



PLP RESEARCH BRIEFING

EU citizens' rights after a 'no-deal' Brexit: What does the law say?

Alexandra Sinclair, Research fellow,
Public Law Project

Updated 01/08/19



The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

www.publiclawproject.org.uk

EU citizens' rights after a 'no-deal' Brexit: What does the law say?

The purpose of this summary is to describe the law applicable to EU nationals¹ residing in the UK, or who arrive in the UK, if the UK leaves the EU without a deal on 31 October 2019. The position is stated on the basis of the law (including domestic primary and secondary legislation as well as retained EU law) and the stated intentions of the Government as at 25 July 2019. This summary does not attempt to address every scenario and should not be taken to constitute legal advice: it is an attempt to summarise the position on the basis of the legislative provisions that have been adopted or proposed to date, and Government policy statements.

Immigration

EEA nationals² resident in the UK before exit day

- (1) EU free movement rights continue in force after exit day until the Immigration and Social Security Co-ordination (EU Withdrawal) Bill ('the Immigration Bill') is passed and brought into force.³ This is the effect of ss.2-4 of the EU (Withdrawal) Act 2018 which, when brought into force,⁴ will convert relevant existing EU law into 'retained EU law' until such time as it is repealed or amended/modified domestically. This is also consistent with Government statements.⁵ This means that EEA nationals and their family members can continue to enter and reside in the UK freely in accordance with their Treaty rights, the Citizens' Directive and the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations'), at least until the Immigration Bill is passed and brought into force, some time after exit day.
- (2) EEA and Swiss nationals (and their family members) resident in the UK before exit day will be eligible to apply to the EU settlement scheme in order to be granted a form of leave to remain in the UK. Individuals that have been resident in the UK for five years are eligible to receive "settled

¹ Save where indicated otherwise, this includes nationals of EEA states, and the family members of EU and EEA nationals, to the extent that they have or would have had a right of residence under EU law by reason of their relationship.

² [The EEA includes EU countries and also Iceland, Liechtenstein and Norway.](#)

³ [The Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill.](#) The Immigration Bill has completed Committee stage in the House of Commons, with the date for Report stage yet to be announced.

⁴ No commencement orders have yet been made for the relevant parts of the Act but it is anticipated that ss1-7 will be brought into force on exit day if the UK leaves without a deal.

⁵ For example, [Explanatory Memorandum to The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 at paragraph 7.9 which says that "after exit day, Home Office regulations will continue freedom of movement for a short period of time" until the Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill enters into force and repeals EU free movement law.](#)

status” which is indefinite leave to remain in the UK.⁶ Those granted settled status are able to leave the UK for up to five consecutive years without losing that status.⁷

- (3) EEA and Swiss nationals who arrive before exit day and have been in the UK for less than five years are eligible for limited leave to remain in the UK for five years which is referred to as “pre-settled status”.⁸ They are then eligible to apply for settled status once they have been continuously resident in the country for five years.
- (4) Applicants under the settlement scheme will not have to pay the immigration health surcharge.⁹
- (5) If Parliament approves the Immigration Bill, when it is brought into force, it will revoke the Citizens’ Directive, the EEA Regulations and all other retained EU law which is inconsistent with domestic immigration law (including any regulations made under the Immigration Bill).¹⁰ This Government has stated that it intends to make regulations under clause 4 of the Immigration Bill¹¹ to protect the rights of EEA nationals resident in the UK before exit day.¹² We do not yet know what these regulations will precisely say because the Bill with the power to make these regulations hasn’t been passed yet. However, the Government has committed to ensuring that EEA nationals who are resident in the UK before exit can stay here until 31 December 2020, by which time they need to have applied for settled status.¹³
- (6) The Government has said that in a no deal scenario EU Citizens and their family members lawfully residing in the UK will “be able to continue to access in country benefits and services on broadly the same terms as now. This means their entitlements to healthcare, education, benefits and social housing, including supported housing and homelessness assistance, will be on the same basis as now.”¹⁴ However, in order for an individual with pre-settled status to access many types of benefits and tax credits, as well as housing assistance, they require an additional EU right to reside in the UK, in addition to the limited leave to remain they obtain under pre-settled status.¹⁵

⁶ The criteria for the grant of “settled status” are set out in Appendix EU of the Immigration Rules and associated guidance and are not addressed in further detail here. Statement of Changes to the Immigration Rules HC 1919, laid on 1 April 2019 and coming into effect on 2 April 2019, amended the provisions of Appendix EU so that a person is eligible to apply for settled status if they arrived in the UK before the date and time of withdrawal, if the UK withdraws without a Withdrawal Agreement (rather than only if they arrived before 29 March 2019).

⁷ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 2, Chapter 2, Article 8.](#)

⁸ [Immigration Rules: Appendix EU.](#)

⁹ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 4.](#)

¹⁰ [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill, Clause 1 and Schedule 1.](#)

¹¹ Which confers on the Secretary of State power to make regulations making ‘such provision as the Secretary of State considers appropriate in consequence of, or in connection with, any provisions of’ Part 1 of the Bill, which ends free movement in the UK.

¹² [Explanatory Memorandum to the Immigration \(European Economic Area Nationals\) \(EU exit\) Order 2019 at paragraph 7.2.](#)

¹³ [Citizens’ Rights – EU citizens in the UK and UK nationals in the EU Policy Paper at paragraphs 9 and 11.](#)

¹⁴ [Citizens’ Rights – EU citizens in the UK and UK nationals in the EU Policy Paper at paragraph 15.](#)

¹⁵ See The Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019, and The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019 and The Social Security

- (7) All EEA nationals, regardless of how long they have spent in the UK, will be subject to new deportation thresholds for any conduct committed after exit day. This means that, as is the case currently for non-EEA nationals, there will be a presumption of deportation where an EEA national has received a custodial sentence of 12 months or more for an offence committed after exit day. After exit day the Home Office can exclude or deport an EEA national where they deem it to be conducive to the public good.¹⁶ EEA thresholds for deportation will continue to apply where the relevant conduct (e.g. the commission of a criminal offence) occurred before exit day.
- (8) EEA nationals and Swiss nationals and their family members who have been granted, or may be granted, leave under the EU Settlement Scheme are able to enter the United Kingdom from Ireland without being subject to the Control of Entry through Republic of Ireland Order 1972 which provides that people who enter the UK from Ireland who are outside the common travel area can only enter the UK for a defined period and without the right to work.¹⁷ In other words, the rights and status of EEA nationals are not affected by the fact that they enter the UK from Ireland.
- (9) EEA and Swiss nationals with leave to remain under the settlement scheme also retain any derivative EU right to remain in the UK under Regulation 16 of the EEA regulations until the Immigration Bill revokes those rights.¹⁸ This is an exception to the rule that normally a person does not have a derivative right to reside if they have indefinite leave to remain.¹⁹
- (10) EEA and Swiss nationals are able to apply for the settled status scheme from overseas from 30 March 2019 if they are able to show they were previously resident in the UK in line with the eligibility requirements for settled status²⁰ (including that they meet the requirements for having a 'continuous qualifying period' of residence, and, if applying for ILR, have not been absent for a period of more than 5 consecutive years since meeting the eligibility requirements).

EEA nationals arriving in the UK after exit day

- (1) As with EEA nationals who arrive before exit day, until the Immigration Bill becomes law and the free movement provisions of EU law are revoked, EEA nationals arriving after exit day can continue to rely on their EEA free movement rights.

(Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019. The Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 exclude access to the following benefits for those whose only right to reside in the UK is via pre-settled status: Income Support, Jobseeker's Allowance, Housing Benefit, Employment and Support Allowance and Universal Credit.

¹⁶ [The Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019, regulation 43.](#)

¹⁷ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Regulations 2019, regulation 2\(4\)\(b\).](#)

¹⁸ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Regulations 2019, regulation 3\(6\).](#)

¹⁹ [The Immigration \(European Economic Area\) Regulations 2016, Reg 16\(6\)\(b\) and \(7\)\(c\)\(iv\)\).](#)

²⁰ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 2, Chapter 2, Article 7.](#)

- (2) When the 2016 Regulations are revoked,²¹ then a new scheme for granting automatic leave to enter to EEA nationals will come into force.²² EEA and Swiss nationals arriving in the UK after exit day (who don't have an existing right to enter the United Kingdom and who are not eligible for the settlement scheme) will have leave to enter the UK automatically for three months without needing to apply for a visa. During those three months they can work, study or visit, there are no restrictions on the activities they can undertake in the UK.²³ Those subject to a deportation order will not receive automatic leave to enter.²⁴ No written notice of leave to enter will be issued or required.²⁵
- (3) A Border Force officer has the power to cancel the three months of automatic leave where it is not conducive to the public good to admit someone to the UK.²⁶
- (4) EEA and Swiss nationals arriving after exit day who wish to stay longer than three months will need to apply for a new status, referred to by the Government as 'European Temporary Leave to remain'.²⁷ If granted, the Government has said that they will be able to remain in the UK for 36 months, subject to identity, criminality and security checks. This leave is not intended to be extendable beyond 36 months, and the Government intends to bring into force a new immigration system from 1 January 2021. As at the date of writing, the Government has not published the Immigration Rules or casework guidance governing this new status.
- (5) Until 1 January 2021, the Government has said that EEA citizens (irrespective of when they arrived in the UK) will be able to show their EU passport or identity card in order to prove their right to rent and work.²⁸

Healthcare for EU/EEA citizens in the UK

EEA nationals resident in the UK before exit day

- (1) The existing rights to free NHS care for EEA nationals and Swiss nationals under EU law will continue until the point at which the UK formally leaves the EU.²⁹

²¹ See paragraph (8) above.

²² [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 1, Article 1\(2\).](#)

²³ [Explanatory Memorandum to The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, paragraph 7.10.](#)

²⁴ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 2, Chapter 1, Article 4](#), see also the [Explanatory Memorandum to The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, paragraph 7.11.](#)

²⁵ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 2, Chapter 1, Article 3.](#)

²⁶ [The Immigration \(European Economic Area Nationals\) \(EU Exit\) Order 2019, Part 2, Chapter 1, Article 4.](#)

²⁷ [European Temporary Leave to Remain in the UK – fact sheet. See also <https://www.gov.uk/guidance/european-temporary-leave-to-remain-in-the-uk>](#)

²⁸ [European Temporary Leave to Remain in the UK – fact sheet.](#)

²⁹ [Explanatory Memorandum to The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 at paragraph 7.15.](#)

- (2) EEA and Swiss citizens who have arrived before exit day who are eligible for limited or indefinite leave to remain under the settled status scheme in Appendix EU are exempt from NHS charging until 31 December 2020.³⁰ They are exempt even if they have not yet applied for leave to remain.
- (3) There is a transitional provision that means that all EEA and Swiss citizens in the UK using the European Health Insurance Card (“EHIC”), or the S1 European healthcare certificate or the A1 healthcare certificate or any equivalent document issued by the UK who arrived before exit day are entitled to continue using that document for free NHS healthcare until the end of their visit (regardless of whether their visit continues past exit day) but they will not be entitled to use the document the next time they arrive in the UK after exit day.³¹
- (4) EEA and Swiss visitors who are students whose course of education or study began before exit day can access needs-arising treatment until the completion of their course of study.³²
- (5) Frontier workers who arrive before exit day are exempt from NHS charging until 31 December 2020.³³ Frontier workers are defined as a person who works in the UK, resides in an EEA state or Switzerland and returns to their residence in that EEA state or Switzerland (as the case may be) at least once a week.

EEA nationals arriving in the UK after exit day

- (1) Family members of EEA and Swiss citizens eligible for leave to remain who arrive after exit day are exempt from NHS charging until at least 31 December 2020.³⁴
- (2) The Government has stated that EEA citizens and Swiss citizens who arrive in the UK after exit day who are not visitors will be entitled to free health care for the duration of their stay if they obtain European Temporary Leave to Remain and are ordinarily resident in the UK.³⁵
- (3) EU citizen visitors who arrive after exit day will not be charged for use of the NHS if the UK has negotiated a reciprocal healthcare agreement with their particular country.³⁶ The UK has said that it will publish a list of all countries it has negotiated reciprocal health care arrangements with after

³⁰ [The National Health Service \(Charges to Overseas Visitors\) Regulations 2015, regulation 24A\(4\) and \(5\), as inserted by the National Health Service \(Charges to Overseas Visitors\) \(Amendment etc\) \(EU Exit\) Regulations 2019, regulation 8.](#)

³¹ [The National Health Service \(Charges to Overseas Visitors\) Regulations 2015, regulation 13, as amended by the 2019 Regulations, regulation 5.](#)

³² [The National Health Service \(Charges to Overseas Visitors\) Regulations 2015, regulation 24A\(3\), as inserted by the National Health Service \(Charges to Overseas Visitors\) \(Amendment etc\) \(EU Exit\) Regulations 2019, regulation 8.](#)

³³ [The National Health Service \(Charges to Overseas Visitors\) Regulations 2015, regulation 14B, as inserted by the National Health Service \(Charges to Overseas Visitors\) \(Amendment etc\) \(EU Exit\) Regulations 2019, regulation 7.](#)

³⁴ [Explanatory Memorandum to The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 at paragraph 7.9.](#)

³⁵ [Explanatory Memorandum to The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 at paragraph 7.9.](#)

³⁶ [The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019, regulation 14.](#)

exit day.³⁷ Limited reciprocal health care arrangements have been agreed with Switzerland and the EFTA states³⁸ in a no deal scenario.³⁹

- (4) EU visitors who arrive in the UK after exit day who are not the subject of a reciprocal healthcare arrangement and to whom none of the above transitional exemptions apply will be charged by the NHS after exit day at the same amount as a British citizen who is not ordinarily resident.⁴⁰

Social Security claimants in the UK

EEA nationals resident in the UK before exit day

- If an EEA or Swiss national has been paying into the social security scheme of another EU member state and now lives in the UK this Government has said those nationals will still be able to claim benefits in the UK after exit day.⁴¹ These benefits include sickness benefits, maternity benefits, disability benefits, unemployment benefits and the pension.
- In determining the entitlement amount that an EU/EEA or Swiss national is entitled to claim in the UK, the government will add up all the social security contributions that individual has made in every EU/EEA member state.⁴²
- However after exit day, the UK will not have full information sharing between itself and particular EU member states as each information sharing agreement will need to be negotiated on a one to one basis with each individual EU member state. EEA nationals in the UK may be required to pay National Insurance Contributions ('NICs') in the UK, under UK legislation, as well as in an EU member state if that country's legislation continues to apply to them.⁴³
- The UK no longer has to make provisional payments to an EU/EEA national in the UK while a dispute is being resolved between the UK and EU member states relating to who has the obligations to make social security payments to the claimant.⁴⁴
- Where EEA nationals who have spent a period of time residing and working in the EU, but who now live in the UK, make a claim for a UK benefit or state pension, the UK government can ask the

³⁷ [Explanatory Memorandum to the Social Security Coordination \(Reciprocal Healthcare\) \(Amendment etc\) \(EU Exit\) Regulations 2019 at part 2, paragraph 5.2.](#)

³⁸ The EFTA states are comprised of Liechtenstein, Norway, Iceland and Switzerland.

³⁹ [Explanatory Memorandum to The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 at paragraph 7.12, see also the Healthcare \(European Economic Area and Switzerland Arrangements\) Act 2019.](#)

⁴⁰ [The National Health Service \(Charges to Overseas Visitors\) \(Amendment etc.\) \(EU Exit\) Regulations 2019, regulation 7.](#)

⁴¹ [Citizens' Rights - EU citizens in the UK and UK nationals in the EU Policy Paper at paragraph 15.](#)

⁴² [Explanatory Memorandum to The Social Security Coordination Regulation \(EC\) No 883/2004. EEA Agreement and Swiss Agreement\) \(Amendment\) \(EU Exit\) Regulations 2019.](#)

⁴³ [Explanatory Memorandum to The Social Security Coordination Regulation \(EC\) No 883/2004. EEA Agreement and Swiss Agreement\) \(Amendment\) \(EU Exit\) Regulations 2019 at paragraph 7.11.](#)

⁴⁴ [Explanatory Memorandum to The Social Security Coordination Regulation \(EC\) No 883/2004. EEA Agreement and Swiss Agreement\) \(Amendment\) \(EU Exit\) Regulations 2019 at paragraph 7.11.](#)

claimant to provide information within a reasonable period of time showing that they paid into another country's social security regime in order to determine the amount they are entitled to. This is a transferring of the burden to the individual to provide the information to the state. However, in the event that the Government decides that the information provided by the claimant is not proof that they paid into another country's social security scheme, the UK will no longer have to compensate the national for payments made into another EEA country's social security scheme⁴⁵

Education

- EEA and Swiss nationals continue to be eligible for home fee status and student finance support for courses starting in the 2019/20 academic year and the remainder of the 2018/19 academic year on the same basis as before exit day.⁴⁶

⁴⁵ [See Schedule 1 Article 1A of the 883/2004 Regulations](#) and there is an equivalent provision in Art 2A of the 987/2009 Regulations (The UK domestic instruments).

⁴⁶ [Explanatory Memorandum to The Education \(Student fees, awards and support\) \(Amendment\) \(EU Exit\) Regulations 2019 at paragraphs 7.1-7.3.](#)



Public
Law
Project