



Post-Brexit rules on eligibility for homelessness assistance and allocation of social housing under Housing Act 1996

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GARDEN COURT CHAMBERS



4 March 2021

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1. Background and context



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The starting point – s185 Housing Act 1996

- s185 divided (and divides) the world into two: (i) persons subject to immigration control; (ii) persons not subject to immigration control.
 - 185.— Persons from abroad not eligible for housing assistance.**
 - (1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance.
 - (2) A person who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless he is of a class prescribed by regulations made by the Secretary of State.
 - ...
 - (3) The Secretary of State may make provision by regulations as to other descriptions of persons who are to be treated for the purposes of this Part as persons from abroad who are ineligible for housing assistance.
- Former fell under reg 5 (or 3) Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006/1294. Latter fell under reg 6 (or 4).



EEA nationals pre-31/12/20

- s13(2) Asylum and Immigration Act - “person subject to immigration control” means a person who under the 1971 Act requires leave to enter or remain in the United Kingdom (whether or not such leave has been given).
- s7(1) Immigration Act 1988 - A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.
- Meant that an EEA national with a right to reside under Immigration (European Economic Area) Regulations 2016, SI 2016/1052 was not subject to immigration control.



EEA nationals post-31/12/20

- s7(1) Immigration Act 1988 and the Immigration (European Economic Area) Regulations 2016 repealed by Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, ss 1 and 9 and Sch 1, paras 1 and 2(2).
- But repeal subject to subject to a labyrinthine set of transitional and saving provisions (Section 2 of this presentation).
- New s3ZA Immigration Act 1971 – ‘An Irish citizen does not require leave to enter or remain in the United Kingdom...’



2. Which EEA nationals are now subject to immigration control?



Four categories of EEA national not PSIC

1. A member of the ‘post-transition period group’. Covers those with pre-settled status.
2. A ‘relevant person’ during the ‘grace period’ who has a right of residence under Immigration (European Economic Area) Regulations 2016. Covers those who are yet to apply under EUSS, from 11pm 31/12/20 –30/6/21.
3. A person who has made an ‘in-time application’ which has not been determined by the end of the ‘grace period’, who has a right of residence under the Immigration (European Economic Area) Regulations 2016. Covers those with extant applications under EUSS after 30 June 2021.
4. A person exercising his or her ‘frontier workers’ rights’.



(1) Member of the post-transition period group

- A member of the post-transition period group is not treated as subject to immigration control for eligibility purposes, notwithstanding repeal of s7 IA 1988. See Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020/1309, reg 83 and Sch 4, paras 5-6.
- A person is a member of the post-transition period group if he or she has limited leave to enter, or remain in, the UK granted by virtue of Appendix EU of the Immigration Rule or any other immigration rule identified, within the Immigration Rules, as having effect in connection with the withdrawal of the United Kingdom from the EU. See SI 2020/1309, Sch 4, para 1.



(2) A ‘relevant person’ during the ‘grace period’

- s7 IA 1988 and Immigration (European Economic Area) Regulations 2016 continue to apply (with modifications) to a ‘relevant person’ during the ‘grace period’. See Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020/1209, regs 3(2), (4) and 12(1)(g).
- Meaning that such a person is not subject to immigration control if he/she has a right of residence under the 2016 Regulations.
- Grace period is 11pm 31 Dec 2020 – end of 30 June 2021 (the deadline for applications under EUSS). See SI 2020/1209, regs 1, 2 and 3(5).



(2) A ‘relevant person’ during the ‘grace period’

- A ‘relevant person’ is a person who:
 - does not have leave to enter or remain in the UK under Appendix EU of the Immigration Rules; and
 - has not, during the grace period, had leave to enter or remain in the UK under Appendix EU of the Immigration Rules; and
 - immediately before 11pm 31 December 2020 was lawfully resident in the UK by virtue of the Immigration (European Economic Area) Regulations 2016; or
 - immediately before 11pm 31 December 2020 had a permanent right of residence under the Immigration (European Economic Area) Regulations 2016.
- See SI 2020/1209, reg 3(6)(j).



(2) A ‘relevant person’ during the ‘grace period’

- Also includes a person who is a ‘relevant family member’ of a person (P) who, immediately before 11pm 31 December 2020:
 - did not have leave to enter or remain in the UK under Appendix EU of the Immigration Rules; and
 - was lawfully resident in the UK by virtue of the Immigration (European Economic Area) Regulations 2016 ; or
 - had a permanent right of residence under the Immigration (European Economic Area) Regulations 2016.
- See SI 2020/1209, reg 3(6)(k).



(2) A ‘relevant person’ during the ‘grace period’

- A ‘relevant family member’ of P includes:
 - a ‘family member’, within the meaning of Immigration (European Economic Area) Regulations 2016, reg 7(1)-(2), who was a ‘family member’ of P immediately before 11pm 31 December 2020 (e.g. spouse/civil partner, children under 21, dependent children who are 21 or older, dependent parents and parents-in-law);
 - a child born or adopted by P after that date (with exceptions where P does not have sole/joint custody);
 - a person who was P’s durable partner immediately before 11pm 31 December 2020, together with his or her children.
- See SI 2020/1209, reg 3(6)(d)-(i).



(3) A person who has made an ‘in-time application’ which has not been determined by the end of the ‘grace period’

- IA 1988, s 7(1) continues to apply during the ‘relevant period’ to a person who:
 - has made an ‘in-time application’;
 - immediately before 11pm 31 December 2020 was lawfully resident in the UK by virtue of the Immigration (European Economic Area) Regulations 2016; or
 - immediately before 11pm 31 December 2020 had a permanent right of residence under the Immigration (European Economic Area) Regulations 2016.
- In addition the Immigration (European Economic Area) Regulations 2016 continue to have effect in relation to a person who satisfies these criteria, during the ‘relevant period’ subject to certain modifications.



(3) A person who has made an ‘in-time application’ which has not been determined by the end of the ‘grace period’

- See SI 2020/1209, regs 4(2), (5) and 12(1)(g).
- Meaning that such a person is not subject to immigration control if he/she has a right of residence under Immigration (European Economic Area) Regulations 2016.
- An ‘in-time application’ is an application for leave to enter or remain in the UK under Appendix EU which:
 - is valid (for purposes of Appendix EU, EU 9);
 - is made on or before 30 June 2021 ; and
 - has not been withdrawn.

See SI 2020/1209, reg 4(6)(a).



(3) A person who has made an ‘in-time application’ which has not been determined by the end of the ‘grace period’

- The ‘relevant period’ begins at the end of 30 June 2021 and ends:
 - if the applicant is, by virtue of his or her application, granted leave to enter or remain in the UK, on the day on which that leave is granted;
 - if the application is refused and the applicant does not appeal, on the first day on which the applicant is no longer entitled to appeal against that decision;
 - if the application is refused and the applicant appeals, on the day on which that appeal is finally determined, withdrawn or abandoned, or lapses.
- See SI 2020/1209, reg 4(6)(a)



(4) Frontier workers

- A person does not require leave to enter or remain in the UK under the Immigration Act 1971 in any case in which the person is entitled to do so by virtue of his or her ‘frontier workers’ rights’. See Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020, SI 2020/1213, reg 5(1). Such a person is not subject to immigration control.
- A person is a ‘frontier worker’ if immediately before, and continually since, 31 December 2020 he or she was/is:
 - an EEA national;
 - not ‘primarily resident’ in the UK;
 - a ‘worker’, a ‘self-employed person’ or person with retained worker or self-employed status under Citizens’ Rights (Frontier Workers) (EU Exit) Regulations 2020, reg 4.



(4) Frontier workers

- On a particular day, a person is to be treated as not being primarily resident in the UK if:
 - he or she has been present in the UK for less than 180 days in the 12-month period immediately before that day; or
 - he or she has returned to his or her country of residence at least once in the six-month period immediately before that day, unless there are exceptional reasons for not having done so;
 - he or she has returned to his or her country of residence at least twice in the 12-month period immediately before that day, unless there are exceptional reasons for not having done so.

- See SI 2020/1213, reg 3(3).



3. Reg 5 Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006/1294



PSICs who are eligible for assistance

- Class A – person with refugee status.
- Class B – person with exceptional leave to remain granted outside of the Immigration Rules, not subject to an NRPF requirement.
- Class C – person with ILR.
- Class D – person with humanitarian protection.
- Class F – person with limited leave to enter UK as a relevant Afghan citizen under paragraph 276BA1 of the Immigration Rules, who is habitually resident in UK or CTA.



PSICs who are eligible for assistance

- Class G – person with limited leave to enter or remain on family or private life grounds under Article 8 ECHR granted under paragraph 276BE(1), paragraph 276DG or Appendix FM of the Immigration Rules, who is not subject to an NRPF requirement.
- Class H – a person transferred to the UK under s67 of the Immigration Act 2016 and has limited leave to remain under paragraph 352ZH of the Immigration Rules, who is habitually resident in UK or CTA.
- Class I – a person who has Calais leave to remain under paragraph 352J of the Immigration Rules, who is habitually resident in UK or CTA.



PSICs who are eligible for assistance

- Class J - a person (P) who has limited leave to enter or remain in the UK by virtue of Appendix EU in circumstances where—
 - P is a family member of a ‘relevant person of Northern Ireland’ (RP) in accordance with Appendix EU; and
 - P would have been considered eligible under reg 6(2)(d) [exception to hab. res. test], if RP were a worker or self-employed person, or treated as a worker under Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013/1460, regs 5 and 6(1).
- ‘Relevant person of Northern Ireland’ means a British and/or Irish citizen born in NI to a British and/or Irish parent, or to a person entitled to reside in NI without any restriction.



PSICs who are eligible for assistance

- Class K – a person who is habitually resident in the UK or CTA and who has limited leave to remain in the UK as a stateless person under paragraph 405 of the Immigration Rules.



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Persons from Abroad not Persons Subject to Immigration Control

Regulations 2 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

- As amended!
- The EEA Regulations means the Immigration (European Economic Area) Regulations 2016
- References to the EEA Regulations are to be read with Schedule 4 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020(Consequential, Saving, Transitional and Transitory Provisions) Regulations 2020
- A discrete code
- “jobseeker”, “self-employed person”, and “worker” have the same meaning as for the purposes of the definition of a “qualified person” in regulation 6(1) of the EEA Regulations



Persons from Abroad not Persons Subject to Immigration Control

Regulation 2 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

- Frontier worker” means a person who is a frontier worker within the meaning of regulation 3 of the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020
- References to the family member of a jobseeker, self-employed person, worker or frontier worker shall be construed in accordance with regulation 7 of the EEA Regulations
- For the purposes of regulations 4(2)(d) and (k] and 6(2)(d) and (k) “family member” does not include a person who is treated as a family member by virtue of regulation 7(3) of the EEA Regulations. (i.e. extended family members: aunts, uncles, cousins, etc., granted a specified residence document or permit).



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

- Must not be a person subject to immigration control or treated as a person not subject to immigration control
- Excluded unless included
- Generally, must be habitually resident in UK, Ireland, Channel Islands or Isle of Man
- *Right to reside must not be solely a job-seeker, family member of a job-seeker, person with the EU initial right of residence for up to 3 months, or as a Zambrano primary carer of a British citizen*
- *But who is included? The Brexit transition period ended at 11 pm on 31 December 2020*
- British citizens, Irish citizens (in that status), persons exempt from immigration control, Commonwealth Citizens with the Right of Abode, EU rights to reside as: student, self-sufficient, retained rights, permanent residence after 5 years
- EUSS Pre-settled Status/limited leave to enter or remain does not count as a 'right to reside' (why would it?)



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England)

Regulations 2006

Rights to reside exempt from the habitual residence test

- *Workers, the Self-employed, an authorised Croatian Worker, and the family members of such persons*
- *Person with the right of permanent residence granted in less than 5 years*
- *But who is included? The Brexit transition period ended at 11 pm on 31 December 2020*
- A person who is in the United Kingdom as a result of his deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom
- Frontier workers
- Family members of frontier workers granted limited leave to enter or remain



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

Persons within the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020

- “**member of the post-transition period group**” means a person who ***has*** *limited leave to enter, or remain* in, the United Kingdom granted by virtue of residence scheme immigration rules within the meaning given by section 17 of the European Union (Withdrawal Agreement) Act 2020 (i.e. the EUSS)



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

- Persons within the **Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, Sch 4**
- EEA Regulations 2016 means the Immigration (European Economic Area) Regulations 2016 as they had effect immediately before they were revoked
- The provisions of the EEA Regulations 2016 continue to have effect in relation to a person who is a member of the post-transition period group, with the specified modifications, despite the revocation of those Regulations (so a retained and modified regime)



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

Persons within the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, Sch 4

Continued application of section 7(1) of the Immigration Act 1988 for purposes of housing legislation

Notwithstanding the repeal of section 7 of the Immigration Act 1988 (exemption from requirement for leave to enter or remain for persons exercising EU Rights, *a member of the post-transition period group* is not to be treated as “*a person subject to immigration control*” within the meaning of section 13 of the Asylum and Immigration Act 1996 for the purposes of the exercise of the functions specified;

- determining whether a person is ineligible for an allocation of housing accommodation in England; and
- housing assistance in England under section 185(2)



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020: Grace Period from 1 January 2021 to 30 June 2021 (deadline for applications)

- The provisions of the EEA Regulations 2016 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to a relevant person during the grace period.
- The provisions specified apply in relation to a relevant person during the grace period as if any reference to the EEA Regulations 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020: Grace Period from 1 January 2021 to 30 June 2021 (deadline for applications)

- A person is to be treated as residing in the United Kingdom at any time which would be taken into account for the purposes of calculating periods when the person was continuously resident for the purposes of the EEA Regulations 2016
- A person who does not have the right to reside in the United Kingdom permanently is to be treated as having such a right if the person had a right of permanent residence in the United Kingdom under those Regulations and who, immediately before IP completion day, has been absent from the United Kingdom for a continuous period of 5 years or less (disregarding any period of absence before the person acquired the right of permanent residence).



Persons from Abroad not Persons Subject to Immigration Control

Regulations 4 and 6 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020: Grace Period from 1 January 2021 to 30 June 2021 (deadline for applications)

- The provisions apply in relation to the applicant during the relevant period as if any reference to the EEA Regulations 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect and modified
- Section 7(1) of the Immigration Act 1988 applies as it had effect immediately before 11 pm on 31 December 2020, with the modification that “of an enforceable EU right or” were omitted;



Persons from Abroad not Persons Subject to Immigration Control

The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020: Grace Period from 1 January 2021 to 30 June 2021 (deadline for applications)

The relevant period begins immediately after the application deadline and ends:

- if the applicant is, by virtue of the in-time application, granted leave to enter or remain in the United Kingdom, on the day on which that leave is granted
- if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant does not appeal against that decision, on the first day on which the applicant is no longer entitled to appeal against that decision (ignoring any possibility of an appeal out of time with permission)
- if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant brings an appeal against that decision, on the day on which that appeal is finally determined, withdrawn or abandoned, or lapses



Persons from Abroad not Persons Subject to Immigration Control

The Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020

- The Regulations make provisions for frontier workers in order to fulfil the United Kingdom's obligations under the Withdrawal Agreement
- They provide for EEA nationals who, by 31 December 2020, are working or self-employed in the United Kingdom but living elsewhere to continue to work in the United Kingdom for as long as they remain a frontier worker
- They also provide for the restriction of those rights and establish a scheme for frontier worker permits.



Persons from Abroad not Persons Subject to Immigration Control

The Withdrawal Agreement

- Art 4(4) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.



Housing Act 1996, s 185, Persons from abroad not eligible for housing assistance

- (4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether a person falling within subsection (5)—
- (a) is homeless or threatened with homelessness, or
 - (b) has a priority need for accommodation.
- (5) A person falls within this subsection if the person—
- (a) falls within a class prescribed by regulations made under subsection (2); but
 - (b) is not a person who, immediately before IP completion day, was—
 - (i) a national of an EEA State or Switzerland, and
 - (ii) within a class prescribed by regulations made under subsection (2) which had effect at that time.



Nationality, Immigration and Asylum Act 2002, Sch 3

- Ineligible, Paragraph 1: section 188(3) or 204(4) of the Housing Act 1996 (c. 52) (accommodation pending review or appeal)
- Repealed Class: Second class of ineligible person: citizen of other EEA State
 - 5 Paragraph 1 applies to a person if he—
 - (a) has the nationality of an EEA State other than the United Kingdom, or
 - (b) is the dependant of a person who has the nationality of an EEA State other than the United Kingdom.
- Remaining Class: Person unlawfully in United Kingdom
- 7 Paragraph 1 applies to a person if—
 - (a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 50A of the British Nationality Act 1981 , and
 - (b) he is not an asylum-seeker
- 3 Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of—
 - (a) a person's Convention rights



Thank you

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