

# **Securing EEA Nationals' Residence Rights**

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## **Introduction**

The rights of EEA nationals (plus Swiss) to reside in the UK are primarily addressed in the Citizens Directive (Directive 2004/38/EC) which is implemented in the United Kingdom in the Immigration (European Economic Area) Regulations 2016. There are three principal categories of residence:

1. A right to reside for up to three months without any conditions or formalities other than holding a valid identity card or passport (Article 6);
2. A right to reside for more than three months if they are workers or self-employed; if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state and have comprehensive sickness insurance; or if they are enrolled in an educational establishment and have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host state (Article 7); and
3. A right to permanent residence, acquired after residing 'legally' (in accordance with the Citizens Directive) for a continuous period of five years (Article 16).

EEA nationals and their family members are also able to secure British Citizenship (naturalization). This will be discussed later in the paper.

## **What can EEA nationals and their family members residing in the UK do now to protect their position?**

The status of EEA citizens currently living in the UK remains unclear. It is also likely to be the subject of a political solution, in that what happens to EEA nationals here is tied up with what will happen to UK citizens living in other EU Countries. However the group of EEA nationals and family members whose position is most likely to be protected in the course of negotiations over the UK's exit are those who have acquired a right of permanent residence or those who have an EU right of residence but not yet acquired permanent residence.

## **Proving their rights**

An EEA national's rights of residence, and associated rights of family members including non-EEA nationals are not conditional on the possession of documents certifying the exercise of those rights (Article 25(1) Citizens Directive). However, in light of Brexit, EEA nationals and their family members should consider obtaining documents proving their exercise of EU law rights and status in the UK.

Proof can come as one of the following types of document:

1. For EEA national workers and other qualified persons, and for EEA national family members, a registration certificate (Article 8 Citizens Directive; regulation 17 of the Immigration (European Economic Area) Regulations 2016);
2. For EEA nationals who have acquired five years of legal, continuous residence in accordance with the Citizens Directive, a document certifying permanent residence (Article 19 Citizens Directive, regulation 19 of the 2016 Regulations);
3. For non-EEA family members of a qualified person or an EEA national with a right of permanent residence, a residence card, (Article 10 Citizens Directive; regulation 18 of the Immigration (European Economic Area) Regulations 2016);
4. For the non-EEA family members of EEA nationals who have acquired a right of permanent residence, a permanent residence card (Article 20 Citizens Directive, regulation 18 of the 2016 Regulations).

A mandatory fee of £65 is payable for residence documents.

The current Home Office forms are:

EEA (QP) – residence certificate for EEA nationals.

EEA (FM) – residence card for third country family members and those with retained rights

EEA (EFM) - residence card applications for extended family members defined as dependant relatives and which can include siblings, nephews/nieces, aunts/uncles.

EEA (PR) - permanent residence applications for EEA nationals, family members and extended family members.

DRF1 - applications by family members on the basis of derived rights of residence.

Some of these forms are online as well.

The use of these forms is no longer optional. From 1<sup>st</sup> February 2017 all applications have to be made on these prescribed forms. Though legally questionable, it brings EEA applications in line with other immigration applications made under the domestic rules.

As well as a fee, other mandatory documents are:

- A valid passport or identity document must be provided for all types of residence cards.
- Bio-metric information for non-EEA family members applying for a residence card (at a cost of £19.20 per person). There is no similar requirement for EEA nationals when they apply for a residence certificate.
- For family members of EEA nationals a document attesting to the existence of a family relationship or of a registered partnership is needed. This could include a marriage certificate or for a child or parent a birth certificate.

## **Delays**

The Home Office is legally obliged to issue an EU law residence document within six months of

application (see the Immigration (EEA) Regulations 2016 at paragraph 18(3)).

Serious delays in issuing documents might give rise to a compensation claim where it has led to a loss of earnings or significant inconvenience. Court proceedings however are costly, so a more feasible option is applying to the Parliamentary Ombudsman with a request for damages. This is still however a lengthy process, and requires a Member of Parliament (MP) to refer the complaint to the Ombudsman. There is no requirement for the MP to do so.

### **Comprehensive Sickness Insurance**

A person who is self-sufficient or a student (including children in school if they are not family members) who does not have comprehensive sickness insurance (CSI) does not have a right of residence.

Reciprocal arrangements for health care between the UK and other Member States – the right to obtain healthcare in the UK and for the cost to be recovered from the individual’s host Member State insurance – should qualify as CSI for this purpose (*Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988).

The UK Home Office has interpreted the requirement for CSI in its European Operational Policy Notice 7/2011. This is now in the modernised guidance ‘EEA nationals; qualified persons Version 4 February 2017 pp33-35 to mean that additional cover is necessary in the form of one of:

- Private medical insurance plan that covers you and your family for the majority of risks while in the UK.
- European Health Insurance Card (EHIC), issued by an EEA Member State other than the UK (not applicable if coming to the UK permanently).
- Form S1 (formerly E106, E109 and E121).
- Form S2 (formerly E112).
- Form S3.

### **What other evidence do I need to include?**

This depends on the type of application you are making.

### **Qualifying for permanent residence (EEA (PR)).**

There is no prescribed list of documents that must be submitted. What is needed is evidence of residing in the UK as a qualified person or family member for a continuous five year period.

Possession of a residence card or certificate is not enough because a person might have ceased their qualifying activity during the 5 year period.

‘Continuous’ means that you must not have left the UK for more than six months in any calendar year during the five-year period, although longer absences are permitted under some limited circumstances.

The five year period could be any five year period, not just the last five years. You can also “mix and

match” your qualifying activities, so you can combine say 2 years of employment with 3 years of being a student (as long as you had CSI). There are also circumstances in which you can get early permanent residence and don't have to have 5 years of qualifying activity, such as where you were working but then retired or have permanent incapacity. Also, if the five year period is more than two years ago, an applicant would also need to show they have not been absent for more than two years as otherwise their PR will have lapsed.

Applications for a document certifying permanent residence or a permanent residence card have to show that they have had comprehensive health insurance for the whole of the five years of continuous residence. Home Office guidance states that it would be sufficient for applicants to show that they have held an EHIC for the full five years as long as it covers the whole of the period being relied upon and features a ‘valid from’ date which covers the start of that five year period. The Home Office cannot request a statement of intent (like it does for students applying as a qualified person) as this is an application which looks retrospectively at whether an applicant has acquired a right of permanent residence and future intentions are irrelevant.

### **Qualifying as a worker (EEA(QP))**

The test is that you must be doing work that is ‘genuine and effective’, rather than ‘marginal and ancillary’. Although the UK introduced a Minimum Earnings Threshold of £153 per week, EEA nationals do not need to meet this threshold for work to be considered ‘genuine and effective’.

For those in continuous employment, the documents are fairly easy to put together. Five P60s and letters from employers or contracts of employment should be sufficient. If you have been out of work for more than 6 months you may need evidence of seeking work and being registered as unemployed or that you were self-sufficient and had CSI.

EU citizens from the “A8” countries (Czech Republic, Latvia, Poland, Estonia, Hungary, Lithuania, Slovakia and Slovenia) need to be careful that they are not relying on a period of employment during the period when the Worker Registration Scheme (WRS) was in operation and when they may not have been registered. Any such period of work will be deemed by the UK Home Office to be unlawful and discounted when calculating eligibility for permanent residence. However, note that the extension of WRS between the years 2009-2011 was deemed unlawful (*TG v Secretary of State for Work and Pensions*, CPC/1026/2014; [2015] UKUT 50 (AAC)). Therefore in theory WRS is not needed for these years, although the Home Office has not implemented this judgment and caseworkers continue to refuse applications of A8 nationals who were not registered on the WRS. The decision is also the subject of an appeal by the government and will be heard in March 2017 in the Court of Appeal.

### **Qualifying as someone who is self-employed (EEA(QP))**

For those who are self-employed, evidence of being registered self-employed and five years of tax returns and National Insurance payments should be sufficient. However the UK Home Office asks for all sorts of additional documents, set out in EEA(QP) Annex A. If applying you should understand that you do not have to possess and submit all of the documents specified in Annex A. All that is needed is enough evidence to prove that you are genuinely self-employed, (i.e. you pay

tax) and that, as with a worker, that it is genuine and effective rather than marginal and ancillary.

### **Qualifying as someone who is self-sufficient (EEA(QP))**

The Citizens Directive does not prescribe what evidence is needed to show self-sufficiency, but the UK Home Office form suggests the following are forms of evidence: e.g. bank statements, building society pass book, evidence of receipt of pension, etc. The form also asks for information about the origins and type of finances (stocks, shares, savings etc), the owner of the resource, the amount and how often it is received. There is also a space for “further information” if your circumstances do not fit easily into the pre-defined categorisations.

The level of income required is not stated anywhere (Article 8(4) of the Citizens’ Directive in fact prohibits it). There is therefore no set minimum, other than that the person and any dependants must have enough to live on without having recourse to public funds.

### **Qualifying as a Student (EEA(QP))**

For students, proof of enrolment at an accredited establishment and of CSI cover is required and a declaration or equivalent that they have sufficient resources (as above) for themselves and their family members not to become a burden on the social assistance system.

In addition the form asks for a number of other documents, including any work placement, though it is not clear on what basis the UK Home Office are entitled to ask for this. The UK Home Office themselves concede that only one of the listed forms of evidence need to be submitted and indeed, under EU law, the declaration of sufficient resources is sufficient.

### **Qualifying as a family member (EEA(FM)) and extended family member (EEA(EFM))**

Family members of EEA nationals have few free standing rights of their own, as their rights largely flow from the family member's relationship with the EEA citizen.

Family members are defined in the Citizens’ Directive at Article 2(2), provisions which are mirrored in the UK 2006 Regulations at paragraph 7(1)). In summary they include:

1. Spouse or civil partner.
2. Children or grandchildren (of the EEA citizen or their spouse or partner) under the age of 21 OR who are dependent on the EEA national.
3. Parents or grandparents (of the EEA citizen or their spouse or partner) who are dependent on their EEA national son or daughter.

Neither an EEA national, nor a family member with a residence card from another Member State, needs a family permit. Their passport or identity card will suffice (see case of *McCarthy* 2013/OJ C189/ 12)). Family permits are needed by family members travelling directly to the UK from outside the EU. Third Country National (TCN) family members may be required to have an entry visa but Member States must facilitate this (*MRAX*). Also under 5(4) of the Citizens Directive Member States cannot refuse to issue a visa if that TCN is able to prove their identity and their relation to an

EEA national, unless they pose a specific risk to public policy, security or health grounds.

The provisions for extended family members are referred to in Article 3 of the Citizens Directive and paragraph 8 of the 2016 Regulations

Both the EEA(FM) and EEA(EFM) ask for considerable information. This includes, in the case of an extended family member, evidence of dependency by the applicant on their EEA sponsor.

## **British Citizenship**

EEA nationals wishing to become British Citizens need to be aware that UK Government says that family members of dual citizens cannot benefit from EU free movement law. This issue will be decided by the European Court of Justice later this year R (*Lounes*) v *Secretary of State for the Home Department* [2016] EWHC 436 (*Admin*). Therefore any family members from outside the EEA would, at the moment, lose their right of residence in the UK if their EEA family member naturalises as British.

The British Nationality Act 1981 requires a successful applicant for British citizenship to show, amongst other things, that for the last 12 months he or she is free from immigration restrictions (paragraph 2(c) of Schedule 1 to the British Nationality Act 1981). An EEA national who is married to a British citizen will also be able to apply for British citizenship as soon as they have received permanent residence.

Citizens of EU and EEA countries and their family members were until 12 November 2015 able to qualify once they had possessed permanent residence for a 12 month period and met all the other requirements.

### **Change to evidence required**

From 12 November 2015, however, if a person with at least 12 months of permanent residence wishes to apply for British citizenship he or she first has to apply for a permanent residence certificate or card. This change was introduced by the British Nationality (General) (Amendment No. 3) Regulations 2015 (SI 2015/1806).

Applications for naturalization, made without a permanent residence document where one is required, are now being refused.

### **Where the EEA national has Indefinite Leave to Remain**

Where someone has evidence of indefinite leave to remain (ILR), in their own right (through a family member who is established in the UK or through EEA national status), and it has not been lost through being absent from the UK for 2 years, then that person is free of immigration restrictions. All that the UK immigration authorities should therefore need to see is the ILR stamp, as this makes clear that the applicant has settled status, which can be in the form of ILR or permanent residence.

A number of EEA nationals with ILR seem to be encountering problems with their applications for British Citizenship being accepted. The Home Office section which deals with these types of applications appears to misunderstand that the process by which British Citizenship through permanent residence or ILR are separate pathways. Therefore individuals applying through ILR need to make it very clear on the application that they are not relying on permanent residence through any Treaty rights, but are instead relying on a former grant of ILR made to them.

## **Suggested Modifications to the Present System**

There is a huge amount of unnecessary bureaucracy in the form filling.

The EEA(PR) for instance is 85 pages long and, with the additional documents required, can run into hundreds of pages. Contrast this with the situation in 2008, when it was only 13 pages long (and free). Nothing has changed in terms of EU law to make it more complex.

The EEA(PR) similarly asks a series of entirely ridiculous or confusing questions. If we ignore for a moment the idea that anyone is going to admit to terrorist activities or genocide (Question 17.3 and 17.4), the singularly most difficult question to comply with for most applicants is Question 5.3 which asks the applicant to list every single absence since coming to the UK. The UK Home Office only need to know whether someone has been absent for 6 months in any given year, nothing more. However, the impression is given that applicants have to remember, and list, the dates of every holiday taken, no matter how short. How many of us could do this?

The documentation the UK Home Office requests is also excessive. An example is the documentation listed in EEA (QR) Annex A for someone to show they are self-employed. The suggestion is that all these documents are needed, when in fact any one of those documents should be sufficient proof of self-employed status.

The UK Home Office could easily introduce a series of changes which would make their lives, and more importantly the lives of EEA nationals who simply want to clarify their status, much easier.

1. Reduce the length and complexity of the forms. The forms only need to ask questions, and request evidence, that is strictly required under EU law in order to show a qualifying right to reside. Everything else is simply intrusive and unnecessary.
2. Original documents should no longer be needed. Instead certified copies should be acceptable. This would avoid people being left without passports/important ID for long periods of time whilst their applications are processed.
3. The online application process, introduced in October 2016, should be truly online and available for all residence applications and applicants, including EEA family members. At the moment online applications still need to be printed out and submitted and copies of documents cannot be uploaded. It also excludes certain students or self-sufficient persons where they are either reliant on a family member to provide your income, or financially responsible for other family members (<https://visas-immigration.service.gov.uk/product/eea-pr>)
4. The issue of CSI should be clarified, following the European Commission argument that a right to NHS care is sufficient. Alternatively the ability to identify whether reciprocal healthcare arrangements are, or were in place, should be made much clearer.

5. Clear guidance should be issued around ILR and British Citizenship as there is clear confusion within the UK Home Office about this and it has led to many EEA Citizens with ILR being wrongly refused for British Citizenship.
6. Clear guidance that someone who has acquired permanent residence more than 12 months ago, does not need to have held a permanent residence certificate or card for a year before applying for naturalisation. Instead someone who automatically acquired permanent residence say in 2010, and then applies for a certificate or card in 2017, should be able to seek British Citizenship immediately and not wait a year.

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