EU rights guide

Workers

Guide to making an application in the UK

by Colin Yeo

PART OF THE EU RIGHTS GUIDE SERIES:

1. **WORKERS**
2. **SELF EMPLOYED**
3. **SELF SUFFICIENT**
4. **STUDENTS**

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CONTENTS

Introduction 6

Glossary and meanings 7

Brexit: what now? 8

No change, for now 8

What will happen to EEA nationals and family members? 8

Is it worth applying for residence documents now? 11

Should EEA nationals apply for naturalisation as British citizens? 12

How EU free movement rights work 15

The fundamental freedoms 15

Rights not privileges 17

What are the EU, EC, EEC, EEA and ECHR? 18

Who are the EU Member States? 19

Where does EU law come from? 20

EU citizenship 22

How to read and understand free movement law 22

What are the benefits of free movement law? 25

- UK and EU rules contrasted 25
- Reverse discrimination 26
- Whose rights? 27

Residence rights of EU citizens 29

Exercise of Treaty rights 29

Legal effect of residence documents 29

Right of admission 31

Right to be accompanied by family members 32

- Family members 32
- Other or extended family members 33

Initial right of residence 36

"Normal" residence 36

Permanent residence 38

- Automatic nature of permanent residence 38
- Combining different qualifying activities 40

Residence prior to the Citizens Directive 41
Permanent residence not necessarily permanent 41
What counts as "work" in EU law? 43
Definition of "work" 44
Job seekers 47
Part time working 49
Low paid work 51
Claiming benefits 53
Maternity or parental leave 54
Retaining rights when work ends 56
Temporary incapacity to work 56
Permanent incapacity to work 58
Retirement 59
Cross border workers 59
Making an application 61
Do I need to apply at all? 61
Family permit and travel to the UK 63
Right of residence (first five years) 64
Permanent residence 65
British citizenship 65
How do I apply? 67
Do I need to use an official application form? 67
Use the online application process 69
Use the Home Office EEA series forms 71
Use a covering letter 72
Can I speed things up? 73
Requesting return of a passport 75
If residence document is not received 76
Damages for delay 76
What are the minimum formalities required? 77
Application fee 77
Valid passport or identity card 78
Other evidence or proof 79
What evidence do I need to include? 79
Initial right of residence 79

Residence 79
Permanent residence 81
What to do if you are refused 84
Accept the refusal 84
Reapply 85
Ask for reconsideration 86
Appeal 88
Is there a right of appeal? 88
Lodging an appeal 90
Is the appeal from within the UK or after removal? 92
Judicial review 92
Further reading and links 94
Conclusion 95

INTRODUCTION

The result of the UK referendum on whether to leave or remain in the European Union has caused huge anxiety to European nationals and their family members living in the UK.

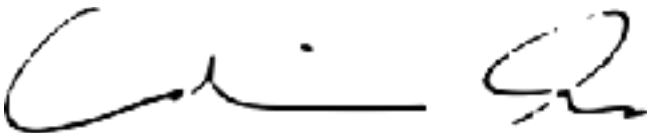
This guide first examines how EU free movement law works, who benefits from it and then turns to the practicalities of making an application.

For the most part, EU free movement law is easy to understand and enabling and it genuinely serves to promote free movement of EEA nationals and their family members. Even before the referendum result, though, the UK Government had become increasingly hostile to free movement of EEA nationals and several administrative measures were taken to try to discourage such movement.

As part of this squeeze, the UK's implementing regulations have been tightened up and are now exceedingly complex in parts. A new set of regulations took effect in February 2017. Perhaps more importantly, a new generation of application forms was introduced in early 2015 which are long, complex and intrusive. The online versions of some forms introduced in October 2016 were an improvement in some ways. From 1 February 2017, it became compulsory to use these forms.

This guide does not cover absolutely every situation and it is not intended to. It is part of a series of guides covering workers, self employment, self sufficiency and students. The purpose of the guides is to cover most types of EU law application for most people.

I am grateful to Unbound Philanthropy for the funding to work on this series and to JCWI for their invaluable help with proof reading. Any errors are of course my own, though.



GLOSSARY AND MEANINGS

Lawyers and the Home Office do like their acronyms. The following is a glossary for some of the terms you may encounter here in this ebook or when trying to deal with the Home Office.

CSI	Comprehensive Sickness Insurance. Required by the self sufficient and students in order to qualify for a right of residence under EU law
CJEU	Sometimes just “the Court”, this is the Court of Justice of the European Union, formerly known as the European Court of Justice or ECJ
Directive	Form of EU law setting out legal details and implementing treaty rights. Can be directly relied on if domestic regulations do not accurately reflect rights.
EC	European Community, predecessor to the European Union
ECHR	European Convention on Human Rights. Different body of law not really related to EU law.
EEC	European Economic Community, predecessor to the European Community and, later, European Union
EEA	European Economic Area.
EU	European Union
Exercising treaty rights	Work, self employment, study or self sufficiency in another Member State.
MET	Minimum Earnings Threshold, a measure used by the Department of Work and Pensions for assessing the right of residence of EEA nationals with low earnings
Third country national	A citizen of a country outside the EEA, including outside the UK
TFEU	Treaty on the Functioning of the European Union: the key bedrock treaty
Treaty	Form of EU law setting out binding legal principles. Can be directly relied on if domestic regulations do not accurately reflect rights.
UK regulations	Form of UK law implementing EU law, primarily the Immigration (European Economic Area) Regulations 2006 as amended (due to be replaced by the Immigration (European Economic Area) Regulations 2016 in February 2017)

BREXIT: WHAT NOW?

No change, for now

The vote in the referendum on 23 June 2016 for the UK to leave the European Union had no immediate legal effect. The referendum was advisory in nature and the law does not change until the Government or Parliament changes it.

At the time of writing, it was expected that the Government would start the process of leaving the EU in March 2017. The legal means to depart from the EU is set out in Article 50 of the Treaty on the Functioning of the European Union, so if you hear references to "Article 50" in the context of Brexit, that is what is meant. Article 50 sets out a process for departure. First, the relevant Government must notify the EU of the decision to leave, which is often referred to in the media as "triggering Article 50". Article 50 then provides that the Member State will cease to be a member of the EU two years from the date of notification, unless the departing Member State and the remaining Member States all agree otherwise.

It seems highly unlikely that the UK and all the remaining 27 Member States would agree to shorten the process, which is already incredibly short in legal terms.

There will therefore almost certainly be a two year period between the UK's notification under Article 50 and the actual departure of the UK from the EU, which will probably be in April 2019. Before and during that time, all EU laws will continue to apply as before, including free movement laws.

To put it another way, there will probably be no change to the rights of EEA citizens and their family members until at least two years after Article 50 is triggered.

What will happen to EEA nationals and family members?

At the time of writing, the Government has repeatedly refused to give any clear assurance that EEA nationals will be allowed to stay in the UK after Brexit. Instead, the Prime Minister and other ministers have tied the right of EEA nationals to stay in the UK with the right of UK nationals to stay in other EEA countries and said that it is a matter of negotiation.

Before going further, one option for the UK is to retain EU free movement rights even outside the EU itself, following the example set by Norway, Switzerland and others. In this scenario, there might well be little change to the rights of EEA nationals living in the UK and no need to apply for further documents as proof of residence. This is sometimes described in the media as "soft Brexit". Soft Brexit remains possible, although at the time of writing the indications from Government seemed to point to "hard Brexit", in which free movement rights would not continue.

Irrespective of whether Brexit turns out to be "soft" or "hard", there are signs behind the scenes that EEA nationals will be permitted to remain in the UK following Brexit, although the terms are currently unknown.

First of all, it would be genuinely extraordinary if the UK were to attempt to expel literally millions of residents. It would be immoral, illegal on human rights grounds and would make the UK into a pariah state.

Secondly, aside from the morality and lawfulness of the exercise, it would be extraordinarily difficult for the UK to do so. Rounding up that many people or simply making them unlawfully resident and asking them to leave would create huge administrative problems.

So, we can expect that EEA nationals will in general be permitted to remain, and there have been cautious indications from officials that this will be so.

A page was added to the Government website on 11 July 2016 stating as follows:

When we do leave the EU, we fully expect that the legal status of EU nationals living in the UK, and that of UK nationals in EU member states, will be properly protected.

A senior Home Office civil servant, Mark Sedwill, told the Home Affairs Select Committee in Parliament on 20 July 2016 that EU citizens in the UK with permanent residence would be allowed to stay:

"People have got that right of permanent residence and that right is associated with other international treaties that the UK is members of such as human rights legislation under the human rights act," he said. "It is under EU law at the moment but it is a right the UK respects."

Asked why no firm assurance was being given to those with permanent residence, he went on:

"I think for people who have the five-year residence, we have in effect had a guarantee."

The BBC published a news item on the evidence and the full evidence can be seen the Hansard website.

On 7 October 2016, an anonymous "senior source" and a "Cabinet source" told The Telegraph that EU nationals with permanent residence would be allowed to remain, and that the remainder would also be allowed to stay anyway:

Home Office research has concluded that when Britain leaves the EU, just over 80 per cent of EU citizens in the UK will qualify for residency, sources said. "The remaining people will, of course, be allowed to stay in the UK," a senior source said.

"That's a given. We just need to work out exactly how we do it."

Another Cabinet source said: "They will be allowed to remain in Britain. But it is important that reciprocal agreements are made with the EU to ensure that British people abroad get the same rights."

At the time of writing there had still been no official announcement but it very much seems that EEA nationals will be allowed to remain in the UK following Brexit. Even then, there remain questions about what kind of residence status they might have after Brexit, whether there will be different legal status for those with permanent residence compared to those without, how they will obtain that new status in practical terms, whether they will retain EU rights to be joined by family members, what will happen to those reliant on "derived" rights of residence and whether there will be any cut-off date for new arrivals from the EEA. We will not know the answer to those questions until an official announcement is made and we do not know when that might occur.

Is it worth applying for residence documents now?

On the one hand, informal indications are that EEA nationals will be allowed to remain in the UK, and that probably also includes family members. On the other, the official Government position remains that it is a matter for negotiation and we also do not know on what basis EEA nationals will be allowed to remain.

We lawyers might properly be described as paid pessimists: a major part of our job is to think of what can go wrong in order to prevent it occurring.

My own cautious and reluctant view is that it probably is better to apply now for permanent residence or residence documents, if only to work out if there are any problems so that there is time to spare to resolve them. For example:

- If those already with permanent residence documents are treated more generously or find it easier to obtain a new immigration status, it might be wise to apply now.
- If you do not apply now and find later that you do not have the right documents, this could cause problems. If you apply now and find you do not have the right documents, you still have plenty of time to sort it out.

- If it turns out that having a right of residence is important in some way, it would be better to know now whether you do or do not have a formal EU law right of residence. Many EEA nationals living in the UK, some for very many years, do not, in particular self sufficient people such as those married to British citizens who do not have comprehensive sickness insurance.
- Third country national family members of EEA nationals (e.g. the Brazilian wife of a Portuguese national) might later have difficulty proving their status if their relationship with the EEA national breaks down, so it might be wise to obtain residence documents now in preparation for Brexit.
- Those who might benefit from what are called "derived rights of residence" based on case law like *Zambrano* should do everything possible now to regularise their position and obtain residence documents. It is this group of beneficiaries of EU law who are most likely to be vulnerable when Brexit occurs.

I am reluctant to advise people to do something that I do not know for sure they need to do. After all, the UK may remain within the EEA and free movement laws might remain essentially unchanged. However, applying for a residence document is cheap at only £65 and it is an application which in my view can normally be undertaken without a lawyer.

Should EEA nationals apply for naturalisation as British citizens?

Some EEA nationals or family members may wish to naturalise as British citizens. This is a very personal decision. However, it is important to be careful because the UK Government now says that the **family members of dual citizens cannot benefit from EU free movement law. This means that any family members from outside the EEA would lose their right of residence in the UK if their EEA family member naturalises as British.**

Further, an EEA citizen will by becoming British lose his or her right to be joined by family members in future. This is particularly a problem with children over the age of 18 and parents and grandparents, who are all virtually excluded from entry by the UK's strict immigration rules.

Prior to 2012 the Government had no problem with dual citizenship giving rise to EU residence rights but in response to a case called *McCarthy* the UK changed its approach. It is arguable that the current UK approach is unlawful in EU law but this is no time to be standing on principle.

Another thing to consider carefully is whether the current country of nationality permits dual citizenship. In British nationality law it is not a problem to be a citizen of another country at the same time. That is not true of all countries and some countries even automatically terminate a person's citizenship if he or she becomes a citizen of another country.

For those who do decide to naturalise, the main issues are the application fee and that since 2015 EEA nationals and their family members must

(a) have had permanent residence for a year at the time of application; and

(b) need to hold a permanent residence certificate or card at the time of application.

Home Office officials are on occasion giving out incorrect information on telephone hotlines and claiming that a person must have held a permanent residence certificate or card for a year before applying for naturalisation. This is incorrect. A certificate or card does need to be held at the time of application but permanent residence is acquired automatically whether or not the person has a certificate or card, so it is perfectly possible to have had permanent residence for over a year at the time the certificate or card is issued and therefore qualify immediately.

Example

Cecile is a French national. She has resided in the UK since 2002 as a worker; she found a job within weeks of arriving and has worked more or less continuously ever since, with a short break of a few weeks between jobs.

She automatically acquired the right of permanent residence in 2007, five years after she entered the UK. She never applied for a permanent residence certificate because she did not need to.

Worried about what will happen when the UK leaves the EU, she decides to naturalise as a British citizen. She applies for a permanent residence certificate in July 2016 and it is issued in December 2016. As soon as she has the permanent residence certificate, she is eligible to apply for naturalisation (assuming she meets the other criteria, such as good character). This is because she now has a permanent residence certificate and she has had permanent residence since 2007, which is more than the required 12 months.

HOW EU FREE MOVEMENT RIGHTS WORK

The fundamental freedoms

The founding purpose of the European Economic Community (EEC), the predecessor to the modern European Union (EU), was to create a common market and guarantee four fundamental freedoms:

Freedom of goods

Freedom of capital

Freedom of services

Freedom of people

In simple terms, EU law on free movement of persons is intended to make it as easy and practicable to move from Barcelona to London to live and work as it is from Birmingham to London. It has been described as "the single greatest advance in European liberty and opportunity since the Iron Curtain was lifted."

“EU law on free movement of persons is intended to make it as easy and practicable to move from Barcelona to London to live and work as it is from Birmingham to London”

The idea behind the free movement of people — and the other freedoms — is that we will all be better off economically, socially and culturally if such freedoms extend across the whole of the EU in a single common market.

That is a noble aim, but one which is hard to achieve in practice because each EU

Member State has its own immigration and other laws. EU law therefore provides a number of rights in order to encourage and facilitate free movement, including:

Right to work in another Member State

Right to *seek* work in another Member State

Right to be temporarily unemployed in another Member State

Right to equal treatment for welfare benefits

Right to be self employed in another Member State

Right to be self sufficient in another Member State

Right to study in another Member State

Right to be accompanied by one's family members

Rights like the right to work would be ineffective if not accompanied by a right to seek and find work, a right to be out of work for at least short periods and a right to be accompanied by one's family. If these "secondary" rights did not exist, it would prevent or discourage people from working in other Member States. Other rights are also conferred in order to ensure that citizens of other Member States are treated equally and therefore not discouraged, such as a right to the same unemployment and social assistance benefits as citizens of the Member State and the right to equal healthcare provision.

These rights are conferred directly by the EU on all citizens of EU Member States and Member States are supposed to respect them absolutely. Pressure on politicians in every Member State from their own citizens mean that governments and immigration officials are sometimes rather reluctant to

"The passport does not itself confer any rights, it is merely evidence that the rights are held. The same is true of EU residence documents."

give full effect to these rights, though. Many feel, rightly or wrongly, that newcomers compete for jobs and services.

In order to make use of these rights, the individual wishing to assert them must be exercising treaty rights of free movement. Non-British EEA citizens may therefore make use of these rights when pursuing certain activities in the UK. A French person in the UK may make use of EU law in the UK and a British person may make use of EU law when in France. If the person has not moved to another EU or EEA country, though, that person will not usually be making use of treaty rights and therefore cannot usually make use of EU law.

There are some circumstances, considered later, where a British citizen may make use of EU freedom of movement law to benefit his or her family members *in the UK* rather than having to rely on UK immigration law.

Rights not privileges

Free movement rights for EEA citizens and their family members are pre-existing *rights*, not *privileges* for which application must be made. This is very important and has many implications.

An analogy can be drawn with a child born in the UK to British parents. Section 1 of the British Nationality Act 1981 states that such a child is a British citizen from birth. The child does not emerge from the womb clutching a passport: the passport can be obtained later if or when the child needs it in order to travel or for convenient identification purposes. **A passport does not itself confer any rights; it is merely evidence that the rights are held. The same is true of EU residence documents.**

Similarly, the treaties and directive confer rights on EU citizens exercising free movement rights. These rights are not granted by any particular government of an EU Member State and certainly not by the UK Government. However, it is often convenient to the individual who possesses a right for a government to have *recognised* that right by issuing EU residence documents.

A British citizen has a right to live in and enter the United Kingdom. However, that might prove difficult in practice if one has lost one's passport on holiday outside the UK. The passport is not necessary for entry in a strict legal sense but it makes it an awful lot easier and avoids the need for the immigration official to detain the British citizen on entry while working out whether they really are British or not.

This all leads to a very important difference of principle between UK immigration law and EU freedom of movement rights. In UK law, if a foreign national wishes to come to the UK he or she must first make an application. There is no pre-existing 'right' to enter the UK. It is a privilege that can be granted or refused by the Home Office.

A great deal flows from this distinction between inherent rights and discretionary privileges, and for those schooled in UK immigration law many aspects of EU free movement law may seem counterintuitive. This is just as true for immigration officials as immigration lawyers and judges.

What are the EU, EC, EEC, EEA and ECHR?

The European Economic Community (EEC) was created in 1957. The United Kingdom joined on 1 January 1973. The EEC was later renamed the European Community (EC) and then later again the European Union (EU).

The European Economic Area (EEA) is a slightly extended version of the EU's common market consisting of the EU Member States plus Iceland,

Liechtenstein and Norway. Switzerland is not formally part of the EEA but all EEA members have agreed to treat it as if it were.

The legal source of free movement law is therefore the EU, but the area within which those rights may be exercised is the EEA. This can lead to a bit of confusion around use of "EU" and "EEA". Here in this guide I generally refer to EU law and often to EU Member States but to EEA citizens or nationals as the beneficiaries of EU free movement law.

All of these bodies are distinct from the European Court of Human Rights (ECHR), which is a separate institution supervising a separate set of laws.

Who are the EU Member States?

There are now 28 Member States to the EU (dates countries joined in brackets):

Austria (1995)

Belgium (1952)

Bulgaria (2007)

Croatia (2013)

Cyprus (2004)

Czech Republic (2004)

Denmark (1973)

Estonia (2004)

Finland (1995)

France (1952)

Germany (1952)

Greece (1981)

Hungary (2004)

Ireland (1973)

Italy (1952)

Latvia (2004)

Lithuania (2004)

Luxembourg (1952)

Malta (2004)

Netherlands (1952)

Poland (2004)

Portugal (1986)

Romania (2007)

Slovakia (2004)

Slovenia (2004)

Spain (1986)

Sweden (1995)

United Kingdom (1973)

Other countries may join in future but there are unlikely to be further new members in the next few years. The UK is likely to cease being a member following the outcome of the referendum on UK membership in June 2016, although the date and terms of departure were not known at the time of writing.

Where does EU law come from?

The purpose of the EEC, later the EC and now the EU has been set out in various treaties and other laws of the EEC, EC and EU since 1957. The current treaty is rather prosaically called the Treaty on the Functioning of the

European Union (TFEU). This sets out the principles of EU law. The current Directive which sets out the details of how the principles will work in practice is Directive 2004/38/EC, more commonly referred to as the Citizens' Directive. These provisions allow EU nationals and their family members to move freely among EU Member States to work, set up in self-employment, retire and study. The rights are not wholly unrestricted, particularly regarding the ability to secure stay for family members, but they are powerful nonetheless.

Lawyers and judges say that the treaty and the directive are "directly effective" and can therefore be cited and used by EU citizens to enforce their rights. This is very important, because EU law is usually adopted and written into the law of Member States as well. This process is called being "transposed". In the United Kingdom, the government of the day will introduce some domestic UK-only regulations that will be applied by immigration officials in the UK and which the government states are an accurate reflection of EU law.

"In reality, governments do not always accurately and properly transpose EU law into domestic law."

In reality, governments do not always accurately and properly transpose EU law into domestic law. The regulations that transpose free movement rights in the UK are from 1 February 2017 the Immigration (European Economic Area) Regulations 2016. I will refer to them in this guide as just "the UK regulations".

The UK regulations have been very heavily amended since they were introduced, sometimes by the Government trying to tighten the original rules and sometimes after the Government lost a major case on EU rights and then made changes. There is an official amended version of the UK regulations that shows the amendments to May 2015.

It is for the courts to decide if the UK regulations accurately reflect EU law. If the UK regulations are not accurate, the courts can and do directly apply EU law properly. If there is a difference between EU law and the UK regulations, a person can expect to be refused by the Home Office when they apply but can hope to win their case on appeal by arguing that the true requirements of EU law are met even if the inaccurate requirements of the UK regulations are not.

EU citizenship

Citizens of Member States are also Citizens of the Union in EU law. Article 20(1) of TFEU provides:

> *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*

Article 21(1) then goes on:

> *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.*

Citizenship of the Union can be relied upon by a limited category of third country nationals in a "*Zambrano* situation" where a child who is a citizen of the Union relies on a third country national parent in order to continue residing within the EU. This is discussed briefly below, but is a complex subject in its own right and is outside the scope of this guide.

How to read and understand free movement law

Laws have to be written (lawyers often say laws are "drafted") in a very precise way so that the law achieves its intended goal. Poorly written laws can be misinterpreted or interpreted in a way that was never intended or may conflict with other laws.

Laws often therefore set out definitions for certain words or phrases so that there is no misunderstanding about what is meant. In free movement law we can find a number of definitions in EU treaties and directives and in the UK regulations. We just looked briefly at the definition of “Citizen of the Union” for example. As we see below, free movement laws enable certain family members to travel with or reside with EEA citizens who are themselves exercising treaty rights. Terms like “family members” and “treaty rights” are defined terms.

I will often reference the UK regulations here, as they are the starting point for arguing EU law issues with the Home Office. The way the UK regulations work, with some exceptions, is to start with definitions such as “work”, “jobseeker”, “family member”, “extended family member”, “qualified person” and similar then move on to set out the rights that are enjoyed by the specific defined groups and people and then to set out some limitations on those rights. Sometimes a specific definition will be included later in the regulations for a very specific purpose. The structure of the regulations is as follows:

Part 1 of the UK regulations sets out various definitions, including:

Regulation 2 sets out many definitions, including of words such as “family permit” and “spouse”

Regulation 6 defines “qualified persons” but with reference to other definitions already set out at regulations 4 and 5

Regulation 7 defines “family member”

Regulation 8 defines “extended family member”

Regulation 9 defines when a British citizen is treated as if the British citizen were an EEA national (i.e. *Surinder Singh* cases)

Regulation 10 defines when a third country national might retain rights of residence

Part 2 sets out the various rights, including:

Regulation 11 sets out the right of admission

Regulation 12 sets out the right to a family permit

Regulation 13 sets out the unconditional initial right of residence

Regulation 14 sets out the right of residence

Regulation 15 sets out the right of permanent residence

Part 3 sets out the conditions for issuing various types of residence documentation

Part 4 sets out circumstances where rights can be refused or curtailed or lost

Part 5 sets out various procedural rights

Part 6 sets out appeal rights (with Schedule 1)

Part 7 sets out minor general provisions

What are the benefits of free movement law?

UK and EU rules contrasted

There are many legal and procedural obstacles to a British citizen who wants to bring to the UK a spouse, children or parents under the United Kingdom's own immigration laws. For example, to 'sponsor' a spouse or partner the British citizen must be earning at least £18,600 and prove that accommodation is adequate. Quite intrusive questions can be asked to establish whether the relationship is genuine and the couple must intend to live together. If non British children are seeking to enter additional earnings are necessary as well. It is virtually impossible for a British citizen successfully to sponsor a parent or grandparent who is not British. English language tests are applied. Further, applications under these categories cost hundreds or even thousands of pounds in application fees paid to the Home Office.

EU free movement law is far more respectful of family life than UK immigration law

In EU free movement law, all that is necessary for an EEA citizen to be joined by his or her family members is to show that the EEA citizen is exercising treaty rights. For example, a German person working in London has an almost unqualified right to be accompanied by his or her spouse. No minimum level of earnings is required, there is no need to prove adequate accommodation is available, the couple do not need to show they will be living in the same accommodation and an application is not even required (although it may be useful to make an application to obtain residence documentation). All that is normally needed to prove the relationship is a marriage certificate.

UK rules for a spouse	EU rules for a spouse
Sponsor must be earning at least £18,600 for at least six months prior to application, onerously proven with certain specified documents	Sponsor must be working or otherwise exercising treaty rights
Must intend to live permanently with the other	Must be in same country together
Couple must prove relationship is genuine	Home Office would need to prove relationship is fake
Accommodation must be “adequate”	…that is all
Must pass English language test	
Must apply for visa before travel	
…and more	

EU free movement law is far more respectful of family life than UK immigration law.

Reverse discrimination

The differences between the two sets of rules does create what is sometimes called “reverse discrimination”: a French person living in the UK has far more right to be joined by family members than a British person. This is particularly stark where the family members in question are from a country completely outside the EU, sometimes referred to by lawyers and judges as “third country nationals”. EU free movement law on family members is not interested in the nationality of the family members: whether the family member of the French person is French, German or Nigerian does not matter at all, the French person still has a right to live with that family member in the UK under EU free movement law.

“a French person living in the UK has far more right to be joined by family members than a British person”

Whose rights?

EU free movement rights belong to the EU citizen. It is the EU citizen who has a right to work and therefore to be accompanied by family members. It might be said that as a consequence the family members also have rights -- for example to enter into, reside in and work in the same country as the EU citizen -- but those rights flow from the family member's relationship with the EU citizen. The family member has few free standing rights of his or her own.

This means that if the EU citizen terminates the family relationship, stops working or otherwise stops exercising treaty rights or moves away from the country of residence to another country, the family member may be left in considerable difficulty. The Citizens' Directive and the UK regulations give some free standing rights to family members in some circumstances, but they are always in a vulnerable position, at least until they have acquired what is called permanent residence after five years of being a family member of a person exercising treaty rights.

> **Example**
>
> Cecile is a French citizen. She takes a job in the UK. Her Brazilian husband, David, joins her there. If Cecile loses her job in the UK then she will initially retain the status of worker (see below), but if she cannot find a new job then eventually she will cease being a worker and lose her right to reside, and David will also lose his right of residence.
>
> Similarly, if Cecile loses or quits her job and moves back to France, David will usually have no right to reside in the UK.

In some circumstances a third country national can retain a right of residence in their own right, but this is a fairly complex area of law and personal legal advice will often be required.

It should also be noted that British citizens living and working in the UK do not generally benefit from EU free movement law even though they are EEA nationals, being nationals of an EU Member State. This is because one of the key pieces of EU free movement law, the Citizens' Directive 2004/38, only applies to EEA nationals outside their country of nationality. There are exceptions, though, which are discussed briefly below. In particular, the *Surinder Singh* case means that a British citizen who leaves the UK to exercise rights of free movement elsewhere in the EEA can make use of EU law to return to the UK with family members.

Residence rights of EU citizens

Exercise of Treaty rights

A key concept in making use of free movement rights is that of the "exercise of Treaty rights". This phrase refers to a citizen making use of the rights that are conferred by the treaties, such as the rights to go to another Member State to undertake the following activities:

- work;
- self employment or self establishment;
- self sufficiency; and
- study.

A person who is self sufficient or a student must also have comprehensive sickness insurance. Importantly, while access to the NHS is permitted for EEA nationals and their family members, it does not count as comprehensive sickness insurance.

If an EU citizen is making use of these rights then he or she is granted additional rights of free movement such as the right to welfare benefits and the right to be accompanied by family members. This is referred to in the Citizens' Directive as the **right of residence**.

In order to encourage, promote and facilitate free movement, certain additional rights are conferred on EU citizens and family members which are not dependent on exercising Treaty rights, including the right of admission and an initial right of residence. Similarly, and again to encourage and facilitate free movement, rights of residence can be retained in some circumstances by EU citizens and family members if they cease to exercise Treaty rights.

Legal effect of residence documents

In EU law, residence documents do not themselves confer rights on the bearer but rather are evidence of the underlying EU right of residence. This is like citizenship laws and passports, where a passport is evidence of citizenship but it is not the passport itself which confers citizenship.

This has two important effects, the first positive and the second potentially difficult:

1. A person can possess and make use of EU residence rights without possessing a particular residence document; and
2. A person who possesses a residence document does not necessarily have a right of residence if the conditions for the residence document are no longer met.

The case of *Dias* (C-325/09) is the leading case on this question. The Court describes residence documents as being "declaratory, as opposed to constitutive" in nature (paragraph 49). This can lead to odd and difficult situations arising.

Example

Eva is a Polish national. She enters the UK, finds a job and applies for and obtains a residence certificate. Her residence certificate is valid for five years.

Eva marries Federico, a Brazilian. He is granted a residence card on the basis that Eva is a qualified person and EEA national.

After a year, Eva loses her job but she remains in the UK. As far as she is concerned, her residence certificate and Federico's residence card are still valid.

In fact, Eva loses her right of residence when she loses her job (and does not look for another) and Federico also therefore loses his right to reside in the UK with Eva. If Federico runs into problems with the Home Office, for example because he travels outside the UK and is questioned on return or if he gets into trouble with the police, he is in a vulnerable position because in law, having lost his EU right of

residence, he now requires leave to enter or remain under UK immigration law and he does not have it.

More likely, both Eva and Federico will remain in the UK oblivious to the fact Federico has no right of residence and it is only if or when he applies for permanent residence that the problem will be identified. The situation could be mitigated by Eva becoming a qualified person again by, for example, finding a job. This may not be feasible after Brexit, however, if free movement laws cease to have effect.

It is therefore important to be aware that merely possessing a residence document does not qualify an EEA national or his or her family members for permanent residence at the end of a five year period.

Right of admission

EEA citizens may still move around the EEA even without exercising Treaty rights, without acquiring the right of residence under the Citizens' Directive or the associated rights such as the right to be accompanied by a family member.

The right to move freely is therefore a little different to the right to reside.

The UK regulations reflect the right of admission at regulation 11(1):

> *An EEA national must be admitted to the United Kingdom on arrival if the EEA national produces a valid national identity card or passport issued by an EEA State.*

This is subject to certain public health, public policy and public security exceptions. Regulation 11 also grants a right of admission to family members.

The right of *admission* imparts an effective right to be physically present in other Member States. The right of *residence*, triggered by a qualifying activity, imparts other rights such as the right to be joined by family members and to acquire permanent residence.

Right to be accompanied by family members

The family members of an EEA citizen who is exercising Treaty rights might in some sense be said to have a right of residence with the EEA citizen, but it is probably more accurate to see the situation as being the EEA citizen having a right to be accompanied by his or her family members.

In this section we look at the legal definition of "family member" and then some wider family members, called "other family members" in EU law and "extended family members" in the UK regulations.

The topic of family members and other or extended family members is dealt with in much more detail in a separate free guide in the series.

Family members

In EU law, family members are defined in the Citizens' Directive at Article 2(2):

> *'family member' means:*
>
> *(a) the spouse;*
>
> *(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;*
>
> *(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);*
>
> *(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)*

So, in summary, a "family member" is for free movement law purposes one of the following:

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
3. Parents or grandparents (of the EEA citizen or their spouse or partner) who are dependent

Family members for students are slightly differently defined as the spouse or civil partner of the student or the dependent child of the student or the spouse or civil partner of the student (the age of the child is irrelevant for students, what matters is whether they are dependent, and parents and grandparents are not generally allowed).

Example

Mohammed is Swedish. He was originally from Eritrea and claimed asylum in Sweden and is now a Swedish citizen.

Mohammed has moved to the UK and is working. He now wants to bring his parents and sister to live with him in the UK. His parents and sister are Eritrean nationals.

Mohammed can potentially bring his parents to the UK as long as he can show that they are dependent on him. His sister does not fall within the definition of a family member but, as we see below, she may potentially still qualify as an extended family member.

Other or extended family members

The phrase “extended family member” is an invention of the UK regulations that does not appear in the Citizens’ Directive. The Directive refers to “other family members” at Article 3:

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State

shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

It can be seen that the words of Article 3 are rather vague: “in accordance with national legislation”, “facilitate entry and residence”, “undertake extensive examination” and “shall justify any denial of entry or residence”. What is clear from this language is that the rights of “other family members” are not as concrete as those of family members.

The UK regulations implement this category of family member in a slightly strange way. In short, if one of the "extended family member" types applies for and is granted a residence document then he or she will be treated as a "full" family member.

The different types of extended family member who are eligible to be treated as “full” family members if they successfully obtain residence documentation are therefore basically:

1. Dependants or members of the household of the EEA national who are dependent or members of household both before and after entry

2. A relative of an EEA national or his or her spouse or his or her civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his or her civil partner
3. A partner in a “durable relationship” with the EEA national

These categories are *eligible* to be treated as full family members but the Home Office retains a discretion not to admit them.

Example

Let us return again to the example of Mohammed, who was originally from Eritrea, naturalised as a Swedish citizen, moved to the UK as a worker and now wants to bring his parents and sister to live with him in the UK.

We have already considered Mohammed's parents and now let us consider his sister. Mohammed's sister can potentially qualify as an extended family member if Mohammed can show that she was a member of his household or was dependent before entry to the UK.

Proving dependency is conceptually straightforward and may well be feasible if Mohammed has been transferring money to her and his parents for their support.

Proving membership of household is harder both in terms of the evidence (finding good quality documents that place Mohammed and his sister at a shared address in Eritrea might be challenging) and also because Mohammed lived in Sweden for many years between leaving Eritrea and entering the UK.

In the case of *Rahman* it was held that the extended family member must have been dependent or a member of household at the time of applying to enter with or join the EEA citizen. This means that it is not possible for Mohammed's sister to succeed as a member of household (she has been living in a different household in Eritrea) but it may be possible for her to succeed as a dependent.

If you need more information on the topic of family members and other or extended family members see the separate free guide in the series.

Initial right of residence

To encourage free movement the Directive grants an initial right of residence to EU citizens for three months, which includes the right to be accompanied by a family member. This enables an EU citizen to move for any purpose, including for example to seek work, find a suitable course of study or set up a business in the knowledge that he or she will not have to leave behind family members until established in the new Member State.

The initial right of entry appears in the UK regulations at regulation 13:

> *(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date of admission to the United Kingdom provided the EEA national holds a valid national identity card or passport issued by an EEA State.*
>
> *(2) A person who is not an EEA national but is a family member who has retained the right of residence or the family member of an EEA national residing in the United Kingdom under paragraph (1) is entitled to reside in the United Kingdom provided that person holds a valid passport.*

Regulation 13 goes on to impose very limited qualifications: the EEA national or family member must not be an “unreasonable burden on the social assistance system of the United Kingdom” and it does not apply to EEA nationals or family members who have already been expelled from the UK on public policy or similar grounds or refused residence documents.

"Normal" residence

Under EU law, a qualifying worker, self employed person, self sufficient person or student has a right of residence. This right of residence is generally conditional on carrying on with the qualifying activity. Where it exists, it brings with it various other rights in EU law, in particular the right to be

accompanied by family members and the right to claim welfare benefits. It also provides enhanced protection against deportation.

The right of residence may well overlap with the unconditional initial right of residence and the right of permanent residence; they are not mutually exclusive. This means that, for example, where a person applies for permanent residence and is refused because of a gap in residence or gap in qualifying activity, the person may still have a right of residence even if permanent residence has not been acquired.

Further, an EU national is generally regarded as having a right to be physically present in another Member State irrespective of whether he or she has a right of residence. Even where an EU law application for a residence or permanent residence is refused by the Home Office, the Home Office will not generally ask the person to leave the UK.

Example

Olaf is from Denmark. He enters the UK in 2007. He has an initial right of residence for 3 months and he is accompanied by his wife, who is from Russia. She is allowed to remain in the UK for the initial 3 month period; she enters the UK using a family permit valid for three months.

Olaf looks for but does not find work immediately but 6 months after entry he finds a job. In the period between the end of the initial 3 months and his finding a job he would be considered a job seeker. The period for which he was looking for work was relatively short, was certainly less than 6 months, and he did find work at the end of it. He would therefore have enjoyed a right of residence as a worker, as "worker" includes a person looking for work.

Once Olaf was in work he was then clearly a worker and had a right of residence. His Russian wife therefore has a right of residence under EU law. Either or both Olaf and his wife can apply for residence documents as proof of their rights. If they do, these will be issued for a five year period.

> Olaf ceases work in 2010. He does not look for a new job but he remains in the UK. He therefore loses his right of residence.
>
> Olaf may or may not have a residence certificate, but having the certificate does not mean that he has a right of residence. This is not necessarily a problem for Olaf (although it does mean he is not eligible for welfare benefits) but it is certainly a problem for his Russian wife. Olaf is allowed to be physically present in the UK but he loses the right to be accompanied by family members. This means that his wife loses her right of residence under EU law and will become subject to UK immigration law. She may have a residence card, but this does not mean that she has a right of residence; her right of residence depends on Olaf remaining a qualified person.

The advantage of permanent residence is that it is not conditional on a qualifying activity such as work. This means that if a person loses his or her job, ceases work for some other reason or simply retires, he or she does not have to leave the UK. There is a particular advantage to permanent residence for family members from outside the EU because it gives them much greater security than being dependent on the EU national remaining a qualified person.

Permanent residence

An EEA national will automatically qualify for permanent residence after five years of living in the UK while exercising their treaty rights and qualifying under the Citizens' Directive. If the EEA national choses to do so, he or she can apply for a permanent residence card as evidence of possession of this right.

There are some quirks to permanent residence, though.

Automatic nature of permanent residence

Like the other rights of EU citizens in the Citizens' Directive, permanent residence is an automatic right that operates by law; a successful application

for a permanent residence card is not necessary in order to possess the right.

However, the flip side of this coin is that five years of possessing a residence card does not automatically qualify the holder for permanent residence. What matters when it comes to qualifying for permanent residence is whether the person was genuinely qualifying under the Citizens' Directive for a period of five years, not whether the person held a residence card. This means there can be some controversy about whether a person does or does not possess permanent residence.

Example

Pierre is a French national who came to live and work in the UK five years ago. He got a job immediately on arrival and successfully applied for a residence certificate within weeks of arrival. After three years, he lost his job and he has not worked for the last two years.

It may be the case the Pierre does not qualify for permanent residence. Depending on the reasons he has not worked and whether he has been looking for more work, he does not obviously qualify for permanent residence because he has not been a qualified person for the final two years of the five year period.

The fact that he possesses a residence certificate is not, by itself, sufficient to prove that he qualifies for permanent residence.

If Pierre could show that he had genuinely been seeking work and had a genuine prospect of being engaged he might qualify for permanent residence that way. There are some further provisions of EU law that might protect Pierre's position as well, such as if he had retired or suffered an industrial accident. These are discussed further below.

This means that when applying for permanent residence, the applicant will need to submit five continuous years' worth of the kind of evidence that is

necessary for a residence card. This is explored further below in the section on evidence.

Combining different qualifying activities

It does not matter how a person has been a qualified person for five years; during a five year period an EU citizen may have been first a worker, then unemployed, then self employed, then a student and still potentially qualify for permanent residence. Any qualifying activities can be aggregated together as long as they amount to five continuous years of some sort of qualifying residence.

Example

Clara is Spanish and arrived in the UK five years ago. She applied for a European Health Insurance Card (EHIC) almost as soon as she arrived. She spent 3 months finding work then worked for 3 years. She was made redundant and set herself up as a consultant. It was some time before she started earning reasonable income but she had plenty of savings to live on and did not claim benefits.

If Clara wishes to apply for permanent residence, she can rely on different qualifying activities combined together to form a continuous five year period:

- Initially Clara was a jobseeker.
- She was then a worker.
- She was then either self employed (she could say that it took time to get started but she was genuinely self employed during that time) or self sufficient and in possession of comprehensive sickness insurance.
- She was then definitely self employed.

You can see from this example that the fact that Clara had applied for a EHIC meant that it is possible for her to fill in any gaps in her qualifying residence using the qualifying activity of self sufficiency. Without being covered by comprehensive sickness insurance, she would need to work hard to make sure she could prove she was

genuinely self employed at a time when her earnings were non existent or low because she was just starting out.

Residence prior to the Citizens Directive

Even though permanent residence was only created as a right by the Citizens' Directive on 30 April 2006, earlier periods of residence under previous EU law provisions can count towards permanent residence and in fact can have created a right of permanent residence, even though the right did not actually exist at that time.

Example

In the case of *Lassal* C-162/09 a French national had lived in the UK working and seeking work between 1999 and 2005. She then left the UK for a 10 month period, returned to the UK to look for work again and then applied for income support in November 2006. Her application was refused on the basis that she had no right to reside.

The Court held that by November 2006 Ms Lassal possessed the right of permanent residence owing to her earlier five years of qualifying activities, even though at that time the right of permanent residence had not actually existed.

Permanent residence not necessarily permanent

Despite including the word "permanent" the right of permanent residence may be lost in certain circumstances, including through absences in excess of two years or due to public interest deportation action against the individual. Deportation action is beyond the scope of this ebook but it is important to mention it here as a possibility.

Example

Marianne is a highly qualified doctor of Dutch nationality. She has lived in the UK for many years, since the age of 12. First she was resident for many years as child of an EU national then as a student and then working as a doctor. She applies for and succeeds in obtaining a job in Australia.

Marianne will almost certainly have acquired permanent residence, even if she has never applied for a permanent residence certificate as proof.

Should Marianne remain outside the UK for over two continuous years, she will lose her right of permanent residence. If she returns to the UK for a visit for even a day to "break" the period of absence she would retain her permanent residence, however.

In previous years this might not have mattered much because Marianne would always have been able to return to the UK as a worker etc under EU free movement rules, but following Brexit we do not know what immigration restrictions may be imposed. Retaining a right of permanent residence has therefore become potentially much more important.

WHAT COUNTS AS "WORK" IN EU LAW?

The right to work in other Member States is a fundamental right in EU law and the concept of "work" is one that is defined by EU law, not by national law. It is Article 45 of the Treaty on the Functioning of the European Union from which the free movement rights of workers derives:

> *Article 45*
>
> *1. Freedom of movement for workers shall be secured within the Union.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> *(a) to accept offers of employment actually made;*
>
> *(b) to move freely within the territory of Member States for this purpose;*
>
> *(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
>
> *(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.*
>
> *4. The provisions of this Article shall not apply to employment in the public service.*

It is to the European cases to which we therefore turn to understand the scope and meaning of what counts as "work". The concept of 'work' has been very broadly interpreted by the EU courts to give maximum effect to

the right in order to facilitate and promote the single market and free movement around the EU.

Definition of “work”

In the case of *Lawrie Blum* (C-66/85) the ECJ defined a “worker” as a person who is employed for a period of time in the provision of services for and under the direction of another in return for remuneration. The definition can be broken down into its constituent parts to assist in identifying whether a given situation amounts to work or not:

(i) A person

(ii) Who is employed

(iii) For a period of time

(iv) In the provision of services

(v) For and under the direction of another

(vi) In return for remuneration

No minimum period of time is specified, nor is any minimum remuneration. However, for work to qualify a person for full free movement rights, it must also be “effective and genuine”, a term that originates from a case called *D.M. Levin v Staatssecretaris van Justitie* (C-53/81), where the Court of Justice concluded:

> *1 . The concepts of “worker" and “activity as an employed person” define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively .*
>
> *2. The provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter state, is*

considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine.

3. The motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter state provided that he there pursues or wishes to pursue an effective and genuine activity.

In *Levin* the court elaborated a little on the meaning of "effective and genuine":

It should however be stated that whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. It follows both from the statement of the principle of freedom of movement for workers and from the place occupied by the rules relating to that principle in the system of the treaty as a whole that those rules guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity.

One potentially helpful way to examine the question of whether work is “genuine and effective” is to consider the question from the point of view of the employer. Is the work of genuine economic value? Would another employee need to have been found to do the work instead, for example? This question was posed by the Court of Justice of the European Union in *Genc* and by the Court of Appeal of England and Wales in the case of *Barry v London Borough of Southwark* [2008] EWCA Civ 1440. It is by no means the only consideration nor necessarily decisive (many firms employ workers who might potentially be surplus to requirements; many family firms may

genuinely employ family members even though the firm might potentially manage without) but this does seem to be a relevant consideration.

In *Barry*, the Court of Appeal reviewed some of the EU case law and held as follows on the meaning of "subsidiary or ancillary":

> *[20] In my judgment, it follows from the above that work will be subsidiary or ancillary if it is done pursuant to some other relationship between the parties which is not an employment relationship, as where a lodger performs some small task for his landlord as part of the terms of his tenancy. The duration of the employment is, however, a factor to be taken into account. The duration of the work in the relevant period is not, however, a conclusive factor in deciding whether a person is a "worker" for Community law purposes (see Ninni-Orasche at [25]).*

The Court of Appeal went on to hold that the whole employment history of the person was a relevant consideration to be taken into account in assessing whether the person remained a worker at a given time.

Internal Government guidance to its caseworkers sets out what are considered to be relevant factors when assessing whether work or self employment is genuine and effective. See, for example the official Decision Makers' Guide at DMG 073050:

1. whether work was regular or intermittent
2. the period of employment
3. whether the work was intended to be short-term or long-term at the outset
4. the number of hours worked
5. the level of earnings.

DMG 073043 helpfully sets out for government caseworkers the principles to be derived from various Court of Justice cases, so may also be a useful reference point.

Job seekers

In practical terms, the right to move freely in order to work would be rather hard to exercise if a person had to have a job before exercising that right and if he or she (and his or her family) lost the right of free movement as soon as he or she became unemployed. In order to facilitate and promote free movement of workers, EU law therefore recognises that the right to work includes the right to seek work and even to be unemployed. There are limits, though; a person cannot be a work seeker or unemployed indefinitely.

The key case on this subject is *Antonissen* (C-292/89). The Court held that a person should be permitted a period of at least six months in order to find work, and would be a "worker" during this time, but that even at the end of that six month period would remain a worker if he "provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged."

Article 7(3) of the Citizens' Directive 2004/38 also provides protection to workers who find themselves out of work in some circumstances:

> *...a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:*
>
> *(a) he/she is temporarily unable to work as the result of an illness or accident;*
>
> *(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;*
>
> *(c) he/she is 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 twelve months and has*

registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

This protection is broadly reflected in the UK's regulations at regulation 6(2).

The UK's regulations recognise a "jobseeker" as a qualified person under EU law (regulation 6(1)(a)). However, the UK regulations have been repeatedly amended in recent years and now arguably impose additional requirements over and above *Antonissen*. The period of six months is reduced to 91 days and "compelling" evidence of seeking employment and having a genuine chance of being engaged must be submitted according to the regulations. There is a strong argument these additional requirements are not compatible with EU law.

Two recent cases in the Administrative Appeals Chamber of the Upper Tribunal have examined these issues: *KS v Secretary of State for Work and Pensions* [2016] UKUT 269 AAC and *MB and others v Secretary of State for Work and Pensions* [2016] UKUT 372 AAC.

In the first case, *KS*, the judge held that the requirement for “compelling evidence” did not mean that a higher standard of proof was required than the normal civil standard.

In the second case, *MB and others*, the tribunal grouped several lead cases together to consider whether the UK’s new “compelling evidence” test of genuinely searching for and finding work was compatible with EU law.

In the course of considering this question, the tribunal also considered the meaning of the “genuine chances” test:

It seems to me that what is contemplated are chances that, as well as being founded on something objective, offer real prospects of success

> *in obtaining work. Such a view is, moreover, consistent with both the French version ("des chances véritables d'être engagé") and with the German ("dass er mit begründeter Aussicht auf Erfolg Arbeit sucht."). It is a significantly higher level than the "not hopeless" suggested by the skeleton arguments for the claimants.*

It is not necessary to be able to point to a particular job, although the offer of a specific job will be powerful evidence of a genuine prospect, and it is necessary to look forward to assess whether there is a genuine chance, for example taking into account the fact that the person intends to undertake a qualification or some training.

The tribunal holds that the prospect of being engaged must be within a reasonable time in order to satisfy the test. There is no set period, so this will vary from case to case but it is not likely to include a prolonged period in order for the person to obtain further qualifications.

On the issue of the meaning of the "compelling evidence" requirement the tribunal emphasised that the test is as established in EU law and warned against applying too high a test (paragraph 57):

> *Insistence on "compelling" evidence may, if care is not taken, all too easily result in raising the bar above the level I have found to be required, namely chances that are founded on something objective and offer real prospects of success in obtaining genuine and effective work within a reasonable period.*

The finding is consistent with the earlier *KS* decision and both cases will be helpful to EEA nationals seeking to establish a right to permanent residence in the aftermath of the Brexit vote where they have experienced periods of job search or unemployment in excess of 6 months.

Part time working

EU law is clear on part time working: it potentially counts as employment. So part time work does qualify a person for EU rights of residence and time spent as a part time employed person counts towards acquiring permanent residence. However, the work still has to be "genuine and effective".

In the case of *D.M. Levin v Staatssecretaris van Justitie* (C-53/81) a British woman had moved to the Netherlands and taken part-time employment in which she earned less than the minimum considered necessary to support oneself. The woman had other sources of income and support, though. The Court held that the woman was a worker as long as the work was "genuine and effective" and that this was irrespective of the fact the woman needed to rely on other forms of support. The Court went on specifically to say that part time working could qualify as work:

> *It should however be stated that whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.*

Applying this approach, it was once held by the Court that a part-time music teacher giving 12 lessons a week topped up with Dutch social security payments was a worker for EU law purposes and entitled to a residence permit even if he was also receiving public funds: *Kempf v Staatsecretaris van Justitie* (Case 139/85). 10 hours per week was held to be sufficient for a person to be considered a worker in *Megner and Scheffel v Innungskrankenkasse Vorderpfalz* (Case C-444/93). In another case the Court stated that a person working only 5 hours per week for a very low hourly wage might potentially be a worker, although all the circumstances needed to be considered including the person's entitlement to holiday pay, sick leave and the length of the employment contract: *Genc v Land Berlin* (Case 14/09).

So, we know that 10 or 12 hours a week is probably genuine part time employment. It may be that even fewer hours might qualify, but at some point we also know that the "work" will become marginal and ancillary.

Low paid work

There is no clear guide in EU law to what level of earnings will amount to "genuine and effective" economic activity. All we know is "activities on such a small scale as to be regarded as purely marginal and ancillary" do not count (from *Levin*).

In practice, judges tend to follow an "I know it if I see it" style approach. Government officials have a threshold which they apply in practice, the Minimum Earnings Threshold ("MET"), as discussed further below.

The *Levin* and *Kempf* cases both concerned very low earnings, and both succeeded. In Levin the issue had been whether earnings below the level considered necessary to support a person would count and they did. On the facts of *Levin*, the claimant had alternative resources available. In *Kempf*, the claimant did not have alternative income and claimed benefits at the same time as working because his income was so low.

The Court nevertheless held that these activities amounted to genuine part-time employment and were not so marginal and ancillary as not to be genuine and effective. The source of supplementary income did not affect the question of whether the activity was genuine and effective.

In EU law, earnings need not even be monetary in nature. The word "remuneration" has often been used in case judgments instead of "pay" or "wages". In the case of *Steymann* (Case 196/87) it was held that the remuneration needs to be economic in nature but need not be monetary; provision of basic needs such as accommodation, food and pocket money in return for participation in a religious community was sufficient. On the other hand, in *Bettray* (Case 344/87) an applicant who was paid a wage but whose

work was rehabilitative and was selected for him (rather than him for it) failed to establish that he was a worker.

A fixed length and short term employment contract may potentially qualify a person as a worker (*Ninni-Orasche* (C-413/01) and also see *Barry*, discussed below) and a "zero hours" contact may still potentially qualify as work if the work is genuine and effective, although if the work has been irregular and limited in duration that is a consideration which is to be taken into account (*Raulin* (C-379/89)).

EU law rarely changes; the UK Government interpretation of EU law changes regularly. On 1 January 2014, the new concept of the "Minimum Earnings Threshold" was introduced into the UK's interpretation of EU law on the definition of who is and is not a worker. Essentially, if a person earns more than the threshold then he or she will automatically be regarded as a worker; if a person earns less than the threshold then his or her case will be more closely considered.

The level of the Minimum Earnings Threshold, or "MET" is set at the earnings necessary to begin paying Class 1 National Insurance payments. Currently, for 2016/17, this is £155 per week or £8,112 per year.

There are legal arguments about whether the MET represents a breach of EU law by discriminating against part time workers and defining the concept of "worker" by reference to national law, which is impermissible. The guidance on how the MET should be applied indicates that where a person earns less it will be assumed as a starting point that the work is not genuine and effective. Realistically, though, unless a test case is brought the rules will continue to be applied by Home Office and Department for Work and Pension officials.

Example

> Ludmilla is a Romanian national. She works part time as a cleaner for the minimum wage. She works around 12 hours per week and the minimum wage in October 2016 was £7.20.
>
> As a rough calculation, for notional 48 week year Ludmilla would currently earn around £7.20 x 12 x 48 = £4,147.20.
>
> The minimum wage in 2008 was £5.73. Working a 10 hour week for a 48 week year would have meant earnings of just £2,750.40.
>
> These figures are far below the Minimum Earnings Threshold, yet they would seem to qualify as genuine and effective work according to case law. Such cases might be more problematic if the work was more occasional in nature rather than regular, however.

It is important to understand that earning less than the MET does not mean a person is not a worker; it just means that the person's situation will be more carefully considered by the relevant official. It is still possible to rely on EU case law and succeed, although an appeal to a judge may become necessary.

Claiming benefits

Claiming benefits does not necessarily disqualify a person from acquiring EU rights of residence. Benefiting from tax credits is certainly not a problem, nor claims for universal benefits such as child benefit. If a worker earns so little that he or she qualifies for income based welfare benefits, that does not necessarily disqualify the person either.

In the case of *Levin*, as we have seen, the Court held that a person could be a worker even if the person had to supplement their income from another source. In the follow up case of *Kempf* the Court held that the fact the source might be welfare benefits did not mean that the work was not "genuine and effective":

> *It follows that the rules on this topic must be interpreted as meaning that a person in effective and genuine part-time employment cannot be excluded from their sphere of application merely because the remuneration he derives from it is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. In that regard it is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his family, as was the case in Levin, or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the member state in which he resides, provided that the effective and genuine nature of his work is established.*

The test is not whether the person is claiming benefits but whether the work is "genuine and effective". Whether benefits are claimed or not is of only very limited relevance to the real question.

Maternity or parental leave

Where a pregnant worker ceases employment for maternity related reasons and then recommences work within 12 months of giving birth, she will retain the status of worker. This was established in the case of *St Prix* (Case C-507/12) and is reflected now in UK case law as well: see *SSWP v SSF and others* [2015] UKUT 0502 (AAC) and *Weldemichael and another (St Prix C-507/12; effect)* [2015] UKUT 540 (IAC).

In the *St Prix* case the Court established no particular limit on how long they woman would retain worker status. In both the Upper Tribunal cases it was held that women can leave work up to 11 weeks before their due date, they can be a job seeker or worker at the start of the period of absence, can retain the status of worker for 12 months following childbirth and do not need to return to work in order to have retained worker status during that time.

In the *SSF* case the tribunal held that worker status could potentially be retained for a period in excess of 12 months, whereas in *Weldmichael* the tribunal held that 12 months was the maximum.

There is no direct case law on paternity or adoption leave but similar arguments could be employed. Given that the UK Government fought *St Prix* and the domestic UK cases, such arguments might well have to be fought in court, unfortunately.

RETAINING RIGHTS WHEN WORK ENDS

In order to promote and give full effect to free movement for workers, the EU definition of "worker" includes the right to move to another country, work and then cease work for certain specified reasons such as experiencing a temporary or permanent incapacity to work or an industrial accident or retirement. There is also protection for cross border workers who retain a place of residence in one Member State but work in another.

The protection for workers extends to the self employed as well; references to worker in this section also apply to the self employed.

The rationale for these rules is that without such protection, workers would be more reluctant to move to other Member States.

Temporary incapacity to work

Citizens' Directive 2004/38 sets out certain circumstances where a person who has already been a worker or self employed retains his or her status despite ceasing work. These are set out at Article 7(3):

> *(a) he/she is temporarily unable to work as the result of an illness or accident;*
>
> *(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;*
>
> *(c) he/she is 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 twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;*

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

In plain English, this means that where a person has been a worker or self employed, he or she will be considered to remain a worker or self employed person with an EU right of residence if:

(a) He or she is temporarily unable to work because of illness or accident. There is no set time period and "temporary" could potentially be any period of time less than "permanent". There must be a causal link between the illness or accident and the inability to work, though.

(b) He or she has worked for more than one year and then registers at the Job Centre and is looking for work (otherwise the unemployment is not involuntary). However, its must be the case that the person does not retain his or her worker status indefinitely; if the *Antonissen* (C-292/89) case is applied, after 6 months he or she will need to show a genuine chance of getting a job.

(c) He or she has worked for less than one year and then registers at the Job Centre, in which case he or she will retain worker status at least six months.

(d) He or she undertakes vocational training. However, if the unemployment was voluntary then the vocational training must be related to the previous employment in some way.

These provisions are partially reflected in the UK regulations at regulation 5. However, the UK tries to force those who find themselves unemployed to prove a "genuine chance of being engaged" even for the first six months of unemployment and then "compelling evidence" of this after six months, and also limits the period of unemployment in situation (c) to only six months.

Nevertheless, these provisions may be helpful in bridging gaps in employment where an application for permanent residence is being contemplated.

Permanent incapacity to work

Citizens' Directive 2004/38 also provides some protection for workers and self employed people who become permanently incapable of work. The basic criteria for a worker who experiences a permanent incapacity to work are that:

(1) The worker must have terminated his or her work or self employment because of a permanent incapacity to work (there must be a causal link between the decision to stop work and the incapacity to work) AND

(2) The worker must have resided in the UK continuously for more than two years prior to ceasing work

OR

the incapacity is the result of an accident at work or an occupational disease that entitles him or her to a pension payable in full or in part by an institution in the UK.

Where these conditions are met, the person will qualify for immediate permanent residence and does not need to wait for the end of the normal five year period.

Example

Gisela is a German national. She comes to the UK for a job in 2012. She marries in the UK but in 2015 she has a terrible car accident leaving her permanently unable to work. She wishes to remain in the UK.

Because she was a worker, she lived in the UK for two years and she has ceased work because of a permanent incapacity to work, she qualifies for immediate permanent residence.

Retirement

Citizens' Directive 2004/38 provides a right of retirement for workers and the self employed in the Member State in which they have been working, as long as the following conditions are all met:

(1) The person has lived in the UK continuously for at least three years prior to retirement; and

(2) The person was working or self employed in the UK for at least one year prior to retirement; and

(3) The person has reached state retirement age or, if a worker, is taking early retirement.

As with permanent incapacity to work, a person who meets these conditions for retirement will qualify immediately for permanent residence and does not need to wait for the end of the normal five year period. These provisions are set out at Article 17 of the Directive and implemented in the UK regulations at regulation 5.

Cross border workers

The Directive also provides at Article 17 for permanent residence to be acquired by certain cross border workers. Cross border working is more common across land borders in continental Europe but can also arise in the UK, particularly between Northern Ireland and the Republic of Ireland.

The conditions to be met are that the worker or self employed person has:

(1) Worked for three years in the UK

(2) Then works in an employed or self employed capacity in another Member State

(3) But retains his or her home in the UK and returns to it at least once a week.

Once again, such a person may acquire permanent residence as soon as the conditions are met and does not need to wait for the normal five year period to elapse.

MAKING AN APPLICATION

Do I need to apply at all?

EU law free movement rights depend on whether a person meets the relevant criteria, not whether an application has been made and a document issued in response. EU law is quite different to domestic UK immigration law in this way; in UK immigration law an application must be made and granted before the person possesses the right in question.

As already discussed above, EU law is akin to nationality law in this way. A child is not born clutching a passport for a particular type of citizenship and does not need to apply in order to possess citizenship; he or she will be a citizen automatically by operation of law if certain qualifying criteria are met. So it is with EU free movement law.

> **Example**
>
> Ferdinand is an EU national. He has lived and worked in the UK since 2001. He has never applied for any residence documents or proof of status.
>
> Whether he knows it or not, he automatically acquired permanent residence in 2006 after five years of living and working in the UK. He possesses that right already and may if he chooses apply for a permanent residence certificate as proof of his status.

However, as with nationality law, possessing a right and making use of it are two rather different things. Just as it will be hard to travel on holiday to another country without first applying for a passport as proof of citizenship and so that identity can be verified on departure, arrival and return, it can be hard to make convenient use of EU free movement rights without applying for proof of possession of such rights. Proof can come as one of the following types of document:

1. **Family permit**. For travel to the UK and making use of the initial right of residence for third country national family members of EEA nationals.
2. **Residence certificate**. Proof of the right of residence for EEA nationals.
3. **Residence card**. Proof of right of residence as a family member or extended family member of an EEA national.
4. **Permanent residence certificate**. Proof of right of residence for EEA nationals.
5. **Permanent residence card**. Proof of right of permanent residence as a family member or extended family member of an EEA national.

The second, third, fourth and fifth of these documents — the residence certificate, residence card, permanent residence certificate and permanent residence card — are all documents that exist under and are issued under EU law. It is for Member States such as the UK to issue them but the rules about how to apply and when the documents will be issued are EU rules.

The first of the documents, the family permit, is a document created by the UK Government and issued under UK law. It is the UK which decides the way in which applications are made.

In the UK it is increasingly difficult to get by without proof of possession of an EU right of residence or permanent residence, especially for third country nationals who are family members of EU citizens. The UK Government has been establishing what it calls a "hostile environment" for migrants without the right to live or work in the UK. This requires British citizens and migrants alike to prove their right to live and work in the UK in order to access an increasingly wide range of services, including employment, banks, building societies and rental accommodation.

Prior to June 2016, whether to apply for proof of the possession of an EU right of free movement was ultimately a matter of personal preference and the balance of convenience. Since the referendum, it has arguably become more important to apply for documents as a form of security.

Family permit and travel to the UK

The easiest way to explain what is a family permit is to quote the Home Office's own guidance to its staff:

> *An EEA family permit is a document that we issue to make it easier for non-EEA family members of EEA nationals to travel with their EEA national or to join them in the UK. EEA family permits are issued under the Immigration (European Economic Area) Regulations 2006 and not the Immigration Rules. The permit is issued ahead of a person's travel to the UK and is valid for six months and is free of charge. The family permit is not an EU document. It is issued by the UK under UK rules to facilitate entry to the UK for third country nationals who are family members of EU nationals.*

Unlike the other types of residence documents, the UK is therefore allowed to mandate that applications are made in a particular way. If a person wants to use a family permit to enter the UK, the mandatory application process must therefore be followed.

An EEA national does not need a family permit, though, because his or her passport or identity card will suffice, and a family member of an EEA national who holds a residence card for another Member State also does not need a family permit (see case of *McCarthy* C-202/13). Those most likely to want to apply for a family permit are family members without residence cards for other Member States, for example if traveling directly to the UK from outside the EU.

Right of residence (first five years)

There is no need to apply for a residence certificate or residence card to possess the right of residence. As long as the qualifying requirements set out in EU law in the Citizens Directive are met then a person will automatically possess the right of residence.

Example

Maurice is French and has lived and worked in the UK for five years. He has therefore automatically acquired permanent residence. If he wants to obtain a residence certificate as proof, he will need to submit evidence of the five years of employment. This might take the form of four years' worth of P60 documents and, because he has not yet received the latest P60, also wage or salary slips covering the final year.

His wife Nina, who is from India, applies six months later because she entered the UK six months after Maurice and has only just attained the necessary five years of residence. She has also now acquired permanent residence automatically. If she wants to obtain a permanent residence card as proof, she will need to submit the same evidence as Maurice to prove he has qualified, plus evidence that she is married to him and that she has been resident in the UK for five years. The Home Office may already have received much of this evidence previously but it is necessary to submit it again. She can also submit Maurice's permanent residence card, but this might not be sufficient on its own.

Maurice and Nina have a child, Owen. He is 25 and has been living with them for five years as their dependent. He has also obtained permanent residence automatically but to obtain a permanent residence card will need to submit evidence that Maurice was a qualified person for five years, evidence that he is Maurice's child and evidence of dependency, such as evidence of living at the same accommodation and receipt of money transfers.

As discussed repeatedly here, though, possessing the right and making use of it in practice are two different things. Many choose to apply for a residence certificate or residence card in order to prove their status when traveling, obtaining employment, renting property or opening a bank or building society account. Brexit is adding an additional reason to that list.

Permanent residence

As with the right of residence for the first five years, a person will automatically acquire the right of permanent residence if he or she meets the qualifying requirements set out in EU law. There is no need to apply for a permanent residence card in order to acquire the right of permanent residence, the card merely acts as evidence.

As already suggested, though, many may well choose to apply for a permanent residence card in order to have proof that they possess the right and as a matter of convenience.

There is an additional reason why a person might choose to apply for a permanent residence card: because he or she is not sure whether he or she does possess the right and he or she seeks confirmation one way or the other. The acquisition of permanent residence can be quite complicated in some cases, for example where there are gaps in employment or self employment, earnings have been very low or the person needs to rely on what are called "retained rights of residence".

British citizenship

EU citizens or their family members may eventually wish to apply for British citizenship. The laws around the acquisition of British citizenship are determined entirely by the UK, not the EU. One of the requirements for a foreign citizen to naturalise as a British citizen is that he or she has been residing in the UK for at least five years, the last year of which must have

been free from restrictions on his or her immigration status. For most non EEA nationals, this means they must possess Indefinite Leave to Remain. For those relying on EU law, this means the possession of permanent residence.

Prior to 12 November 2015 it was possible for an EEA national or family member of an EEA national with permanent residence to apply to naturalise as British without first applying for a permanent residence card. Proof of having acquired permanent residence would still need to be submitted (evidence of five years of employment in the UK for example) which was the same as the evidence that would have been submitted with a permanent residence application, but there was no need to apply twice.

For new applications made on or after 12 November 2015 the rules have been changed and the Home Office only now accepts applications for naturalisation from EEA nationals and their family members where an application has first been made for a permanent residence card and the card is enclosed with the naturalisation application.

If an application for naturalisation is made without including the permanent residence document, the application will be refused and the substantial application fee will not be refunded.

It is important to note that the one year period of being free from restrictions on immigration status does *not* run from the date the permanent residence card was issued. It is necessary to possess a permanent residence card but if the underlying right of permanent residence has already existed for a year prior to the date of issue of the card then an application can be made as soon as the card is issued. If the applicant has possessed permanent residence for six months when the card is issued, he or she will need to wait a further six months from the date the card is issued before applying for naturalisation.

For the avoidance of doubt, it is always necessary to use the correct application form for British citizenship applications.

How do I apply?

Do I need to use an official application form?

From 1 February 2017 it it has become mandatory to use the official application forms, either online or on paper, that are provided by the Home Office. This is a new requirement introduced by paragraph 21 of the Immigration (European Economic Area) Regulations 2016, which came into force on 1 February 2017. The relevant parts of the regulation say that an application for residence documents must be made:

> *(a) online, submitted electronically using the relevant pages of www.gov.uk; or*
>
> *(b) by post or in person, using the relevant application form specified by the Secretary of State on www.gov.uk.*

The regulation also states that all applications must be accompanied or joined by "the evidence or proof required by this Part" within the time specified on www.gov.uk and must be "complete." This part of the regulations does not actually specify any specific evidence or proof, however, and the word "complete" is ambiguous in the context of, for example, an 85 page application form for permanent residence which has large sections which must be left blank.

An application for a residence card (for a family member of an EEA national) must be made from within the UK.

The same part of the regulations goes on to say later:

> *When an application is submitted otherwise than in accordance with the requirements in this regulation, it is invalid.*

Where an application is deemed invalid a £25 administration fee will be retained by the Home Office and the balance of the fee (which is £65 per person) will be returned to the applicant.

Example

Pieter wishes to apply for a permanent residence certificate. It is after 1 February 2017. He has been living and working in the UK for six years and wishes to rely on the first five years of his residence.

Pieter has travelled abroad for work and leisure purposes frequently during his time in the UK. He has made hundreds of trips, all of them of short duration. He has never been outside the UK for anything close to six months in any of the five years, though.

Pieter cannot remember or find records for all these trips. One of the questions on the form asks him to record the date of every single trip abroad. He cannot do this and instead writes on the form:

"I have made hundreds of short trips abroad but have never been outside the UK for more than about two months of a year."

Is Pieter going to have his application returned as invalid because his form was not "complete"? Probably not, but at the time of writing this was unclear.

There is an exception to the requirement to use the official forms, but at the time of writing it was not at all clear when the exception might apply. Regulation 21(6) says:

Where—

(a) there are circumstances beyond the control of an applicant for documentation under this Part; and

(b) as a result, the applicant is unable to comply with the requirements to submit an application online or using the application form specified by the Secretary of State,

the Secretary of State may accept an application submitted by post or in person which does not use the relevant application form specified by the Secretary of State.

The change to require use of mandatory forms is a controversial one. EU law does not confer the power on Member States to require applications for EU documents to be made in a certain format or with certain documents. To put it another way, in EU law there are no mandatory application forms. If you are interested in these things see Directive 2004/38/EC Article 8(3), for example, about "administrative formalities for Union citizens" which states that Member States may *only* require certain things, and which does not list mandatory application forms. See also Articles 10, 19 and 20, none of which allow for a mandatory application form. The residence documents issued under the Directive, such as a permanent residence certificate, are issued as of right to those who qualify.

There has never been anything to stop Member States from devising and providing application forms to assist people with making applications under EU law. The use of these forms has always previously been optional, though, not compulsory.

Nevertheless, it is unlikely to be in any single person's interests to challenge this requirement and refusal to use the form will lead to an application being treated as invalid and being returned to the applicant.

Use the online application process

In October 2016 the Home Office introduced a new online application process for EEA nationals wanting to apply for a residence certificate or permanent residence certificate.

The process is more or less an online version of the EEA(QP) or EEA(PR) which works by recording answers online, after which the applicant is

required to print the form, make payment online and send the form and supporting documents to the Home Office.

The big advantage to using the online process is that users may use the European Passport Return Service, whereby an application is physically submitted via a participating local authority, which immediately copies the passport and returns it to the applicant there and then.

All questions in the online versions of the forms are mandatory; you cannot ignore a question as the software will not allow you to progress and complete the form.

At the time of writing there were some differences between the online process and the paper versions of the application forms, and various improvements were being made to the online process.

The advantages to using the form are:

- Use of the European Passport Return Service so that passport is retained throughout
- Simpler because only relevant questions are shown
- Can include family members (the EEA(QP) cannot, the EEA(PR) can)
- Not all absences from UK have to be listed. Instead a declaration is made that applicant has not been outside UK for more than 6 months in any year.
- For employees, it is possible to submit five years' worth of P60 forms as the only evidence needed to prove (a) qualifying activity and (b) continuous presence in UK

There is nothing to suggest that applications made using the online process will be decided any faster than applications made by any other means.

A video walk through of how the online form works in is available here.

Use the Home Office EEA series forms

The current series of forms provided by the Home Office for use by EEA nationals and family members is available on the gov.uk website and all can be downloaded for free:

EEA (QP) - residence certificate for EEA national

EEA (FM) - residence card for third country family members

EEA (EFM) - for residence card applications for extended family members

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

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

As already discussed, the use of these forms used to be optional but is mandatory from 1 February 2017

There are a number of problems with the Home Office forms. For many applicants, these will not matter and the form may assist them in putting together an application by guiding them as to what is necessary. However, the forms are very long and include many questions that it is not necessary to answer in order to succeed with an application.

For example, the EEA (PR) form asks for a complete record of absences from the UK including dates and evidence. This is extremely difficult and inconvenient to provide, not least because the passport of an EEA national is not stamped when moving within the EEA.

Where there is something about an application that suggests a person has been or might have been outside the UK for substantial periods, greater care may need to be taken to show the Home Office that the criteria are met. A worker who has been continuously employed would on the face of it appear to have been continuously resident and an application need not include evidence of absences. However, a self employed person, a student or a self

sufficient person might well have gaps in their activity during which the person might conceivably have been outside the UK. If so, care should be taken in such cases to show that the person was resident in the UK and not outside for more than 6 months.

Other parts of the forms that can cause unnecessary problems for some applicants include the declarations on criminal convictions where a person has one or more very minor convictions or the sections on dependency. These parts of the forms and some other parts are essentially “fishing” for potential reasons for refusal and disclosure of the information may not be necessary.

Ultimately, it is impossible to retract information that is disclosed to the Home Office which triggers a refusal. It is possible to make a new application for only £65 if an application is refused for lack of evidence on a certain issue. Where an application is rejected as invalid the application fee should be refunded by the Home Office apart from a £25 administration fee.

Use a covering letter

When applying it may be useful in many cases to use a covering letter setting out some basic information about why the person applying qualifies for the residence document in question. It was previously possible to apply with *only* a covering letter with supporting documents but since 1 February 2017 a covering letter is an optional extra to using the official forms.

A good covering letter will be clearly written in plain English, will not include legal submissions unless absolutely necessary (perhaps in a marginal case where refusal is a realistic possibility) and will clearly map out for the Home Office caseworker how the applicant meets the requirements and where to find the documentary proof that the requirements are met.

For example, in an application for permanent residence a short table setting out what qualifying activity was carried out in what year and referring to documents to prove it would be very helpful to the caseworker:

Dates	Activity	Documentary proof
May 2000 - July 2000	Arrived in UK, looking for work	
July 2000 - October 2002	Employed at Employer X	#3, 4, 5
October 2002 - January 2004	Employed at Employer Y	#6, 7, 8
January 2004 to February 2004	Unemployed	#9, 10
February 2004 to May 2005	Self employed contractor	#11, 12, 13, 14, 15, 16

What needs to be included in the covering letter will vary with the type of application. If there are longer gaps between employment then some explanation may be needed, for example.

You should send your application to this address, taken from the new generation of forms:

Home Office – EEA applications

PO Box 590

Durham

DH99 1AD

If applying for a Family Permit it has always been necessary to use the official application process, which at the time of writing is an online one. A Family Permit is not an official EU document and the UK is therefore allowed to dictate the application process.

Can I speed things up?

Brexit is causing significant delays in the processing of EU free movement documentation applications. In normal times, before the Brexit vote on 23 June 2016, an EU national could expect a permanent residence certificate

to be issued in about 6 weeks and a family member in about 4 months or so. Current waiting times are unknown but likely to be significantly longer.

The Home Office is legally obliged to issue an EU law residence document within six months of application. The Immigration (EEA) Regulations 2016 cover this at paragraph 19 and state that a permanent residence certificate must be issued to an EEA citizen “as soon as possible” and to a family member “no later than six months after an application is received”.

This reflects Article 10(1) of Directive 2004/38/EC. However, there is no mention of this duty in the Home Office’s instructions to caseworkers, nor even in the policy on prioritising applications. Given that the junior civil servants dealing with such cases refer to the policies not the regulations, there is considerable potential here for breach of these provisions by the Home Office.

If the Home Office does fail in its duty to issue within 6 months, pursuing a legal remedy can be difficult and may well be disproportionate depending on the losses and inconvenience experienced. It is possible to seek damages for breaches of EU law, as discussed below.

On 30 August 2016 an existing instruction for Home Office staff was updated and a new section on expediting applications was introduced to it. This is Processes and procedures for EEA documentation applications and the section on expediting is at page 37-38.

Unhelpfully, what seems to be a significant section of the policy has been censored as being for internal Home Office use only. We are left with some limited information about how requests to expedite are handled once they reach the Home Office, a section that tells us applications should be expedited if a person is detained and then a short section on exceptional circumstances:

There may be exceptional, compelling circumstances that would merit an application being expedited. Examples of grounds which could be considered exceptional, compelling circumstances include:

- *family emergencies such as bereavement or serious illness*
- *the need to travel for essential medical treatment overseas*

In all cases, documentary evidence of the exceptional, compelling circumstances must be provided.

Family celebrations such as weddings and holidays are not generally considered exceptional, compelling 'family emergencies' which would merit expediting an application.

We do not know how to contact the famously impenetrable Home Office to request that an application be expedited. However, the policy does say this:

Applicants may contact the Home Office directly, or may ask their MP or a minister to make enquiries on their behalf.

All requests for a case to be expedited must be referred to the appropriate email inbox.

Home Office policy was previously that where an MP intervenes an application might be expedited and this seems likely to remain the case.

There is a phone number (call charges apply) for EU nationals on the gov.uk website.

Requesting return of a passport

It is possible to request return of your passport from the Home Office using an online form. This does not have the effect of withdrawing the application, despite the name of the page. One of the first steps is to state whether you are withdrawing your application or not.

The Immigration Minister stated in correspondence with the Immigration Law Practitioners Association on 10 October 2016 that current turnaround time for returning passports is within 10 working days.

Those using the newer online application (only available for EEA(QP and EEA(PR) at the time of writing) can have their passport returned immediately through the European Passport Return Service (which is different to the online passport return form mentioned above).

If residence document is not received

A separate problem can sometimes occur where a decision is made on an application but the actual document does not arrive. The pages on gov.uk providing information on residence card applications (for EEA nationals and their family members) does include a specific passage on what to do if your card hasn't arrived. It says:

> *Email the Home Office on BRCDelivery@homeoffice.gsi.gov.uk if you haven't received your residence card or permanent residence card within 10 working days of the date on your decision letter.*
>
> *Include the following in your email:*
>
> - *your full name, date of birth and nationality*
> - *your passport number*
> - *your case reference number*
> - *a contact telephone number*
> - *your delivery address*

Damages for delay

Most people will just be relieved to get their residence documents and want to move on even if there have been delays. However, delays can very seriously inconvenience some people, and even lead to loss of earnings. If

so, damages or compensation for delays in the issuing of EU residence documents are discussed in these blog posts on Free Movement:

- Family member of EU national awarded £136,000 damages against Home Office
- Home Office pays £40,000 in damages for delay in issuing EU residence documents
- Pursuing compensation from the Home Office

An application to the Parliamentary Ombudsman with a request for damages might be more feasible than a full blown damages claim in court but is still a lengthy process, and it requires the intervention of a Member of Parliament.

What are the minimum formalities required?

The Citizens' Directive 2004/38 sets out some requirements that Member States may impose when issuing EU residence documents. These appear at Articles 8, 9, 10, 19 and 20 of the Directive.

There is an important difference of language between the rules for EU citizens and third country family members when it comes to residence certificates and cards. Article 8 applies to EU citizens themselves and states that Member States ***may only require*** certain things, including a valid passport or identity card and then proof that the person is a qualified person. Article 9 applies to third country family members and says that Member States ***shall require*** certain documents, but does not limit or restrict the power to request documents in the same way as it does for EU citizens.

The provisions at Articles 19 and 20 of the Directive on permanent residence certificates and card are permissive rather than restrictive, meaning that Member States can potentially ask for more documents.

Application fee

There is a mandatory fee for a residence certificate or card or permanent residence certificate or card which ***must*** be paid for the application to be a valid one. This applies to EEA nationals and non EEA family members. The fee is £65 per person. Information on how to pay the fee is included on the latest version of the forms provided by the Home Office, at the time of writing the EEA(QP), EEA(FM), EEA(EFM) and EEA(PR).

There is no fee for Family Permit applications.

Valid passport or identity card

It is necessary for all applicants for all types of residence card to provide a valid passport or identity document with the application. This is clear on the face of the Directive. A Member State is entitled to reject an application that includes a notarised copy or similar. However, where a passport or ID card cannot be provided due to circumstance genuinely beyond your control the requirement can be waived if suitable alternative proof of nationality and identity can be provided.

This can be inconvenient, particularly where the passport or ID card is needed for travel or for some other purpose such as proving entitlement to work. A request can be made to the Home Office for return of the document while the application is considered (an online form is provided) or if the online application process is used then the European Passport Return Service may be used and the passport is immediately returned.

Where the applicant is a family member of an EEA national, the UK regulations did not used to clearly state whose passport must be included with the application. In a case called *Barnett and others (EEA Regulations: rights and documentation)* [2012] UKUT 00142 (IAC) the tribunal held that it is the passport of the family member that must be included, not the passport of the EEA national. However, despite this case the Home Office has been

known to refuse applications where the passport of the EEA national is not included.

From 1 February 2017 the regulations were being changed definitely to require the passport of the EEA national to be submitted as well.

Other evidence or proof

For the other requirements that need to be satisfied, the Directive provides that “proof” that the person qualifies must be submitted. It is to these different forms of proof that we now turn.

What evidence do I need to include?

This depends on the type of application being made. The evidence is broadly similar because the requirements are similar for different types of qualifying activity in the UK, but here we look at different types of application to spell things out.

Initial right of residence

The initial right of residence is unqualified, unless there are public policy reasons for the exclusion of a person from the UK such as previous criminal offending. There is therefore no evidence that is required for a document certifying the initial right of residence, other than the EU citizen is an EU citizen and that any family members are related as claimed.

Residence

In the case of a worker the Citizens’ Directive 2004/38 states that Member States may *only* require of a worker “a confirmation of engagement from the employer or a certificate of employment” before issuing a residence certificate.

A contract of employment should therefore suffice. Alternatively, or if for some reason wanting to submit additional evidence, evidence such as wage slips, P60s and bank statements showing payments from employment would all be suitable proof of employment.

The EEA(QP) form requests the following types of evidence:

> *e.g. employer's declaration (section 3B) or letter, plus wage slips or bank statements showing receipt of wages*

The form also requests the start date for employment, the number of hours worked per week and salary or wages received. The guidance notes that accompany the form state that the evidence should cover "at least" the last 3 months or else the entire period of employment if less than three months.

None of these pieces of information other than the employer declaration of employment is mandatory in EU law.

This list of evidence and information requested illustrates the problem with using this form; the Home Office requests more evidence than it is supposed to and the additional evidence requested by the Home Office may trigger a refusal if, for example, the Home Office takes the view that the employment is not sufficiently well paid, does not meet basic living needs or is not genuine and effective. Whether in a given case these are lawful and legitimate reasons for refusal may well be highly questionable. Further, the evidence requested by the Home Office will reveal spending habits and personal information which many people will feel it is inappropriate and unnecessary to disclose to a Home Office official.

If unable to find employment within the initial right of residence period of three months and needing to establish a right of residence while still looking for work, the EEA(QM) suggests the following forms of evidence:

> *e.g. proof of receipt of job-seeking benefits, letters of invite to interviews, rejection letters from employers, evidence of academic or professional qualifications, etc*

Other forms of evidence such as the adverts for which applications have been made could also be used.

Permanent residence

As already discussed above, in order to qualify for permanent residence a person needs to have been residing in the UK as a qualified person for five years. Possession of a residence certificate or residence card is not enough by itself, because these are always issued for five years and a person might cease their qualifying activity during the five year period.

The same is true when applying for a permanent residence certificate or card; what is needed is evidence of residing in the UK as a qualified person or family member for the required five years.

The type of evidence required will therefore depend on how the person qualifies for permanent residence. To put it another way, the same kind of evidence needed to obtain a residence certificate or card will be needed for permanent residence, but this time five years' worth of it. It is instructive to look at the old EEA application guidance notes, which were far shorter and simply said as follows about applications for permanent residence:

> *The documentation you need to send us along with your application is the same as the evidence required for a Registration Certificate, except that you must provide proof that you have been resident in the United Kingdom for a continuous five-year period and that you were exercising treaty rights during this time. Examples of how you can prove that you have been resident include tenancy agreements, utility bills and bank statements. Examples of the evidence to support exercising treaty rights can be found under the Registration Certificate section of these guidance notes. You will need to provide documentation which confirms that all the family members included on the application form have been*

resident for the full five-year period. In the case of children, this may include school or nursery letters or immunisation records.

There has been no change in EU law since that old guidance was withdrawn at the start of 2015 by the Home Office; there is no prescribed list of documents that *must* be submitted.

The EEA(PR) guidance notes set out the Home Office's current wish list of documentation for different scenarios. For an EEA national worker, for example, the guidance suggests:

- *Letter from each employer confirming the dates you/your sponsor worked for them, salary/wages, normal hours of work, and the reason the employment ended (if relevant)*
- *Wage slips and/or bank statements showing receipt of wages (this must cover each job you have/your sponsor has held during the relevant qualifying period)*
- *P60s for each year in which you were/your sponsor was employed.*

If you can't submit the documents above (for example, you've lost the relevant documents, the employer is no longer trading or you are/your sponsor is unable to contact them), you should enclose a letter explaining why not and you must submit alternative evidence of the relevant employment, such as:

- *P45s*
- *signed contract of employment*
- *notice of redundancy*
- *letter accepting resignation*
- *letter of dismissal*
- *employment tribunal judgment relating to the employment.*

In fact a letter from the relevant employer or employers and/or employment contract(s) and P60s should be more than sufficient, with any gaps around the P60s filled in with wage slips and bank statements showing receipt of wages. Personal expenditure can be redacted (blacked out with a marker pen) from bank statements; Home Office officials only need to see the money was genuinely received, they do not need to know what it was spent on.

The EEA(PR) guidance notes can be used as a guide and checklist but remember it is important to prove entitlement to permanent residence using documents that can not easily be forged or manufactured; not every single document suggested by the Home Office need be submitted.

Where an application for a permanent residence certificate or card is based on retained rights, appropriate evidence will be needed depending on how the rights were retained.

WHAT TO DO IF YOU ARE REFUSED

In previous years around three out of four (75%) of applications for permanent residence documents were successful. Only one in four (25%) were refused. In an analysis of the figures the University of Oxford based Migration Observatory found as follows:

> *Analysis of the data by nationality suggest that approval rates are lower among nationals of EU-14 countries (those that were already members of the EU before 2004). Excluding invalid applications, 72% applications by EU-14 nationals were approved in 2015, compared to 80% of A8 nationals and 87% of Romanians and Bulgarians. The figures including invalid applications were 61%, 72% and 79%, respectively…*
>
> *There are no published data on why applications are refused or considered invalid. Reasons could include people applying too soon, having breaks in their employment, or not having comprehensive sickness insurance; as well as not providing sufficient documentation, providing an incomplete application or forgetting to include the fee.*

If an application is refused, there are different options available. Which is best depends on personal circumstances and on the reasons given by the Home Office for refusing the application.

Accept the refusal

Sometimes a refusal is right and the applicant does not have a right of residence or permanent residence, or perhaps does not currently have evidence to prove his or her case.

Sometimes it is better to accept the decision and look for a different way forward or make alternative plans for the future. Challenging a decision in the courts or tribunal can be very time consuming, expensive and stressful and that effort might be better expended differently.

Reapply

One of the many advantages of EU free movement law over domestic UK immigration law is that it is simple, cheap and convenient to simply reapply and make a new application. The cost is only £65, compared to an application fee of hundreds of pounds for UK immigration law applications.

The cost of lodging an appeal is usually £80 for a hearing "on the papers" and rises to £140 for a proper oral hearing in front of a judge (some EEA appeals are exempt from the fees: see below).

Following on from Brexit, the principle disadvantage to being refused and having to make a new application is the waiting time, which is unknown at the time of writing.

Sometimes a fresh application will be the best way forward. This may be so if, for example, an application was refused because of insufficient evidence or because the evidence requirements were misunderstood and the right documents were not submitted the first time. If the right evidence is available now it will almost certainly be better to just make a new application.

> **Example**
>
> Xavier made an application for a permanent residence card as the family member of an EU national. His application was refused because he only submitted evidence that his wife had been working in the UK for the last year; he needed to submit evidence that she had been working for the last five years (or that she was otherwise a qualified person for five years).
>
> He has good evidence but had simply not submitted it. He makes a new application with the correct evidence and his new application is granted.

There may be cases where there is little or no point making a new application, however. Where the Home Office refused an application for legal

reasons such earnings being too low or there being too long a gap in employment then a court or tribunal challenge might be the only realistic way forward. It is only where you have newer or better evidence than you originally submitted that a new application is likely to be worthwhile.

Ask for reconsideration

The Home Office has a policy on when refusals of EU law applications will be reconsidered. It is set out in policy document Processes and procedures for EEA documentation applications.

There is no specific form to use or fee to pay.

In short, the policy is that where the Home Office has made a clear and provable mistake then a request for reconsideration can be made. The examples that are given in the policy for when reconsideration might be appropriate are as follows:

- *the applicant or representative raises a point of law – this could include accusations that the wrong regulation has been applied to the refusal*
- *the applicant or representative raises a challenge to Home Office policy – this could include where the wrong policy has been applied or the policy itself is alleged to be unlawful*
- *the applicant or representative has rightly drawn attention to the fact that evidence alleged not to have been provided in support of the application was actually with the Home Office at the relevant time*
- *new and compelling evidence was submitted before the refusal decision was dispatched that would, if it had been considered at the time, have led to documentation being issued*

These examples show that reconsideration is not about cases where the applicant and the Home Office disagree about something but where the Home Office might actually have reached a different decision had a mistake not been made about the relevant category of application or evidence that

had been submitted. If the official looking at the case has failed to apply correct Home Office policy that might be another example where reconsideration might be effective.

The policy also sets out a list of circumstances where reconsideration is NOT appropriate:

- *the applicant or representative requests a reconsideration without putting forward any substantive arguments*
- *the applicant or representative submits documentary evidence after the refusal decision has been issued*
- *the applicant or representative asks for reconsideration on a different basis than the original application (for example under Article 8 of the European Convention on Human Rights)*

Where an appeal has already been lodged the policy says that applications for reconsideration should be refused; it is not possible to appeal and ask for reconsideration at the same time. This means that a choice has to be made, because if a person applies for reconsideration it will almost certainly take far longer than the 14 days allowed for lodging an appeal. It is sometimes possible to submit appeals late, after the deadline, but waiting for a reconsideration decision from the Home Office is unlikely to be accepted as a good enough reason.

There is no timescale for asking for reconsideration nor for the reconsideration application to be decided within. It is possible that an application for reconsideration might be made and it might take a considerable time to receive any response.

Example

Yvonne is in a similar position to Xavier in the last example. She applied for a permanent residence card as the family member of an EU citizen. She did submit the right evidence and included five years'

worth of p60s for her husband plus an employment contract and employer letter. Her application is refused by the Home Office on the grounds that she only included one years' worth of evidence.

Luckily, Yvonne kept a copy of her application and she resubmits it with a covering letter asking for reconsideration, politely pointing out that in fact she included five years' worth of evidence.

Her application for reconsideration is granted and she is issued with a permanent residence card.

Where a refusal is based on the Home Office's interpretation of the law or the evidence and the right law or evidence was considered but you feel a wrong decision was reached, that will not be a good case to ask for reconsideration. In such circumstances, the reconsideration may well take considerable time (it is unlikely to be high priority at the Home Office) and will be pointless. It would probably be better to reapply or bring a legal challenge.

Appeal

It is sometimes possible to pursue an appeal against refusal of an EU right of residence or permanent residence decision.

Is there a right of appeal?

The right of appeal is not automatic: it is a limited right of appeal defined in the Immigration (European Economic Area) Regulations 2016 at paragraph 36 read alongside the definition of "an EEA decision" at paragraph 2.

In short, there is generally a right of appeal against an "EEA decision". An "EEA decision" is defined as follows:

> *"EEA decision" means a decision under these Regulations that concerns —*
>
> *(a) a person's entitlement to be admitted to the United Kingdom;*

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card (but does not include a decision that an application for the above documentation is invalid);

(c) a person's removal from the United Kingdom; or

(d) the cancellation, under regulation 25, of a person's right to reside in the United Kingdom,

but does not include a decision to refuse to issue a document under regulation 12(4) (issue of an EEA family permit to an extended family member), 17(5) (issue of a registration certificate to an extended family member) or 18(4) (issue of a residence card to an extended family member), a decision to reject an application under regulation 26(4) (misuse of a right to reside: material change of circumstances), or any decisions under regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person) On most occasions that an application by an EEA national or family member of an EEA national for a residence or permanent residence document is refused, there will be a right of appeal. There is also generally a right of appeal where an application for a family permit is refused.

However, there is **no right of appeal** against refusal of an application by an extended family member. It was previously thought that there was such a right of appeal but in a case called *Sala (EFMs: Right of Appeal : Albania)* [2016] UKUT 411 (IAC) the Upper Tribunal held that this interpretation was wrong and that in fact there is no right of appeal. Where an application by an extended family member is refused, the only available legal challenge is therefore an application for judicial review (see below).

There is also **no right of appeal** in these circumstances (even though it might at first look as if there is a right of appeal):

1. Where an EEA national is the applicant and fails to produce a valid national identity card or passport issued by an EEA state.
2. Where the applicant claims to be in a durable relationship with an EEA national but fails to produce sufficient evidence to satisfy the Home Office that he or she is in a relationship with the EEA national (although note it does not have to be enough to show a durable relationship, just a relationship).
3. Where a non-EEA family member or relative is the applicant and fails to produce a passport and one of an EEA family permit, an EEA residence card from another Member State, proof that he or she is a family member or relative of an EEA national (or in a retained rights case former family member).
4. Where a non-EEA national claims to have a derivative right of residence but does not produce a valid national identity card issued by an EEA Member State or a passport and one of an EEA family permit or the types of proof set out at paragraph 26(3A)(b)(i) to (v).
5. Where the Home Office certifies that the ground of appeal has already been considered in a previous appeal.

Lodging an appeal

If there is a right of appeal (or there may be and the only way to find out is to try lodging one) it can be lodged online or by submitting forms on paper.

The court fee for lodging an appeal is usually £80 for an appeal "on the papers" or £140 for a full oral hearing which the appellant and his or her lawyer, if he or she has one, can attend in person.

An appeal does not need to be paid where the appeal is against a decision to remove an EEA national and/or family member. A refusal of a residence or permanent residence certificate or card will not necessarily be a decision to remove a person, though. The text of the refusal letter needs to be read carefully to see if there is an explicit reference to removal.

If the appeal succeeds, the Home Office will normally be ordered to repay the appeal fee to the appellant.

In most cases applicants ask for an oral hearing so that they can attend the hearing and give evidence and see the judge to present arguments in person. The chances of success are certainly higher that way.

Once the online appeal is submitted it is necessary to physically send to the tribunal the notice of decision and ensure that you make payment. Additional documents can be submitted at that stage if desired and available but most people wait until much closer to their hearing date to submit additional evidence. Part of the appeal process is that the Home Office bundle of documents is received, and at that point the appellant will want to respond to the evidence they rely on.

Appeals can be submitted and paid for online through a tribunal portal.

You can also lodge an appeal the old fashioned way, on paper. Confusingly, there are seven different forms for different types of appeal, although there are only some which will be relevant in most cases today:

Number	Title	Download
IAFT-5	Appeal to the First-Tier Tribunal (Immigration and Asylum Chamber) – Complete This Form if You Are Appealing From Inside the United Kingdom and You Have the Right to Do So	Pdf
IAFT-5A	Appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against your Home Office decision	Word
IAFT-6	Appeal to the First-Tier Tribunal – (Immigration and Asylum Chamber) Against a Decision of an Entry Clearance Officer (ECO)	Pdf

Number	Title	Download
IAFT-7	Appeal to the First-Tier Tribunal – (Immigration and Asylum Chamber) – Complete This Form if Your Right of Appeal Can Only Be Exercised After Having Left the United Kingdom or You Have Chosen to Leave the United Kingdom Before Exercising Your Right of Appeal	Pdf

Is the appeal from within the UK or after removal?

Even where there is a right of appeal, the appeal may have to be from outside the UK in certain circumstances.

There will be a right of appeal from within the UK if on arrival the person holds a family permit or EU residence document at the time of the EEA decision or the person can prove he or she is resident in the UK.

Otherwise, the general rule is that appeals will be from outside the UK.

Even where a person whose EEA application is refused **is** resident in the UK, the person can be removed in certain circumstances. For example, where the Home Office refuses an EEA spouse application on the basis that the marriage is one of convenience, the spouse can be removed from the UK even though he or she pursues an appeal against that decision.

There is also provision for appeals against EEA deportation decisions to be pursued from abroad if the Home Office certifies that removal pending the appeal would not cause serious irreversible harm. The person facing deportation would normally be readmitted to the UK for the purpose of attending the hearing of their appeal.

Judicial review

Where there is no right of appeal, it is possible instead to pursue an application for judicial review. A judicial review application is made to the High Court or the Upper Tribunal. In immigration cases, including EEA cases, it is usually made to the Upper Tribunal. If uncertain, the allocation Practice

Direction can be consulted. This sets out which types of judicial review are heard in which court or tribunal.

An application for judicial review is said to be a remedy of last resort. This is because it can only be used where there is no adequate alternative. It is also a stressful, difficult and potentially expensive process.

The process of applying for judicial review of a decision is beyond the scope of this guide. If intending to go down that road, it is important to follow the pre action protocol for judicial review and that the claim form is lodged within 3 months of the decision under challenge. The forms for making an application can all be downloaded for free here or located on http://hmctsformfinder.justice.gov.uk.

Further reading and links

The various forms and accompanying guidance notes are available here:

- EEA(QP)
- EEA(FM)
- EEA(EFM)
- EEA(PR)
- Old EEA application guidance
- Family permit online applications

There are several sources to which to turn if wanting to learn more about how the Home Office interprets and applies EU free movement law. As well as the Immigration (European Economic Area) Regulations 2006 and their successor 2016 regulations, referred to in this ebook as just “the regulations” or “the UK regulations”, the Home Office often issues guidance to its own staff on how to interpret and apply the law. In European immigration cases there are several sources of guidance that are publicly available on the gov.uk website if one knows where to look, including:

- European Casework Instructions
- EEA modernised guidance
- Caseworker guidance for applications under the Surinder Singh route from January 2014
- EEA nationals: EUN01
- EEA family permit: EUN02

There is so much guidance issued that some of it is always likely to be out of date and it may even be inconsistent.

Conclusion

I hope this ebook has been useful, although I am sorry that you have needed to read it!

EU free movement law is at source user friendly and genuinely facilitates free movement. The Citizens' Directive is short and written in plain English. The UK has in recent years tried hard to undermine it, though, both through complex and convoluted amendments to the implementing UK regulations and through the introduction of unnecessarily and arguably unlawfully complex and intrusive application forms.

Those who try too hard to comply with Home Office expectations and evidential "requirements" in the hope this will reduce their chances of refusal may be in for a nasty surprise; the forms are deliberately designed to gather information and evidence to reveal legally dubious justification for refusals. Such refusals can often be overturned on appeal, but the appeal process is lengthy, stressful and expensive.

Lastly, it would be a mistake to regard the Home Office as a well organised monolith which will produce consistent decisions. Individual immigration officers make decisions and they have quite a lot of individual discretion. To put it another way, even the best prepared application may be unfortunate enough to be decided by a mean minded official who dislikes EU free movement who is having a bad day.

If you have any questions or need help with your application, appeal or application for judicial review then we can offer assistance via the Free Movement blog at freemovement.org.uk. In particular, we offer 30 minute

slots of video link advice for £99 where you can ask us anything and we also offer an application checking service starting at £249.