

## **RIGHT TO RESIDE – EUROPEAN UNION (WITHDRAWAL AGREEMENT) ACT 2020 – UC**

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## Introduction

- 1 This Memo provides guidance on the European Union (Withdrawal Agreement) Act 2020 (“the WAA 2020”), which implements the Withdrawal Agreement, as agreed between the UK and the European Union (EU). The WAA 2020 is required to implement the Withdrawal Agreement for it to have domestic legal effect and to enable the UK Government to ratify the Withdrawal Agreement. This Act<sup>1</sup> also gives effect to the EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein, and the Swiss Citizens’ Rights Agreement between the UK and Switzerland.

*1. WAA 2020, s.6*

- 2 The WAA 2020 provides for the direct application of the Withdrawal Agreement provisions in domestic law (where relevant) and amends the EU (Withdrawal) Act 2018 (“the EUWA 2018”) to ensure it reflects the terms of the Withdrawal Agreement. The WAA 2020 also amends the EUWA 2018 so that certain EUWA 2018 provisions will take effect at the end of the transition period, instead of on exit day, such as the creation of the new body of retained EU law. The WAA 2020 also creates powers to make secondary legislation, where appropriate, to enable the Withdrawal Agreement to be implemented domestically. It includes amendments to the Northern Ireland Act 1998 in relation to rights, safeguards and equality of opportunity protections contained in the Belfast (Good Friday) Agreement 1998.

## The European Union (Withdrawal) Act 2018 - Retained EU law

- 3 The EUWA 2018 introduces a new body of domestic law, called “retained EU law”. This only takes effect after the end of the transition period. On exit day, the EUWA



2018 repealed the European Communities Act 1972 (“the ECA 1972”) and the WAA 2020 added new sections that save and modify the ECA 1972 and the UK legislation that implemented EU requirements, and gives effect to the Withdrawal Agreement terms on transition.

- 4 The ECA 1972 was the main legislation which gave effect to EU law in the UK and was the legislation which made EU law supreme over UK law. The amended EUWA 2018<sup>1</sup> repealed the ECA on the day the UK left the EU, and provided that existing domestic legislation which implements EU law obligations (“EU-derived domestic legislation”) remains on the domestic statute book after the UK leaves the EU. EU-derived domestic legislation remains in place and continues to have effect on and after exit day, as it had effect before exit day<sup>2</sup>. The WAA 2020 preserves existing UK law that implements EU law, to ensure continuity of law until Parliament changes it.

*1. EUWA 2018, s.1A; 2. s.2(1)*

- 5 This means that the rules on a person’s right to reside will continue to have effect in the UK, until free movement is repealed. This is scheduled to happen on 31.12.20 at 11:00 p.m. The amended EUWA 2018 also creates temporary powers to make secondary legislation to enable corrections and consequential modifications to be made to laws that would otherwise no longer operate correctly once the UK has left the EU. The WAA 2020 and the amended EUWA 2018 also provide for the implementation, into UK law, of specific provisions of the Withdrawal Agreement where additional detail or clarification is required, and include a range of powers that leave much of this detail to Statutory Instruments.

- 6 The WAA 2020 sets out how retained EU law is to be read and interpreted on and after exit day, and sets out the relationship between the CJEU and domestic courts and tribunals after exit.

- 7 Retained EU law falls into three main categories

1. EU-derived domestic legislation<sup>1</sup> (e.g. any domestic legislation that is related to the EU or EEA) **and**
2. direct EU legislation<sup>2</sup> (e.g. EU Treaties, EU Regulations, EU Decisions & EU tertiary legislation) **and**
3. indirect EU legislation (EU Directives).

*1 EUWA 2018, s.2(2); 2 s.3(2)*



## Implementation Period / transition period

- 8 The UK and the EU have agreed that the UK's exit will be followed by a time-limited implementation period, which will last until 11.00 p.m. on 31.12.20. During the Implementation period, common rules will remain in place, with EU law continuing to apply to the UK in the same way it did prior to the UK's departure as agreed in the Withdrawal Agreement.

**Note:** The implementation period is also referred to as the "transition period", and for consistency throughout this document, "transition period" has been used.

- 9 Therefore, new pieces of directly applicable EU law that are introduced during the transition period will continue to apply automatically within the UK<sup>1</sup>, in line with Part 4 of the Withdrawal Agreement. Other new EU measures introduced will need to continue to be implemented domestically to comply with Part 4 of the Withdrawal Agreement.

*1. EUWAA 2020, s.5*

## Interaction with the EUWA 2018 and secondary legislation

- 10 In line with paragraphs 3 to 9 above, EU rules and regulations will continue to apply in the UK during the transition period. The WAA 2020 amends the EUWA 2018 so that the conversion of EU law into 'retained EU law' and precedence of the Court of Justice of the European Union (CJEU) can occur at the end of the transition period rather than on 'exit day'. The WAA 2020<sup>1</sup> defines this point in time as "IP completion day". The Withdrawal Agreement<sup>2</sup> requires provisions referring to EU law concepts or provisions, to be implemented and applied in conformity, with relevant CJEU case law handed down before the end of the transition period. The WAA 2020 provides for how the UK courts should interpret EU case law and when they would not be bound by CJEU case law.

*1. WAA 2020, S.39; 2. Withdrawal Agreement, Art.4(4)*

- 11 The WAA 2020 also includes a power to allow Ministers, following consultation with the judiciary, to change how the EUWA 2018 provides for courts to interpret saved historic CJEU case law after the transition period. Regulations may enable the judiciary to decide whether to depart from any retained EU case law.
- 12 The WAA 2020 also amends the deficiency- correcting powers in the EUWA 2018 to allow correction of deficiencies arising both from the UK leaving the EU and the end of the transition period. Deficiencies could arise where:



1. the law does not function appropriately or sensibly because of the UK's exit from the EU and the end of the transition period, for example, where a piece of legislation references an obligation 'under EU law', which no longer applies at the end of the transition period **or**
  2. reciprocal arrangements which, as a result of Part 4 of the Withdrawal Agreement, no longer apply to the UK at the end of the transition period. For instance, during the transition period, the UK will need to continue to report to the European Commission on many issues. On 'IP completion day', the reference to the European Commission could be removed or replaced with reference to a domestic UK body or replacement UK domestic regime.
- 13 Direct jurisdiction of the CJEU in the UK will come to an end with the transition period. During the transition period, the UK and the EU have agreed that the existing EU mechanisms for supervision and enforcement will continue to apply in the UK. This will ensure that EU rules are interpreted and applied consistently in both the UK and the EU for the duration of the transition period<sup>1</sup>. The WAA 2020 amends the EUWA 2018 to add provisions which end the jurisdiction of the CJEU in the UK and will take effect at the end of the transition period. However, where a case commences within 8 years from the end of the transition period, before a UK court or tribunal, and question arises concerning the interpretation of Part Two (Citizens' Rights) of the Withdrawal Agreement, and that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the CJEU to give a preliminary ruling on that question<sup>2</sup>.

*1. Withdrawal Agreement, Art.86; 2. Art. 158(1)*

## **Rights related to residence, application deadline and temporary protection**

- 14 The WAA 2020<sup>1</sup> provides a power to make regulations, which enables the UK to require individuals within scope of the Withdrawal Agreement or within scope of residence scheme immigration rules to apply for a UK immigration status (i.e. leave to enter or remain in the UK) conferring their residence rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement, and the Swiss Citizens' Rights Agreement ("the Agreements"), by a specified deadline. It also enables regulations to be made that ensure that those individuals within the scope of the Withdrawal Agreement continue to enjoy the residence rights in the UK pending conferral of their new immigration status. The UK is giving effect to its commitments in the Agreements regarding residence status for EU citizens, EEA EFTA and Swiss nationals and their family members through the EU Settlement Scheme (EUSS), which was established under Immigration Rules made under section 3(2) of the Immigration Act 1971.

- 15 Free movement rights for EU citizens are set out in the EU Treaties and the Citizenship Directive 2004/38/EC and implemented domestically through the Immigration Act 1988 and the Imm (EEA) Regulations 2016. By ending free movement, EU citizens, EEA EFTA nationals, and Swiss nationals will become subject to immigration control. Free movement will end on 31.12.20. There will then be a Grace Period (see paragraph 17 below) and those who were exercising treaty rights before the end of the transition period will have until 30.6.21 to apply for status<sup>1</sup>.

**Note:** Other cohorts who are not covered by the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement may make an application to the EUSS e.g. Irish citizens enjoy a right to reside in the UK that is not reliant on the UK's membership of the EU. This means that Irish nationals do not need to apply for status under the EUSS. However, Irish nationals may make an application under the EUSS if they wish to do so.

*1. Withdrawal Agreement, Art.18*

## **EU Settlement Scheme**

- 16 In addition to the WAA 2020, the Immigration Rules (made under the Immigration Act 1971) deliver the EU Settlement Scheme ("the EUSS"). The WAA 2020 makes reference to 'Residence Scheme Immigration Rules' which provide for all EU citizens, EEA EFTA and Swiss nationals, and their family members, resident in the UK to be eligible to apply for leave under the EUSS. This includes citizens who do not have a right to reside under the Free Movement Directive at the end of the transition period, or who currently derive an EU right of residence by virtue of their relationship to a UK national, and therefore fall outside the scope of the Withdrawal Agreement.

### **Grace Period**

- 17 The grace period runs from 1.1.21 to 30.6.21. Eligible EU citizens will have until 30.6.21 to submit their application for EUSS leave. EU citizens will be able to rely on their rights under the Withdrawal Agreement, if their application is submitted **before** the end of the grace period and until their application is decided. If their application is refused, and an appeal is made, they will be able to rely on their rights under the Withdrawal Agreement until the appeal is withdrawn or is finally determined<sup>1</sup> (see note 2 below).

**Note 1:** Anyone who submits their EUSS application **after** the end of the grace period, becomes an unlawful resident in the UK until that application is decided.



**Note 2:** “Finally determined” includes an application being successful or exhausting any rights of appeal that the individual may have<sup>1</sup>.

**Note 3:** Separate guidance is being drafted in relation to the Grace Period.

*1. The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, reg 4(7)*

## **Citizens' Rights**

18 The WAA 2020 gives effect to the Withdrawal Agreement so that it applies directly in the UK, underpinning the rights contained within Part Two (Titles I, II and III) of the Withdrawal Agreement in domestic law and providing a means of redress where

1. these rights are not properly implemented **or**
2. where other legislation is inconsistent with the Withdrawal Agreement.

It also makes provision for the corresponding EEA EFTA Separation Agreement and Swiss Citizens' Rights Agreement. In addition, the WAA 2020 establishes an independent body to monitor the implementation and application of the citizens' rights part of the Withdrawal Agreement and the EEA EFTA Separation Agreement in the UK.

19 The WAA 2020<sup>1</sup> makes provision for Union citizens' rights by legislating for:

1. rights in relation to entry and residence, including:
  - 1.1 residence rights of family members,
  - 1.2 deadlines for applications and temporary protection<sup>2</sup>;
  - 1.3 rights of frontier workers<sup>3</sup>;
  - 1.4 restrictions on rights of entry and residence<sup>4</sup>, and retention of existing grounds for deportation<sup>5</sup>; and
  - 1.5 appeals<sup>6</sup>.
2. recognition of professional qualifications<sup>7</sup>;
3. co-ordination of social security systems<sup>8</sup>;
4. non-discrimination and equal treatment<sup>9</sup>; and
5. monitoring of citizens' rights through the establishment of an “independent monitoring authority” (the IMA)<sup>10</sup>

- 20 Once free movement has ended, beneficiaries of the citizen's rights who have not secured leave to enter or remain in the UK under the EUSS by the end of the grace period, would no longer have a lawful basis to reside in the UK (unless further provision is made).

### **Personal scope of the Withdrawal Agreement**

- 21 Persons falling within the personal scope of the withdrawal Agreement<sup>1</sup> include
1. EU citizens who exercised a right to reside in the UK before the end of the transition period and continue to reside in the UK<sup>2</sup> **or**
  2. UK nationals who exercised a right to reside in the EU before the end of the transition period, and who continue to reside there<sup>3</sup> **or**
  3. EU citizens who exercised a right as frontier workers in the UK before the end of the transition period and continue to do so thereafter<sup>4</sup> **or**
  4. UK nationals who exercised their right as frontier workers in the EU before the end of the transition period and continue to do so thereafter<sup>5</sup> **or**
  5. Family members of a 'right holder' (i.e. persons falling within **1.** to **4.** above), who are lawfully resident in the host State before the end of the transition period<sup>6</sup> **or**
  6. family members who are directly related to a right holder, including durable partners, living outside the host State before the end of the transition period, at the point they seek residence to join the right holder in the host State after the end of the transition period<sup>7</sup> **or**
- Note to point 6:** The relationship must have existed before the end of the transition period and still exist when the person seeks to join the right holder in the host State (Art. 1(e)(ii)). Parents of the right holder must be dependent on the right holder at the point they seek to join the right holder, but are not required to be dependent at the end of the transition period.
7. children born to, or legally adopted by, the right holder (see paragraph 37 "Future Children" below)<sup>8</sup>.
  8. Extended dependent family members of the household of those covered by paragraph **1.** or **2.** above, whose residence has been facilitated or applied for before the end of the transition period<sup>9</sup>.



*1. Withdrawal Agreement, Art.10; 2. Art. 10(1)(a); 3. Art. 10(1)(b); 4. Art. 10(1)(c); 5. Art. 10(1)(d); 6. Art. 10(1)(e)(i); 7. Art. 10(1)(e)(ii); 8. Art. 10(1)(e)(iii); 9. Art 10(2) – (4)*

- 22 Where rights of residence are exercised under free movement rules, EU citizens and qualifying British citizens who lawfully reside in the host State before the end of the transition period fall within the scope of the Withdrawal Agreement. This is irrespective of whether the right of residence is permanent; or of its duration.

**Note:** The Withdrawal Agreement sets out the substantive conditions that underpin the right of residence<sup>1</sup> in the host State for EU citizens, UK nationals and their respective family members, irrespective of their nationality. Further provision<sup>2</sup> is made that EU citizens and UK nationals who have such a right of residence can change their status and remain beneficiaries under the Withdrawal Agreement. For example, a person who was a worker before the end of the transition period, becomes a student after the end of the transition period still falls within scope of the Withdrawal Agreement. It is also possible to hold multiple statuses, for example a student who is simultaneously a worker.

*1. Withdrawal Agreement, Art.13(1); 2. Art. 17(1)*

### **Example**

An EEA national arrives in the UK 2 weeks before the end of the transition period. He is residing here and exercising Treaty<sup>1</sup> rights as a jobseeker. He falls within scope of the Withdrawal Agreement.

### **EU citizens**

- 23 EU citizens who have exercised their right to reside in the UK in accordance with EU law before the end of the transition period and continue to reside there thereafter<sup>1</sup> will be within scope of the Withdrawal Agreement.

*1. Withdrawal Agreement, Art.10(1)(a)*

- 24 They are eligible to apply to the EUSS (see paragraphs 16 - 17 above) to enable them to continue to reside in the UK. Their rights to claim benefits and access services in the UK will remain unchanged.

**Note:** Further information about the EUSS can be found at ADM Chapter C1870 – C1875.



## UK nationals

- 25 UK nationals who have exercised their right to reside in a Member State in accordance with EU law before the end of the transition period and continue to reside there thereafter<sup>1</sup> will be within scope of the Withdrawal Agreement.

*1. Withdrawal Agreement, Art.10(1)(b)*

## Frontier workers

- 26 'Frontier workers' means<sup>1</sup> EU citizens or UK nationals who pursue an economic activity as workers<sup>2</sup> or self-employed<sup>3</sup> persons in one or more States in which they do not reside (see ADM chapter C2). Union citizens<sup>4</sup> or UK nationals<sup>5</sup> who exercised their right as frontier workers, before the end of the transition period and continue to do so thereafter, fall within scope of the Withdrawal Agreement.

*1. Withdrawal Agreement, Art.9(b); 2. TFEU art.45; 3. Art.49;*

*4. Withdrawal Agreement Art.10(1)(c); 5. Art.10(1)(d)*

- 27 Frontier workers retain their worker<sup>1</sup> or self-employed<sup>2</sup> status, and fall within scope<sup>3</sup> of the Withdrawal Agreement, where they

1. are temporarily unable to work as a result of illness or accident **or**
2. are in duly recorded involuntary unemployment after being employed for more than a year and have registered as a jobseeker with the relevant employment office **or**
3. are in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year, or after having become involuntarily unemployed during the first 12 months and have registered as a jobseeker with the relevant employment office **or**
4. embark on vocational training.

*1. Withdrawal Agreement, Art.24(3); 2. Art.25(3); 3. Art.10(1) & Art.30*

- 28 The rights of frontier workers are protected from the end of the transition period, by retaining their right to enter and work in the country of their employment (including self-employment). This cohort will be issued with a specific immigration status that makes it clear that they are frontier workers. This will apply to EU citizens who are not living in the UK, but are currently working here.



- 29 Under the Common Travel Area (CTA) and the Reciprocal Agreement with the Irish Government, UK and Irish citizens will have the right to move freely and work across the Irish border, and so will not need to rely on these frontier worker rights.

**Note:** The CTA is a long-standing arrangement between the UK, the Crown Dependencies (Bailiwick of Jersey, Bailiwick of Guernsey and the Isle of Man) and the Republic of Ireland. The CTA established cooperation between respective immigration authorities enabling British and Irish citizens to move freely between, and live in, these islands. British and Irish citizens enjoy additional rights in Ireland and the UK. These include (amongst others) the right to work or study, as well as to access social welfare benefits and health services. Both the UK and Irish governments have committed to taking all necessary measures to ensure that the agreed CTA rights and privileges are protected.

### **Family members**

- 30 Under EU law<sup>1</sup>, family members of EU citizens do not generally enjoy an independent right to move and reside freely (unless they fall under the exception in paragraph 31 below). Under the Withdrawal Agreement, family members do not enjoy rights under the Withdrawal Agreement without these rights being derived from 'right holder'<sup>2</sup> i.e. a person who exercised their right to reside in a host State before the end of the transition period, and continues to reside there thereafter<sup>3</sup> (see paragraph 21 above)

*1. Directive 2004/38, Art. 2(2); 2. Withdrawal Agreement, Art.10(1)(a) – (d); 3. Art.10(1)(a)*

- 31 The exception<sup>1</sup> to paragraph 30, are family members who

1. resided in the host State independently at the end of the transition period **and**
2. had acquired an independent right to reside in the host Member State before the end of the transition period.

This is because their right of residence under EU law, at the end of the transition period, was no longer conditional on continuing to be a family member of an EU citizen who was currently exercising a Treaty right in the host Member State.

*1. Withdrawal Agreement, Art 10(1)(f)*

- 32 In line with Directive 2004/38, the Withdrawal Agreement distinguishes between 'core family members'<sup>1</sup> and 'extended family members'<sup>2</sup>. Core family members who have resided in the UK at the end of the transition period in their capacity as family members of an EU citizen who was exercising their rights as a qualified person in the UK, fall within the scope<sup>3</sup> of the Withdrawal Agreement.



*1. Withdrawal Agreement, Art.9(a); 2. Art.10(2) - (5); 3. Art.10(1)(e)(i)*

**Note 1:** A 'core family member' is spouse, civil partner, direct descendent under the age of 21 or a dependent direct relative in the ascending line<sup>1</sup>.

*1. Directive 2004/38, Art.2(2)*

**Note 2:** An 'extended family member' is a family member falling outwith Note 1 above, or a partner with whom the EU citizen has a durable relationship, duly attested<sup>1</sup>.

**Note 3:** For children born to, or adopted by the right holder after the end of the transition period, see paragraph 37 below.

*1. Directive 2004/38, Art.3(2)*

### **Core family members**

- 33 Core family members who have not moved to the UK before the end of the transition period, may join the right holder, at any point in time after the end of the transition period<sup>1</sup>.

*1. Withdrawal Agreement, Art.10(1)(e)(ii)*

### **Example**

A German national was habitually resident and working in the UK at the end of the transition period. They are in scope of Titles I, II & III of Part Two of the Withdrawal Agreement. Their family remains resident in Germany, residing there at the end of the transition period. As the family members have not joined the primary right holder in the UK by the end of the transition period, they are not in full scope of the Withdrawal Agreement, but do have derived rights as family members under Title II for certain social security coordination provisions. These rights would cease if the family link under the Withdrawal Agreement was broken e.g. following a divorce, or a child ceasing to be dependent.

If the family members subsequently moved to join the primary right holder in the UK e.g. in 2023, the family members would be brought within scope of Titles I & II and they would have full rights under Title III. They would then maintain these rights even if the family link was broken.

### **Extended family members**

- 34 Extended family members<sup>1</sup> who have resided in the UK by the end of the transition period by virtue of their relationship to an EU citizen exercising an EU right to reside in the UK fall within scope<sup>2</sup> of the Withdrawal Agreement. This presupposes that the



person was issued with a residence document by the HO which confirms their family status. Extended family members, who lodge an application to join their right holder in the UK before the end of the transition period, but whose application is outstanding at the end of the transition period, will be in scope of the Withdrawal Agreement<sup>3</sup>.

**Note:** As long as the Home Office have carried out an extensive examination of the personal circumstance of the applicant and their relationship with their EEA family member, that person will be in scope of the Withdrawal Agreement even if they are not yet resident in the UK before the end of the transition period.

*1. Directive 2004/38, Art.3(2)(a) – (b); Withdrawal Agreement, Art 9(a)(ii); 2. 10(2); 3. Art.10(3)*

### **Durable partners**

- 35 Partners in a durable relationship<sup>1</sup> of the right holder, but who resided outside the UK at the end of the transition period fall within scope<sup>2</sup> of the Withdrawal Agreement.

*1. Directive 2004/38, Art.3(2)(b); 2. Withdrawal Agreement, Art.10(4)*

- 36 Persons within paragraph 35 include all long-term durable partnerships, both opposite-sex and same-sex relationships. The requirement of the durability of the relationship must be assessed (in light of the objective of the Directive<sup>1</sup>) to maintain the unity of the family in a broad sense. Such persons would need to be in a durable relationship at the end of the transition period and still be in that durable relationship at the time they seek residence in the UK under the Withdrawal Agreement. This provision also includes those persons who were in a durable relationship at the end of the transition period, and are since married to the right holder at the time they seek residence in the UK. They are in scope if they have submitted their application to the Home Office before the end of the transition period (and it is successful). They should also be allowed into the UK if the relationship was durable before the end of the transition period and at the time they seek entry to the UK.

*1. Directive 2004/38, Recital 6 & Art. 3(2)(b)*

### **Future Children**

- 37 Persons who are born to, or adopted by, the right holder after the end of the transition period fall within scope of the Withdrawal Agreement. When seeking to join the right holder in the UK, children will have to satisfy one of the conditions<sup>1</sup> that

1. both parents are covered by the Withdrawal Agreement **or**
2. one parent is covered by the Withdrawal Agreement and the other is a national of the host State **or**



3. one parent is covered by the Withdrawal Agreement and has sole or joint rights of custody of the child. (Art. 1(e)(iii)). This covers children born or legally adopted before and after the end of the transition period.

*1. Withdrawal Agreement, Art.10(1)(e)(iii)*

### Example 1

A Spanish national lives and works in the UK before the end of the transition period. A child of the Spanish national is born in 2022 while the Spanish national continues to reside in the UK. The child is within scope of the Withdrawal Agreement<sup>1</sup>.

*1. Withdrawal Agreement, Art.10(1)(e)(iii)*

### Example 2

A Portuguese citizen resides and works in the UK before the end of the transition period. Her minor children remained in Portugal, so had derived rights<sup>1</sup> as family members. After the end of the transition period, her children join her in the UK, bringing them within full scope<sup>2</sup> of the Withdrawal Agreement.

**Note:** Once the children cease to be dependents on their parent, they would continue to be within scope of the Withdrawal Agreement as long as they maintain residency in the UK. This is because, for family members who are dependents of EU citizens or UK nationals before the end of the transition period, the rights provided for within Title II of Part Two of the Withdrawal Agreement shall be maintained even after they cease to be dependents<sup>3</sup>.

*1. Withdrawal Agreement, Art.30; 2. Art.10; 3. Art.17(2)*

### Third country family members accompanying EU citizens

- 38 Family members<sup>1</sup> of a right holder<sup>2</sup> who are lawfully residing in the host State at the end of the transition period and who continue to reside there, fall within the scope<sup>3</sup> of the Withdrawal Agreement. This includes *Chen*<sup>4</sup> carers. The CJEU in the case of *Chen*<sup>4</sup> ruled that a third country national parent has a right of residence in the host Member State in order to underpin the right of residence of a self-sufficient EU citizen minor child, for as long as that child is dependent; and where not to do so, would result in depriving that EU national child their right of residence.

*1. Withdrawal Agreement, Art.9(a)(ii); 2. Art.10(1)(a) – (d); 3. Art.10(1)(e)(i); 4. Chen (Case C-200/02)*

- 39 The Withdrawal Agreement<sup>1</sup> goes beyond reference to primary carers used by the CJEU in *Chen*, and is drafted in a more open manner, to also allow persons other than primary carers, for example, minor siblings who also share the primary carer(s) with



the minor EU citizen. Furthermore, where a person's residence status under the Withdrawal Agreement is solely derived from being the family member of a right holder<sup>2</sup>, the Withdrawal Agreement<sup>3</sup> expressly prevents them from becoming a right holder. This prevents them from being joined by their own family members.

*1. Withdrawal Agreement, Art.9(a)(ii); 2. Art.10(1)(a) – (d); 3. Art.17(1)*

- 40 During the transition period, EU citizens who move to the UK may be accompanied by their non-EU citizen family members. This includes direct family members (see ADM C1736), and extended family members (see ADM C1737), as now. If the EU national is exercising treaty rights on 31.12.20 then the family member can stay beyond that date.

#### **Dual nationals – EU citizens**

- 41 As EU citizens, dual EU/EU nationals (e.g. French & German nationality) or EU/non-EU nationals (e.g. French & Chinese nationality) who

1. are residing in the UK at the end of the transition period **and**
2. have exercised their right to free movement

are covered by the personal scope of the Withdrawal Agreement.

#### **Dual nationals – UK nationals**

- 42 Dual EU/UK nationals (whether by birth or naturalisation) are covered by the Withdrawal Agreement if, by the end of the transition period, they have exercised free movement rights of residence prior to their naturalisation in either

1. the host Member State of whose nationality they have acquired **or**
2. in a Member State other than that of which the person holds nationality.

**Note 1:** If a dual national exercises their treaty rights in a host State, then as long as they continue living in that host State they are covered by the scope of the Withdrawal Agreement. However, upon their return to their country of nationality, they no longer fall within scope of the Withdrawal Agreement e.g. Surinder Singh cases.

**Note 2:** In line with *Lounes* (Case C-165/16), Dual EU/UK nationals who acquire nationality of the host Member State even after the end of the transition period are covered by the personal scope of the Withdrawal Agreement.



### Example

A UK/French national (who held both nationalities from birth) was born in the UK. They move to Sweden as a self-employed worker before the end of the transition period. They fall within scope of the Withdrawal Agreement.

### Dual nationals – outside the scope of the Withdrawal Agreement

- 43 Dual EU/UK nationals who have never exercised their free movement rights (as in the Case C-434/09 *McCarthy*) are not covered by the Withdrawal Agreement.

### Example

A UK/Spanish national was born in Spain (who held Spanish and UK citizenship from birth). They only resided in Spain before the end of the transition period. They would not fall within scope of the Withdrawal Agreement.

### Continuity of residence

- 44 Persons, who are temporarily absent from the UK at the moment of the end of the transition period, are still considered as lawful residents and their right of residence is consequently protected<sup>1</sup> by the Withdrawal Agreement. This is due to the Withdrawal Agreement referring to 'right of residence' in the host State and not to 'presence' in the host State. Accordingly, this means that a person who already has a permanent right of residence will only lose it, if absent for more than five years<sup>2</sup>. Those who do not yet have permanent residence status can only be absent for a maximum of 6 months a year<sup>3</sup> without losing their ability to acquire permanent residence.

**Note:** In exceptional circumstances, a person may have a single absence from the UK/host State for a maximum of 12 consecutive months for an important reason<sup>4</sup> without interrupting continuity of residence. Such reasons may include for example, pregnancy and childbirth, serious illness, study or vocational training.

*1. Withdrawal Agreement, Art.11; 2. Art.11(second para) & 15(3); 3. Art.11(first para) & 15(2); 4. Directive 2004/38, Art.16(3)*

### Example 1

EEA national acquires the right of permanent residence in the UK and leaves the UK four years before the end of the transition period. That EEA national should be considered as 'exercising their right of residence in accordance with the Withdrawal Agreement (even if they do no longer have the right of permanent residence under Directive 2004/38) at the end of the transition period because they have not been



absent for a period exceeding five consecutive years. They are eligible for the new permanent residence status in the UK, provided they apply within the set<sup>1</sup> deadline.

*1. Withdrawal Agreement, Art.18(1)(b)*

### **Example 2**

EEA national has been living in the UK for four years. He leaves the UK before the end of the transition period on 20.11.20. He returns to the UK after the end of the transition period, on 12.4.21. As the absence is less than the maximum of 6 months in a year, this absence does not affect his continuity of residence<sup>1</sup> towards his accrual of 5 continuous years for the purposes of acquisition of a right of permanent residence<sup>2</sup>.

*1. Withdrawal Agreement, Art.11; 2. Art 15(2)*

### **Example 3**

EEA national has been living in the UK for 18 months as a qualified person. She finds she is 3 months pregnant and decides to return to her family in Estonia until after the birth of her child. She leaves the UK on 6.12.20, before the end of the transition period. She returns to the UK, following the birth of her child, on 1.9.21. As her absence was for an important reason due to pregnancy, and was less than the maximum of 12 consecutive months, the absence does not break the continuity of residence<sup>1</sup>.

*1. Withdrawal Agreement, Art.11; Art 15(2)*

### **Accumulation of periods**

- 45 The period of legal residence in accordance with EU free movement rules that a person or their family member has before the end of the transition period, will be counted for the completion of the period of residence of 5 years necessary to acquire the right of permanent residence under the Withdrawal Agreement. Such beneficiaries are afforded the right to acquire permanent residence status later (after accumulating the sufficient period of legal residence)<sup>1</sup>.

*1. Withdrawal Agreement, Art.16*

## Outside the scope of the Withdrawal Agreement

### Posted workers

46 Posted workers are

1. EU citizens who are employed or self-employed in the UK, but are habitually resident in an EU Member State and are the subject of the legislation of that Member State **or**
2. UK nationals who are employed or self-employed in an EU Member State, but are habitually resident in the UK and are subject to UK legislation.

Although posted workers are not covered by the full scope of the Withdrawal Agreement<sup>1</sup>, so do not have a right of residence, EU citizens and their family members who are employed/self-employed in the UK, but are habitually resident in an EU Member State and are the subject of the legislation of that Member State<sup>2</sup>; or UK nationals and their family members who are employed/self-employed in an EU Member State, but are habitually resident in the UK and are subject to UK legislation<sup>3</sup>, at the end of the transition period, do fall within the scope of Title III of the Withdrawal Agreement. This confers social security coordination rights whilst they remain within that scope. The Withdrawal Agreement does not confer any entitlement to posted workers to remain in the host Member State after the end of the transition period.

*1. Withdrawal Agreement, Art. 10; 2. Art.30(1)(e)(i); 3. Art.30(1)(e)(ii)*

### Host State - Zambrano & Surinder Singh cases

47 For UK nationals and their family members, the 'host State'<sup>1</sup> is the EU Member State<sup>2</sup> in which they are exercising their right of residence under EU free movement rules before the end of the transition period and continue to reside thereafter. The UK cannot become the host State under the Withdrawal Agreement for UK nationals. This means that UK nationals who have resided in the UK before the end of the transition period, in accordance with rights under EU law, do not become beneficiaries of the Withdrawal Agreement in their personal capacity.

*1. Withdrawal Agreement, Art. 9(c)(ii); 2. Art. 2(b)*

48 EU citizens and UK nationals and their family members who are covered by the CJEU cases of C-34/09, Ruiz Zambrano, or C-370/90, Surinder Singh fall outside the scope of the Withdrawal Agreement. This is due to the residence status of family members of UK nationals returning to the UK, or of EU citizens returning to the Member State of which they are nationals, will be regulated by their respective UK or EU Law.



## Example

In a *Zambrano* case<sup>1</sup>, the basis of the CJEU's judgment was that, if Mr Zambrano (a third country national) was not granted a right to reside and a work permit in Belgium, the result would be that his dependent children, who were Belgian (and thus EU) citizens, would be deprived of the genuine enjoyment of the substance of their rights as EU citizens under the Treaty<sup>2</sup>. In line with the guidance above, a right to reside which exists in accordance with *Zambrano*, where that right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a EU Citizen, continues to be an excluded right to reside under domestic UC Regulations<sup>3</sup>.

*1. Ruiz Zambrano v Office national de l'emploi (ONEm) (Case C-34/01); 2. TFEU, Art.20; 3. UC Regs, reg 9(3)(b)*

- 49 For EU citizens and their family members, the 'host State'<sup>1</sup> is the UK<sup>2</sup> if they exercised their EU right of residence in the UK before the end of the transition period and continue to reside in the UK thereafter.

*1. Withdrawal Agreement, Art. 9(c)(i); 2. Art. 3(1)(a)*

## Future immigration system

- 50 The government will introduce a new immigration system from January 2021.
- 51 Under the future immigration system, following the ending of the transition period (31.12.20), those who wish to move to the UK, including EU citizens, who intend to work, study or join family will need permission to do so. Normally this will be in the form of an electronic status which must be obtained before coming to the UK. This means everyone coming to the UK will have an individual immigration status which will form the basis of our immigration controls.
- 52 EU citizens and their family members, who arrived in the UK and have been living lawfully before the end of the transition period, will be eligible to apply to the EUSS (see paragraphs 14 - 17 above) and will have until 30.6.21 to make their application (see paragraph 17 – Grace Period above). EU citizens will be able to evidence their rights in the UK using their passport or national identity card. Alternatively, if they wish to do so, an EU citizen will be able to use their digital status, granted under the EUSS, via the Home Office's digital status checking service. This Home Office service enables the person to share their digital status securely. Non-EU citizen family members will be able to rely on a biometric immigration document to prove their entitlements, also via the digital status checking service where they wish to use this. Family Members who joint rights holders in the UK after the end of the transition



period will have 3 months from their arrival to make the application, if later than the end of the grace period.

## **The Common Travel Area and the associated rights of Irish citizens in the UK**

- 53 The UK and Irish governments have made firm commitments to protecting existing Common Travel Area (CTA) arrangements, including the associated rights of British and Irish citizens in the other state. Under these associated rights, a national of the Republic of Ireland can exercise an EU treaty right while living in the UK without having to reside in another EEA state.
- 54 If a Northern Irish person is granted a right of residence on the basis of identifying themselves as Irish, or both Irish and British, then they are treated in the same way as a national of the Republic of Ireland. This means that Irish citizens who identify as Irish, or Irish and British will continue to have the right to enter, live and work in the UK without requiring permission.

**Note:** Separate guidance is drafted in relation to persons of Northern Ireland and their family members – see Memo ADM 19/20.

- 55 Recent caselaw<sup>1</sup> determined that despite the Belfast (Good Friday) Agreement 1998 allowing people of Northern Ireland the right to identify as British, Irish or both, it did not supersede national law<sup>2</sup> which sets out the terms of citizenship for people born in the UK, including Northern Ireland. A person born in Northern Ireland remains a British citizen<sup>3</sup>, even if they identify as Irish. Family members of Irish citizens arriving in the UK (who are non-British, non-Irish citizens) may apply to the EUSS. Those who do not, will need to apply under the new immigration system if they wish to remain in the UK after 31.12.20.

*1. [2019] UKUT 355 (IAC); 2. British Nationality Act 1981; 3. S.1*

## **Summary**

- 56 Until the end of the transition period, there is no change to the rules on access to benefits for EU citizens as a result of Britain's exit from the EU. The HRT process continues to apply as it does now.
- 57 Where the claimant is granted pre-settled status i.e. limited leave to remain under the EUSS, they will not automatically have a right to reside which is relevant for the purposes of claiming UC. The claimant is still required to demonstrate that they are exercising a qualifying right to reside under the Imm (EEA) Regs 2016, such as worker status, self-employed status or permanent residence.



58 UC regulations<sup>1</sup> provide that a person is to be treated as not being in Great Britain, if that person is not habitually resident in the CTA (UK, Channel Islands, Isle of Man or Republic of Ireland). No person shall be treated as habitually resident in the CTA, without having a relevant right to reside in one of those places in the CTA<sup>2</sup>. Those relevant rights to reside do not include (amongst others<sup>3</sup>) a right which exists by having been granted limited leave to enter or remain in the UK by virtue of

1. Appendix EU to the Immigration Rules<sup>4</sup> **or**
2. being a person with a Zambrano right to reside<sup>5</sup>.

*1 UC Regs, reg 9(1); 2 reg 9(2); 3 reg 9(3); 4 reg 9(3)(c)(i); 5. 9(3)(c)(ii)*

59 The effect of the guidance in paragraphs 57 - 58 above is that pre-settled status granted under the EUSS is not a relevant right to reside for the purposes of establishing habitual residence. HRT DMs must continue to apply the Imm (EEA) Regs 2016 for claims from EU citizens and their family members who have been granted pre-settled status.

**Note:** Although the claimant has been granted pre-settled status (which is not a right to reside that allows access to income-related benefits) they may still be able to exercise a qualifying right to reside under the Imm (EEA) Regs 2016.

## ANNOTATIONS

Please annotate the number of this memo (Memo ADM 34/20) against ADM paragraphs:

C1736, C1737, C1870 (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**

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