarily resident in the UK; or
    - under another part of the Immigration Rules, or outside the Immigration Rules, in which case you will need to consider whether they are exempt from charging on any other basis; or
    - claims to be an EEA national who was resident in the UK by 31 December 2020 or a family member of such an EEA national but has not yet applied for or been granted immigration status under the EU Settlement Scheme, then you need to consider whether they have a right to reside under the saved Immigration (European Economic Area) Regulations 2016 which apply during the grace period, which ends on 30 June 2021.
56. You can use the digital status checker for any individual who claims to have been granted immigration status under the EU Settlement Scheme if they give you permission to do so.
57. Non-EEA citizens granted immigration status under the EU Settlement Scheme will also hold a biometric residence permit confirming either a right to reside under the EEA Regulations, or their status under the EU Settlement Scheme.
58. Where someone has not been granted status under EUSS before the end of the grace period (30 June 2021), you will need to consider whether a person has a right to reside under the EEA Regulations, you can refer to Home Office caseworker guidance at:

- [EEA and Swiss nationals: free movement rights](#)
  - [EEA nationals: qualified persons](#)
  - [Direct family members of EEA nationals](#)
  - [Extended family members of EEA nationals](#)
  - [Family members who have retained a right of residence](#)
  - [Free movement rights: family members of British citizens](#)
  - [Derivative rights of residence \('Chen', 'Ibrahim and Teixeira', and 'Zambrano'\)](#)
59. If, following this action, the relevant body believes the individual is subject to immigration control but is unable to confirm their immigration status, it is recommended to request a status check from the Home Office.
60. Where checks are submitted concerning individuals who hold valid documentation or a digital status to evidence their status, that is available to the relevant body to check or NHS systems indicate a positive status, the Home Office will reject such a request as not appropriate for processing in line with the Data Protection Act 2018. Relevant bodies must articulate a valid justification for checking the status of an individual who holds a valid token to evidence their status.
61. Relevant bodies can request a status check from the Home Office at:  
[ICESSVECWorkflow@homeoffice.gov.uk](mailto:ICESSVECWorkflow@homeoffice.gov.uk).