# Eligibility for homelessness assistance

Toby Vanhegan

BREXIT UPDATE

1. On 10 April 2019 the European Council granted the UK an extension of the Article 50 period until 31 October 2018. The extension was conditional upon the UK holding European Parliament elections. If the Withdrawal Agreement is ratified by the UK and the EU before 31 October 2018, then the withdrawal will take place on 1 November.

2. If the Withdrawal Agreement is not ratified by that date, then either the UK leaves without a deal, or there will have to be a further extension.

3. The Withdrawal Agreement contains a transitional period until the end of 2020, with a possible extension until the end of 2022, which largely retains the existing EU law on free movement rights as set out in Directive 2004/38/EC. After that date, Part Two of the Withdrawal Agreement comes into effect which largely preserves those rights for persons in the UK on or before that date, by the grant of Settled or Pre Settled Status. The Court of Justice of the EU retains jurisdiction concerning Part Two matters for 8 years after the end of the transition period.

4. From March 2019 the UK opened up the settled status scheme. This is not just for EU citizens but also for EEA nationals and Swiss citizens. Applications must be made by 30 June 2021 or, if there is a no deal Brexit, applications must be made by 31 December 2020.

5. On 28 January 2019 the Government issued a Press Release explaining what would happen in the event of a No Deal Brexit. It stated that the Government would seek to end free movement as soon as possible, but during the transitional period until that happens, EEA citizens and their families will be able to come to the UK and stay much as they do now. However, to stay longer than 3 months, they will need to apply for permission and receive European Temporary Leave to Remain, which is valid for a further 3 years. EU citizens wishing to stay for longer than 3 years will need to make a further application under the new skills based immigration system, which will begin from 2021.

6. At present, the Immigration Rules contain Appendix EU which sets out the basis upon which an EEA citizen and their family members, and the family members of a qualifying British citizen, will, if they apply under it, be granted indefinite leave to enter or remain or limited leave to enter or remain.

7. The EU Settlement Scheme was fully opened to the public on 30 March 2019. The Scheme allows EEA or Swiss citizens and their family members to continue to live, work and study in the UK. If the applicant has been resident in the UK for at least five continuous years at the point of application, the applicant will be eligible for settled status. There is no need to show a right of residence under EU law, actual residence is sufficient.

8. If the applicant has been resident for less than five years at the point of application, the applicant will be eligible for pre settled status.

9. Pre Settled Status is forfeited by a continuous period of more than two years outside the UK. Settled Status is forfeited by a continuous period of more than five years outside the UK. Continuity of residence for the purposes of upgrading pre settled to settled status is broken by absences from the UK of up to 6 months in any 12 month period, or by a single absence of up to 12 months. The five year period for Settled Status is contained in the Withdrawal Agreement, but the Government has said that it will allow five year absences even in the event of a no deal Brexit.

10. The Eligibility Regulations will have to be amended to take account of these new forms of status. However, given the current state of uncertainty, it is impossible to say how and when these changes will be put into effect.

Toby Vanhegan

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## Immigration control

1 People in the UK are divided into two classes: persons who are subject to immigration control; and persons who are not subject to immigration control. The latter group includes all persons who have a right to reside in the UK.

### Persons subject to immigration control

2 The term 'persons subject to immigration control' as used in both HA 1996 Parts 6[1] and 7[2] and H(W)A 2014 Sch 2 para 1, is based on immigration legislation[3] and means a person who, under the Immigration Act (IA) 1971, requires leave to enter or remain in the UK (whether or not such leave has been given). Generally speaking, this means anyone who requires a visa to come to the UK. It primarily applies to non-EEA (European Economic Area) nationals, but EEA nationals who are not exercising a right to reside in the UK are also subject to immigration control[4] (even though they are legally present).[5]

### Persons not subject to immigration control

3 Persons not subject to immigration control form two groups. The first group consists of those who are exempt from the requirement to have leave to enter or remain in the UK.[6] This group is relatively unimportant for eligibility purposes, and comprises three main classes:

diplomats and certain staff of embassies and high commissions and their families who form part of their household;[7]

members of UK armed forces, members of a Commonwealth or similar force undergoing training in the UK with the UK armed forces, and members of a visiting force coming to the UK at the invitation of the government;[8] and

members of the crew of a ship or aircraft, hired or under orders to depart as part of that ship's crew or to depart on the same or another aircraft within seven days of arrival in the UK.[9]

4 The second group is those who do not require leave to enter or remain in the UK, they include:

a) British citizens;
b) Commonwealth citizens with the right of abode in the UK;
c) EEA nationals who have a right to reside in the UK.

5 The IA 1971 expressly excludes a) and b) from the requirement to have leave to enter or remain in the UK;[10] c) was a later addition to the group to reflect the evolving nature of the EU.[11]

#### *British citizenship*

6 British citizenship was created by the British Nationality Act (BNA) 1981.[12] It came into force on 1 January 1983. Prior to that date, the most beneficial form of national status was to be a Citizen of

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[1]HA 1996 s160A(3).

[2]HA 1996 s185(2).

[3]AIA 1996 s13.

[4]***Abdi v Barnet LBC and First Secretary of State; Ismail v Barnet LBC and First Secretary of State*** [2006] EWCA Civ 383, [2006] HLR 23. See para 3.20. See footnote 50, below, for members of the EEA.

[5]***Abdirahman v Secretary of State for Work and Pensions*** [2007] EWCA Civ 657, [2008] 1 WLR 254, [2007] 4 All ER 882. A person who has temporary admission to the UK is also lawfully present: see ***Szoma v Secretary of State for Work and Pensions*** [2005] UKHL 64, [2006] 1 AC 564.

[6]IA 1971 s8.

[7]IA 1971 ss3 and 3A.

[8]IA 1971 s8(4) and (6).

[9]IA 1971 s8(1).

[10]IA 1971 s1(1).

[11]IA 1988 s7(1).

[12]This has been the subject of numerous amendments including by the Borders, Citizenship and Immigration Act 2009.

the United Kingdom and Colonies (CUKC) with the right of abode in the UK.[13] A person can become a British citizen in a variety of ways, which include the following:

a person who, on 31 December 1982, was a CUKC with the right of abode in the UK because of his or her birth, adoption, naturalisation or registration in the UK, or because he or she has a parent or grandparent who was born, adopted, naturalised or registered in the UK;[14]

a person who, on 31 December 1982, had been ordinarily resident in the UK for five years;[15]

a person born in the UK after 1 January 1983 is a British citizen if at the time of the birth, the person's father or mother was a British citizen or settled in the UK.[16] In this context, 'settled' means that he or she has indefinite leave to remain or permanent residence in the UK;

a person born in the UK after 1 January 1983 is entitled to be registered as a British citizen if, while the person is a minor, his or her father or mother becomes a British citizen or becomes settled in the UK;[17]

otherwise, a person born in the UK after 1 January 1983 can apply for registration as a British citizen after the person is ten years old, providing that he or she has not been absent from the UK for more than 90 days a year;[18]

a person born outside the UK after 1 January 1983 will be a British citizen if at the time of the birth his or her father or mother was a British citizen who was born in the UK ;[19]

a person may also apply for naturalisation[20] as a British citizen so long as the person fulfils certain requirements set out in BNA 1981.[21]

### *Commonwealth citizens with the right of abode in the UK*

7 Since the coming into force of the BNA 1981,[22] the following now have the right of abode in the UK:

Persons who automatically became British citizens[23] on the coming into force of the BNA 1981.[24] These will include all the former citizens of the UK and Colonies who had a right of abode because they were 'patrials', ie, citizens of the UK and Colonies born, adopted, registered or naturalised in the UK, those with the necessary ancestral connections with the UK, and those who were ordinarily resident here for five years free of immigration restrictions.[25]

Commonwealth citizens[26] who immediately before commencement had the right of abode by virtue of having a parent who was born in the UK under the now revoked IA 1971 s2(1)(d).

Female Commonwealth citizens who immediately before commencement had a right of abode under the now revoked IA 1971 s2(2) by virtue of their marriage to a patrial.[27]

### *EEA nationals with the right to reside in the UK*

8 The right to reside in the UK for EEA nationals now derives from the Treaty on the Functioning of the European Union (TFEU).[28] It is not an unconditional right.[29] The requirements to be met are

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[13]IA 1971 s2 as it was then in force.

[14]BNA 1981 s11(1).

[15]IA 1971 s2(1)(c) as it was in force on 31 December 1982.

[16]BNA 1981 s1(1).

[17]BNA 1981 s1(3).

[18]BNA 1981 s1(4).

[19]BNA 1981 s2.

[20]BNA 1981 s6.

[21]BNA 1981 Sch 1.

[22]On 1 January 1983.

[23]See para 3.21(a) and (b).

[24]BNA 1981 s11.

[25]IA 1971 s2(1)(c) before amendment.

[26]Commonwealth citizens are all those who are citizens of the countries set out in BNA 1981 Sch 3.

[27]IA 1971 s2 before amendment. Patriality was conferred on certain citizens of the UK and Colonies and certain other Commonwealth citizens.

[28]This came into force on 1 December 2009.

principally[30] set out in Directive 2004/38/EC[31] ('the Directive') which has been enacted into domestic law by the Immigration (European Economic Area) Regulations ('EEA Regs') 2016.[32] The EEA Regs 2016 are not simply a repetition of the Directive: where the Directive gives a right to reside and the EEA Regs 2016 do not, an applicant is entitled to rely on the Directive.[33] Conversely, if the Directive does not give a right to reside but the EEA Regs 2016 do so, then an applicant can rely on those more favourable provisions.

9 There are two ways in which a person can have a right to reside in the UK. These are either

as an EEA[34] national who satisfies the relevant conditions,[35] known as a 'qualified person'[36] in the EEA Regs 2016; or

as a family member of an EEA national who either has a right to reside or has had a right to reside.

10 The right to reside exists independently of any residence documentation: the latter is merely evidence of the right,[37] although a person who is in possession of such documentation may be able to rely on Article 18 of the TFEU in order to be granted social assistance:[38] in ***Sanneh***,[39] however, the Court of Appeal held that the ability to rely on article 18 only applied to EU citizens in possession of a residence permit.[40] This seems consistent with the judgment of the CJEU in ***Ahmed***,[41] which concerned an Algerian national with a right under domestic law to be present in Belgium, which was not enough to enable her to claim social assistance under EU law.[42]

11 There are three categories of the EEA national right to reside:

initial right to reside;
extended right to reside;
permanent right to reside.

**Initial right to reside**

12 An EEA national must be admitted to the UK if he or she produces on arrival a valid national identity card or passport issued by an EEA state.[43] A person who is not an EEA national must produce on arrival a valid passport and an EEA family permit, a residence card or a permanent residence card.[44] An EEA family permit acts as a sort of entry clearance or visa for non-EEA nationals and its issue cannot be made subject to conditions that are more restrictive than those set out in the Directive.[45]

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[29]TFEU Article 21; ***Minister voor Vreemdelingenzaken en Integratie v RNG Eind***, Case C-291/05 at [28]; ***Trojani v Centre public d'aide sociale de Bruxelles*** (CPAS), Case C-456/02, [2004] ECR I-7573 at paras [31] and [32]; ***Zhu and Chen v Secretary of State for the Home Department***, Case C-200/02, [2004] ECR I-9925 at para [26]; ***Ali v Secretary of State for the Home Department*** [2006] EWCA Civ 484, [2006] 3 CMLR 10 at para [20].

[30]Some rights of residence exist outside the scope of the Directive, see paras 3.79–3.99.

[31]Of the European Parliament and of the Council of 29 April 2004, which came into force on 30 April 2004.

[32]SI No 1052, which came into force on 1 February 2017.

[33]IA 1988 s7(1).

[34]The EEA consists of the EU plus Norway, Iceland and Liechtenstein. The EU consists of the EU15: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK, plus the countries which acceded on 1 May 2004, which are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, plus the countries which acceded on 1 January 2007 (the A2), which are Bulgaria and Romania and Croatia which acceded on 1 July 2013 pursuant to the Accession Treaty signed on 9 December 2011.

[35]These are either set out in the Directive or the EEA Regs 2016.

[36]EEA Regs 2016 reg 6(1).

[37]***Mario Lopes da Veiga v Staatssecretaris van Justitie***, Case 9/88; ***Echternach and Moritz v Minister van Onderwijs en Wetenschappen***, Cases 389/87 and 390/87, at para [25]; ***Secretary of State for Work and Pensions v Maria Dias***, Case C-325/09 at para [48].

[38]***Trojani v Centre public d'aide sociale de Bruxelles*** (CPAS), Case C-456/02, [2004] ECR I-7573 at para [43].

[39]***Sanneh v Secretary of State for Work and Pensions*** [2015] EWCA Civ 49, [2015] HLR 27.

[40]***Sanneh*** at [110].

[41]***Office national d'allocations familiales pour travailleurs salaries (ONAFTS) v Ahmed***, Case C-45/12.

[42]***Ahmed*** at [40] and [41].

[43]Directive 2004/38/EC Article 5(1); EEA Regs 2016 reg 11(1).

[44]EEA Regs 2016 reg 11(2); see also Directive 2004/38/EC Article 5(2).

[45]***Metock v Minister for Justice, Equality and Law Reform***, Case C-127/08.

13 The initial right to reside lasts for no longer than three months and is on condition that the EEA national or his or her family member does not become an unreasonable burden on the social assistance system of the UK.[46] The phrase 'unreasonable burden' may be thought to imply that a temporary or short-term reliance on social assistance does not deprive a person of an initial right to reside.

14 The term 'social assistance' is not defined in the Directive, or elsewhere in EU legislation, but has been considered by the CJEU, which has held that the grant of such assistance must essentially depend on need and not be linked to employment or contributions.[47] This is therefore likely to include social housing.[48] In England, a person who has an initial right to reside is ineligible under HA 1996 Parts 6[49] and 7.[50] In Wales, such a person is also ineligible under HA 1996 Part 6[51] and H(W)A 2014 Part 2.[52]

**Extended right to reside**

15 There are five ways in which an EEA national may have an extended right to reside in the UK.[53] These are as:

a jobseeker;
a worker;
a self-employed person;
a self-sufficient person; or
a student.

*A jobseeker*

16 A jobseeker is a person who:

a) entered the UK in order to seek employment; or
b) is present in the UK seeking employment, after having previously had a right to reside;

and in either case

c) provides evidence of seeking employment and having a genuine chance of being engaged.

A person can retain the status of jobseeker for as long as he or she provides compelling evidence of continuing to seek employment and of having a genuine chance of being engaged.[54]

17 The CJEU has held that, after six months, a jobseeker must provide evidence that he or she is continuing to seek employment and has genuine chances of being engaged.[55] In English law, jobseekers are expressly excluded from eligibility under HA 1996 Parts 6[56] and 7.[57] In Wales, jobseekers are ineligible under HA 1996 Part 6[58] and H(W)A 2014 Part 2.[59]

*A worker*

18 There are three essential criteria which determine whether a person is a worker for the purposes of Article 45 of the TFEU. First, the person must perform services of some economic value.[60] The ac-

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[46]Directive 2004/38/EC Article 14(1); EEA Regs 2016 reg 13.

[47]***Frilli v Belgium*** Case 1/72, [1972] ECR 457, [1973] CMLR 386.

[48]By analogy, for the purposes of immigration law, the term 'public funds' is defined (Immigration Rules (HC 395) para 6) as including housing under HA 1996 Part 6 or Part 7 and HA 1985 Part 2.

[49]Eligibility Regs 2006 reg 4(1)(b)(ii).

[50]Eligibility Regs 2006 reg 6(1)(b)(ii).

[51]Eligibility (Wales) Regs 2014 reg 4(1)(b)(ii).

[52]Eligibility (Wales) Regs 2014 reg 6(1)(b)(ii).

[53]EEA Regs 2016 reg 6(1)(a)–(e).

[54]EEA Regs 2016 reg 6(1).

[55]***R v Immigration Appeal Tribunal ex p Antonissen,*** Case C-292/98, [1991] ECR I 745.

[56]Eligibility Regs 2006 reg 4(1)(b)(i).

[57]Eligibility Regs 2006 reg 6(1)(b)(i).

[58]Eligibility (Wales) Regs 2014 reg 4(1)(b)(i).

[59]Eligibility (Wales) Regs 2014 reg 6(1)(b)(i).

[60]***Lawrie-Blum v Land Baden Wurttemberg***, Case 66/85, [1986] ECR 2121; in ***Bristol City Council v FV*** [2011] UKUT 494 (AAC) (21 December 2011), the Upper Tribunal held that sellers of the ***Big Issue*** can be considered self-employed. The opposite decision was reached in DV v Secretary of State for Work and Pensions (CHB) [2017] UKUT 155 (AAC).

tivity must be real and genuine, to the exclusion of activity on such a small scale as to be marginal and ancillary.[61]

19 Second, the performance of such services must be for and under the direction of another person. Any activity performed outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity.[62]

20 Third, the person concerned must receive remuneration.[63] Neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequences with regard to whether or not the person is a worker.[64] The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person from being regarded as a worker,[65] even if he or she seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds[66] of the host member state.[67]

21 The fact that the employment is of short duration does not, of itself, prevent the employee from being a worker.[68]

22 A person who is no longer working does not cease to be a worker if:[69]

a) he or she is temporarily[70] unable to work as the result of an illness or accident;
b) he or she is in duly recorded involuntary unemployment[71] after having been employed in the UK for at least one year, provided that he or she has registered as a jobseeker with the relevant employment office,[72] and satisfies conditions A and B (below); such status cannot be retained for

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[61] ***Vatsouras and Koupatantze v Arbeitgemeinschaft (ARGE) Nurnberg 900***, Cases C-22/08 and C-23/08; ***Lawrie Blum***, above.

[62] ***Jany v Staatssecretaris van Justitie***, Case C-268/99 at [34].

[63] ***Vatsouras***, above, at para [25]; and ***Lawrie-Blum***, above.

[64] ***Vatsouras***, above, at para [27].

[65] ***Levin v Staatssecretaris van Justitie***, Case 53/81.

[66] For the purposes of UK immigration law, the term 'public funds' is defined in the Immigration Rules (HC 395) para 6 as including housing under HA 1996 Part 6 or Part 7 and HA 1985 Part 2. The Rules have not been updated to reflect the H(W)A 2014.

[67] ***Kempf v Staatssecretaris van Justitie***, Case 139/85, [1986] ECR 1741.

[68] ***Vatsouras***, above, at para [29]; ***Ninni Orasche v Bundesminster für Wissenschaft, Verkehr und Kunst***, Case C-413/01; ***Barry v Southwark LBC*** [2008] EWCA Civ 1140, [2009] HLR 30.

[69] EEA Regs 2016 reg 6(2).

[70] In ***Secretary of State for the Home Department v FB*** [2010] UKUT 447 (IAC), it was held that temporary means not permanent, see paras [23]–[26], followed by the Court of Appeal in ***Aurelio de Brito and Lizette de Noronha v Secretary of State for the Home Department*** [2012] EWCA Civ 709, [2012] 3 CMLR 24 at [30]–[35], where it was held that the test is objective and that a temporary condition could become permanent and a permanent condition could become temporary depending upon the facts of the case, such as a successful medical intervention. In ***Konodyba v Royal Borough of Kensington and Chelsea*** [2012] EWCA Civ 982, [2013] PTSR 13 at [22] and [23], the Court of Appeal held that whether a homeless applicant is temporarily unable to work or unlikely to be able to work in the foreseeable future is a question of fact. These decisions were followed in ***Samin v Westminster City Council*** [2012] EWCA Civ 1468, [2013] 2 CMLR 6, [2013] HLR 7 where the Court of Appeal held that the question is one of fact in every case and that it will generally be helpful to ask whether there is or is not a realistic prospect of a return to work. This case has now been the subject of an appeal to the Supreme Court, [2016] UKSC 1, [2016] HLR 7, but this aspect of the case was unaffected by its judgment: see para 3.12 above.

[71] In decisions of the Social Security Commissioner CH/3314/2005 and CIS/3315/2005, it was held that this phrase is concerned with why the worker is not working at the date of the decision, not on why the worker ceased to be employed, though this may also be relevant: see para [11].

[72] ***Elmi v Secretary of State for Work and Pensions*** [2011] EWCA Civ 1403, [2013] PTSR 780 concerned an EU citizen who had become involuntarily unemployed and then claimed income support at Jobcentre Plus. She ticked the box on the relevant form stating that she was looking for work. The Court of Appeal held that she had registered with the employment office as a jobseeker, even though she was in receipt of income support and not jobseeker's allowance, and had therefore retained her worker status.

longer than six months without providing compelling evidence[73] of continuing to seek employment and having a genuine chance of being engaged;

c) he or she is in duly recorded involuntary unemployment after having been employed in the UK for less than one year, provided he or she has registered as a jobseeker with the relevant employment office, and satisfies conditions A and B, but he or she can only retain worker status for a maximum of six months under this provision.[74]
d) he or she is involuntarily unemployed and has embarked on vocational training; or
e) he or she person has voluntarily ceased working and embarked on vocational training that is related to his or her previous employment.

Condition A is that the person entered the UK in order to seek employment, or is present in the UK seeking employment, immediately after enjoying a right to reside other than as a jobseeker.[75] Condition B is that the person provides evidence of seeking employment and of having a genuine chance of being engaged.[76]

23 If a woman is incapable of working due to pregnancy, this does not constitute an illness or accident within a unless there is an actual associated illness.[77] In JS the Court of Appeal adopted a similar approach to a woman who ceased working as a nursery school teacher because the demands of the job were too great for her because of her pregnancy, although it had not been found that she could not work because of the pregnancy:[78] it was held that the term 'worker' could not be construed to include a person who has no contract of employment and is not therefore on maternity leave, although the issue of whether this amounted to unlawful sex discrimination was left open because it did not arise on the evidence.[79]

24 JS was the subject of a reference to the CJEU as ***St Prix***,[80] where it was held that a woman who had temporarily given up work because of the late stages of her pregnancy and aftermath of childbirth could not be regarded as a person temporarily unable to work as the result of an illness, but that she nevertheless retained the status of worker provided that she returned to work or found another job within a reasonable time after the birth of her child; in order to determine whether the period was reasonable, the national court should take account of all the specific circumstances of the case and the applicable national rules on the duration of maternity leave.[81]

24 In a decision of the Upper Tribunal[82] it was held that it will be unusual for the reasonable period

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73 In ***KS v Secretary of State for Work and Pension***s [2016] UKUT 269 (AAC), it was held that this means no more than the requirement for evidence to establish on a balance of probabilities that the claimant is continuing to seek employment and has genuine chances of being engaged. To interpret the phrase as meaning a higher standard of proof would be contrary to EU law. See also ***Secretary of State for Work and Pensions v MB (JSA)*** [2016] UKUT 372 (AAC), where it was held that the fact that a claimant has been looking for work for six months is only one factor in determining whether he or she has a genuine chance of being engaged; 'compelling' evidence does not mean more than chances that are founded on something objective and which offer real prospects of employment within a reasonable period. Given that evaluating a 'chance' necessitates a degree of looking forward, events likely to occur in the near future may be relevant to a claimant's genuine chance of being engaged. The government's guidance, the ***Decision Makers' Guide Volume 2: International subjects: staff guide***, para 073099 suggests an approach that is much higher than a mere balance of probabilities and may therefore not be correct.

74 EEA Regs 2016 reg 6(3).

75 EEA Regs 2016 reg 6(5).

76 EEA Regs 2016 reg 6(6).

77 [2009] UKUT 71 (AAC), decided in the context of a benefits appeal and ***Webb v EMO Air Cargo (UK) Ltd*** Case C-32/93 [1994] ECR I-3567.

78 ***JS v Secretary of State for Work and Pensions*** [2011] EWCA Civ 806. The case is now the subject of a reference to the ECJ, see [2012] UKSC 49.

79 ***JS*** at paras [19] and [27].

80 ***St Prix v Secretary of State for Work and Pensions***, Case C-507/12, [2014] PTSR 1448.

81 ***St Prix*** at [29], [47] and [48].

82 ***Secretary of State for Work and Pensions v SFF*** [2015] UKUT 0502 (AAC) and ***Weldemichael and Obulor v Secretary of State for the Home Department*** [2015] UKUT 540 (IAC) at [59], a determination in relation to an immigration case, where it was held, as a general proposition, that a woman will retain worker status where maternity leave did not commence more than 11 weeks before the expected date of birth, she did not have more than 52 weeks off and she returned to work after that period.

to be other than 52-weeks.[83] This is consistent with the concession made by the Secretary of State in the Court of Appeal in ***Dias***, that a woman on maternity leave retains her status as a worker, which the court assumed was correct.[84]

*A self-employed person*

25 A self-employed person is a person who establishes himself or herself in another EU state in order to pursue activity as a self-employed person in accordance with Article 49 of the TFEU.[85] Essentially, this means someone who is working outside a relationship of subordination.[86]

26 The EEA Regs 2016 provide that a person who is no longer in self-employment shall not cease to be treated as a self-employed person if he or she is temporarily unable to pursue his or her activity as the result of an illness or accident.[87] This is much narrower than the provisions of the Directive,[88] which allow a self-employed person to retain that status in the same way as a worker who is no longer working.

27 In ***Tilianu***, the Court of Appeal applied this differential treatment and held that unless a self-employed person is temporarily unable to pursue his or her activity because of illness or accident, a person who is not working is not self-employed.[89] This means that the self-employed have fewer rights than workers, because there are fewer circumstances in which they can retain that status when they are not working.[90] This is arguably discriminatory under Article 18 of the TFEU, unless there is some justification for the differential treatment.

28 The decision of the Court of Appeal in ***Tilianu*** was distinguished in a benefits appeal,[91] where the Upper Tribunal held that a self-employed person does not necessarily cease to be self-employed just because he or she does not have any contract work at a particular time. If the person is actively seeking self-employed work, then he or she can still be held to be self-employed and therefore continue to have a right to reside. The basis of the distinction was that the Court of Appeal had not considered whether self-employed status had been retained.

*A self-sufficient person*

29 A self-sufficient person is a person who has sufficient resources not to become a burden on the social assistance system of the UK during his or her period of residence, and who has comprehensive sickness insurance cover in the UK.[92]

30 The requirement not to become a burden on the social assistance system of the UK is not qualified (as in the case of a person who has an initial right to reside, which only requires that the person is not to be an 'unreasonable' burden).[93]

31 A self-sufficient person is most unlikely to be eligible in England under HA 1996 Parts 6 and 7, and in Wales under HA 1996 Part 6 and H(W)A 2014 Part 2, because the need for social housing will mean that he or she has become a burden on the social assistance system of the UK and therefore cannot have a right to reside on the basis of self-sufficiency.[94]

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83 ***Secretary of State for Work and Pensions v SFF*** at [35].

84 ***Secretary of State for Work and Pensions v Dias*** [2009] EWCA Civ 807, [2010] 1 CMLR 4 at para [18].

85 EEA Regs 2016 reg 4(1)(b).

86 See ***Jany***, above.

87 EEA Regs 2016 reg 6(4).

88 Directive 2004/38/EC Article 7(3).

89 ***R (Tilianu) v Secretary of State for Work and Pensions*** [2010] EWCA Civ 1397, [2011] PTSR 781.

90 See para 3.35.

91 ***Secretary of State for Work and Pensions v AL*** [2010] UKUT 451 (AAC).

92 EEA Regs 2016 reg 4(1)(c).

93 Directive 2004/38/EC Article 14(1); EEA Regs 2016 reg 13; see paras 3.27–3.29.

94 By analogy, for the purposes of immigration law, 'public funds' is defined (Immigration Rules (HC 395) para 6) as including housing under HA 1996 Part 6 or Part 7 and HA 1985 Part 2; the rules have not yet been amended to reflect the introduction of H(W)A 2014 Part 2.

32 The Commission of the European Communities has published[95] guidance on the interpretation of the Directive. This states that any insurance cover, private or public, contracted in the host member state or elsewhere, is acceptable in principle, so long as it provides comprehensive coverage and does not create a burden on the public finances of the host member state.[96]

33 This could suggest that private health insurance may not be necessary, and raised the possibility that NHS cover would be sufficient.[97] In ***Ahmad***,[98] however, the Court of Appeal held that access to NHS treatment did not count as comprehensive sickness insurance. The court followed its previous decision in ***W (China)***,[99] in which use of free state medical services was held to create a burden on the host state and that contributions towards it were not a proxy for insurance designed to remove the burden of providing health care.

34 In a benefits appeal,[100] a Polish national who was receiving an invalidity pension from Sweden was held to have comprehensive sickness cover by virtue of Regulation (EEC) No 1408/71,[101] because these provisions allowed the UK to claim back the cost of her NHS care from Sweden. She did not, however, have sufficient resources, taking into account her housing needs and the fact that her stay in the UK was intended to be permanent.

*A student*

35 A student is a person who:

is enrolled, for the principal purpose of following a course of study (including vocational training), at a private or public establishment which is financed from public funds or otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the UK in which the establishment is located;

has comprehensive sickness insurance cover in the UK; and

assures the Secretary of State by means of a declaration or by such equivalent means as he or she may choose that he or she has sufficient resources not to become a burden on the social assistance system of the UK during his or her period of residence.[102]

36 This means that a person can have a right to reside as a student even if he or she subsequently becomes a burden on the social assistance system of the UK, ie if his or her circumstances change. If a student can have a right of residence despite having a need for social housing, then the student is likely to be eligible in England under both HA 1996 Parts 6[103] and 7,[104] and in Wales under HA 1996 Part 6 and H(W)A 2014 Part 2, so long as he or she is habitually resident in the UK.

**Permanent right to reside**

37 An EEA national who has resided in the UK for a continuous period of five years has a permanent right to reside.[105] The CJEU has held that periods of imprisonment cannot be taken into account, so that they interrupt continuity of residence for this purpose.[106] Family members who are not EEA na-

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95 On 2 July 2009.

96 At para 2.3.2.

97 In ***Secretary of State for Work and Pensions v SW*** [2011] UKUT 508 (AAC), 15 December 2011 at [20], the Upper Tribunal stated that a person could be self-sufficient by virtue of being entitled to treatment under the NHS by satisfying the residence and presence conditions under domestic law. In ***Secretary of State for Work and Pensions v Czop***, C-147/11 at [38], the UK government conceded that the claimant was self-sufficient even though she did not have private health insurance.

98 ***Ahmad v Secretary of State for the Home Department*** [2014] EWCA Civ 988, [2015] 1 WLR 593.

99 ***W (China) v Secretary of State for the Home Department*** [2006] EWCA Civ 1494, [2007] 1 WLR 1514.

100 ***SG v Tameside MBC*** [2010] UKUT 243.

101 This has now been replaced by Regulation (EC) No 883/04.

102 Directive 2004/38/EC Article 7(1)(c); EEA Regs 2016 reg 4(1)(d).

103 In England, Eligibility Regs 2006 reg 4(1); in Wales, Eligibility (Wales) Regs 2014 reg 4(1).

104 In England, Eligibility Regs 2006 reg 6(1); in Wales, Eligibility (Wales) Regs 2014 reg 6(1).

105 Directive 2004/38/EC Article 16(1); EEA Regs 2016 reg 15(1).

106 ***Onuekwere v Secretary of State for the Home Department***, ***Secretary of State for the Home Department v MG***, Cases C-378/12 and C-400/12.

tionals but who have resided with the EEA national for a continuous period of five years also obtain the right.[107]

38 Workers or self-employed persons who have stopped working (and their family members) also have a permanent right of residence.[108] The worker or self-employed person must have resided in the UK continuously for more than three years, must have worked for the last one of those years and then stopped working at an age when he or she is entitled to a state pension or, in the case of an employed person, has ceased work in order to take early retirement.[109]

39 The definition also applies to a person who has stopped working as a result of a permanent incapacity who either resided in the UK continuously for more than two years prior to the termination, or whose 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.[110]

40 The Court of Appeal has held that a non-EU national[111] is entitled to a permanent right to reside under Directive Article 17(3) on marrying an EU worker who has stopped working due to a permanent incapacity and who had lived in the UK for two years prior to that time; it was not necessary for her to have been a family member before, or as at the date of, her husband's acquisition of permanent residence.[112]

41 In ***Lassal***,[113] the ECJ noted that the permanent right to reside did not appear in previous EU legislation[114]; it held that continuous periods of five years' residence completed before the Directive came into force on 30 April 2006, in accordance with earlier legislation,[115] had to be taken into account for the purposes of the acquisition of the right. It also held that absences from the host member state of less than two consecutive years, which occurred before 30 April 2006 but after a continuous period of five years' legal residence completed before that date, did not affect acquisition of the right of permanent residence.

42 In ***Dias***,[116] the ECJ held that time spent in the UK before 30 April 2006, when Ms Dias had no right to reside but was in possession of a residence permit granted by the national authorities, did not constitute legal residence and therefore could not count towards the five years required for permanent residence. It was, however, also held that such time would not, so long as it amounted to less than two consecutive years, affect any right of permanent residence which had already been acquired.

43 This does not seem to rule out the argument that the holder of a valid residence permit is entitled to social assistance; otherwise, there would be discrimination contrary to Article 18 of the TFEU.[117] This, however, seems only to apply to EU citizens, by virtue of what was said in ***Sanneh***[118] (after

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[107] Directive 2004/38/EC Article 16(1); EEA Regs 2016 reg 15(1)(b).

[108] Directive 2004/38/EC Article 17; EEA Regs 2016 reg 15(1)(c) and (d).

[109] Directive 2004/38/EC Article 17; EEA Regs 2016 reg 5(2).

[110] Directive 2004/38/EC Article 17; EEA Regs 2016 reg 5(3).

[111] Sometimes known as a third country national.

[112] ***RM (Zimbabwe) v Secretary of State for the Home Department*** [2013] EWCA Civ 775, [2014] 1 WLR 2259.

[113] ***Secretary of State for Work and Pensions v Lassal and Child Poverty Action Group (intervener)***, Case C-162/09, [2011] 1 CMLR 31.

[114] This means Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC which were all repealed by the Directive, and Regulation (EEC) No. 1612/68 which was amended by the Directive.

[115] This refers to the various Directives and Regulation summarised in footnote 146 above.

[116] ***Secretary of State for Work and Pensions v Maria Dias***, Case C-325/09, [2011] 3 CMLR 40.

[117] ***Trojani v Centre public d'aide sociale de Bruxelles (CPAS)***, Case C-456/02, [2004] ECR1-7573, ECJ at paras [43]–[46], which was followed in ***R (Bidar) v London Borough of Ealing and Secretary of State for Education and Skills***, Case C-209/03, at para [37].

[118] ***Sanneh v Secretary of State for Work and Pensions*** [2015] EWCA Civ, [2015] HLR 27 at [110].

consideration of what was said in ***Ahmed***[119] by the CJEU).[120]

44 In ***Clauder***,[121] the European Free Trade Association (EFTA)[122] Court held that, although Article 16 of the Directive does not confer an autonomous right of residence on the family members of an EEA national with a permanent right to reside, it does grant them a derivative right to live with the holder of permanent residence. The admission and residence of the family members in such cases is not subject to a condition of sufficient resources, because the holder of a permanent right of residence is not subject to any such requirement and his or her enjoyment of that right would be impaired and deprived of its full effectiveness if he or she were prevented from founding a family on the basis of insufficient resources. Family members will only obtain permanent residence when they have fulfilled five years' residence.

45 In ***Ziolkowski***,[123] the ECJ held that Article 16 of the Directive means that an EU citizen who has been resident for more than five years in a host member state on the sole basis of the national law of that state, and without a right of residence pursuant to Article 7(1) of the Directive, cannot be regarded as having acquired permanent residence.

46 In the same case, it also held that periods of residence completed by a national of a non-member state in the territory of a member state before its accession to the EU must, in the absence of specific provisions in the Act of Accession, count towards the period required to obtain permanent residence, provided they were completed in accordance with Article 7(1) of the Directive.

**Residence documentation**

47 An EEA national who has a right to reside in the UK is entitled to a registration certificate or derivative[124] residence card.[125] A non-EEA national who has a right to reside in the UK is entitled to a residence card or derivative residence card.[126] A person with a permanent right of residence is entitled to a permanent residence document.[127]

**Family members**

48 The EEA Regs 2016[128] define a 'family member' as:

a) a spouse[129] or civil partner;
b) direct descendants[130] including those of a spouse or civil partner who are:

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[119] ***ONAFTS v Ahmed***, C-45/12 at [40] and [41].

[120] See para 3.26.

[121] Case E-4/11, 26 July 2011.

[122] This was not a decision of the CJEU because it concerned a retired German citizen living in Liechtenstein which is not a member of the EU and therefore not subject to the jurisdiction of the CJEU. Liechtenstein, along with Iceland and Norway, are part of the EEA and therefore their references go to the EFTA Court instead.

[123] ***Ziolkowski and Szeja v Land Berlin***, Cases C-424/10 and C-425/10.

[124] A derivative residence card is granted to a person whose right to reside in the UK is dependent upon another person's right to reside; see paras 3.79–3.99.

[125] Directive 2004/38/EC Article 8; EEA Regs 2016 regs 17 and 20 ; the right to reside exists independently of any residence documentation which is merely evidence of the right, see ***da Veiga v Staatssecretaris van Justitie***, Case 9/88; ***Echternach and Moritz v Minister van Onderwijs en Wetenschappen***, Cases 389/87 and 390/87, at para [25]; ***Secretary of State for Work and Pensions v Dias***, Case C-325/09 at para [48]; a person who is in possession of such documentation may, however, rely on EC Treaty Article 12 in order to be granted social assistance, see ***Trojani v Centre public d'aide sociale de Bruxelles*** (CPAS), Case C-456/02, [2004] ECR I-7573, at para [43].

[126] Directive 2004/38/EC Article 10; EEA Regs 2016 regs 18 and 20.

[127] Directive 2004/38/EC Articles 19 and 20; EEA Regs 2016 reg 19.

[128] EEA Regs 2016 reg 7(1).

[129] EEA Regs 2016 reg 7(1)(a). In ***Diatta v Land Berlin*** [1985] EUECJ R 267/83, the CJEU held that a marital relationship continues until terminated by the competent authority and is not affected by the fact that the spouses live separately, even where they intend to divorce at a later date. Note EEA Regs 2016 reg 2(1) states that a spouse does not include: a) a party to a marriage of convenience; or b) the spouse of a person who already has a spouse, civil partner or durable partner in the UK.

[130] In SM(Algeria) v Entry Clearance Officer [2018] UKSC 9, it was held that direct descendants refers to consanguineous children, grandchildren and other blood descendants in the direct line, which may include step descendants, and those descendants who had been lawfully adopted in accordance with the requirements of the host country. The case concerned a child who had become the subject of guardianship under the kefalah system in Algeria. The Supreme Court referred to the CJEU the question wheth-

i) under 21; or
ii) their dependants;[131]

c) dependent[132] direct[133] relatives in the person's ascending line (ie, parents or grandparents) or those of the person's spouse or civil partner, or

d) extended family members[134] who have been issued with an EEA family permit, a registration certificate or a residence card and who satisfy the conditions in EEA Regs 2016 reg 8.

49 In ***Jia***,[135] the CJEU defined 'dependency' to mean that the family member needs the material support of the EEA national or his or her spouse in order to meet his or her essential needs in the country of origin. Proof to establish such material support may be adduced by any appropriate means and is not confined to financial dependency.[136]

50 This decision has been distinguished by the Court of Appeal,[137] which has held that Article 2(2) of the Directive did not specify when the dependency had to have arisen, nor did it require that the relative had to be dependent in the country of origin. It was further held that Article 2(2), taken together with Article 8(5)(d), suggested that dependency in the state of origin need not be proved for family members and that it was sufficient for the dependency to have arisen in the host member state: such an interpretation reflected the policy of the Directive to strengthen and simplify the realisation of realistic free movement rights of EU citizens compatibly with their family rights; accordingly, proof of dependency by the claimant on her son in the UK sufficed.

51 In ***Metock***,[138] the CJEU held that, in order to benefit from the free movement rights set out in the Directive, it was contrary to the Direction for a member state to enact legislation which requires a non-EEA national, who is the spouse of an EU citizen residing in that member state but not possessing its nationality, to have previously been lawfully resident in another member state before arriving in the host member state.

52 It was also held that Article 3(1) must be interpreted to mean that a non-EEA national who is the spouse of an EU citizen residing in a member state whose nationality he or she does not possess, and who accompanies or joins that EU citizen, benefits from the provisions of the Directive, irrespective of when and where the marriage took place and of how the national of a non-member country entered the host member state.

53 The EEA Regs 2006 were amended[139] to reflect this judgment, which change has been carried across to the EEA Regs 2016, so that the family member who is accompanying the EEA national to the UK, or joining the EEA national here, no longer has to be lawfully resident in an EEA state or meet the requirements of the Immigration Rules.

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er the child was a direct descendant in those circumstances. It did, however, decide that if the child was not a direct descendant under article 2.2(c) of the Directive, then it would be another family member under article 3.2(a).

131 In ***Reyes v Migrationsverket***, Case C-423/12, the CJEU held that a member state cannot require a direct descendent who is 21 years old or over to have tried to obtain employment or subsistence support from his or her home state before he or she can be treated as a dependant under the Directive Article 2(2)(c). In ***Lim v Entry Clearance Officer Manila*** [2015] EWCA Civ 1383 per Elias LJ at [32], it was held that the critical question is whether the claimant is in fact in a position to support himself which is an issue of fact. If he can support himself there is no dependency, even if he is given financial material support by the EU citizen. If he cannot, the court will not ask why, except where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant.

132 EEA Regs 2016 reg 7(1)(c).

133 ***PG and VG*** [2007] UKAIT 19, where it was held that 'direct' is not confined to the first generation but can include grandchildren, although it does not include nieces, nephews, uncles and aunts. This approach was assumed to be correct in ***Bigia and others v Entry Clearance Officer*** [2009] EWCA Civ 79 at [4].

134 See para 3.56.

135 ***Jia v Migrationsverket,*** Case C-1/05, [2007] QB 545.

136 ***Jia*** at para [43].

137 ***Pedro v Secretary of State for Work and Pensions*** [2009] EWCA Civ 1358, [2010] PTSR 1504.

138 ***Metock and others v Minister for Justice, Equality and Law Reform***, Case C-127/08.

139 Immigration (European Economic Area) (Amendment) Regulations 2011 SI No 1247.

54 An extended family member[140] is treated as the family member of the relevant EEA national for so long as he or she holds a valid EEA family permit, a registration certificate or a residence card[141] and is one of the following:[142]

a relative of an EEA national, residing in a country other than the UK who is dependent on the EEA national or is a member of the EEA national's household and who either is accompanying the EEA national to the UK or wants to join him or her in the UK, or who has joined the EEA national in the UK and continues to be dependent upon him or her, or to be a member of the EEA national's household;[143]

a relative of an EEA national or his or her spouse or civil partner, who strictly requires his or her personal care on serious health grounds;[144]

a relative of an EEA national who would meet the requirements for indefinite leave to enter or remain in the UK as a dependent relative of the EEA national;[145]

a partner of an EEA national who can prove that he or she is in a durable[146] relationship with the EEA national.[147]

55 A number of questions about extended family members have been referred[148] to the CJEU. The CJEU has held that member states have a wide discretion in setting criteria for extended family members: Article 3(2) of the Directive does not provide a direct right to reside for such persons, and states can impose requirements in their own domestic legislation.[149] This is consistent with domestic cases which have held that extended family members have no right to reside unless they have residence documentation.[150]

56 Subsequent to the decision of the CJEU in ***Rahman***,[151] the Court of Appeal has approved its approach and held that Article 3(2) requires an extended family member to show dependence that existed in the country from which the family member comes; accordingly, and in contrast to the position of non-extended family members,[152] there is a requirement that the necessary relationship of dependency or membership of the household must have existed in another country as well as in the host state.[153]

57 A family member has a right to reside in the UK for so long as he or she remains the family member of an EEA national who has a right to reside in the UK.[154] The Directive provides that EEA nationals who are family members of an EEA national retain the right to reside on the death or departure of the EEA national from the host member state[155] or where there has been a divorce, annulment of marriage or termination of the registered partnership between the family member and the EEA national.[156] Under the Directive, family members who are not EEA nationals may also retain their right to reside.[157]

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140 See para 3.52(d).

141 EEA Regs 2016 reg 7(3).

142 EEA Regs 2016 reg 8.

143 EEA Regs 2016 reg 8(2).

144 EEA Regs 2016 reg 8(3).

145 EEA Regs 2016 reg 8(4).

146 Home Office policy suggests that a period of two years' cohabitation is required. EEA Regs 2016 reg 2(1) defines a durable partner as not including a party to a durable partnership of convenience, or the durable partner (D) of a person (P) where a spouse, civil partner or durable partner of D or P is already present in the UK which marriage, civil partnership or durable relationship is subsisting.

147 EEA Regs 2016 reg 8(5).

148 ***MR (Bangladesh) and others*** [2010] UKUT 449 (IAC).

149 ***Secretary of State for the Home Department v Rahman and others***, Case C 83/11 at [26].

150 ***SS v Secretary of State for Work and Pensions (ESA)*** [2011] UKUT 8 (AAC).

151 ***Secretary of State for the Home Department v Rahman and others***, Case C 83/11.

152 See para 3.52.

153 ***Oboh and others v Secretary of State for the Home Department*** [2013] EWCA Civ 1525, [2014] 1 WLR 1680.

154 EEA Regs 2016 reg 14(2).

155 Directive 2004/38/EC Article 12(1).

156 Directive 2004/38/EC Article 13(1).

157 Directive 2004/38/EC Articles 12(2), (3) and 13(2).

58 The EEA Regs 2016 provide that family members who are not EEA nationals may retain a right to reside in the following circumstances,[158] which are more restrictive than the Directive:

a) if the qualified person has died and the family member has resided in the UK for at least a year before the death and, if he or she were an EEA national, would be a worker, a self-employed person or a self-sufficient person or the family member of such a person;[159]
b) if the family member is the direct descendant of a qualified person who has died or left the UK, or is a direct descendant of that person's spouse or civil partner, and he or she was attending an educational course in the UK immediately before the qualified person died or left the UK, and continues to attend such a course;[160]
c) if the family member is the parent with actual custody of a child who satisfies b) above;[161]
d) if the family member ceased to be such because he or she is divorced from the qualified person[162] or their civil partnership has been terminated, he or she is not an EEA national but if he or she were, he or she would be a worker,[163] a self-employed person or self-sufficient person or the family member of such a person, and either:
   i) the marriage or civil partnership lasted for at least three years, and the couple resided in the UK for at least one year during its duration[164]; or
   ii) the former spouse or civil partner has custody of a child of the qualified person; or
   iii) the former spouse or civil partner has the right of access to a child under the age of 18, and a court has ordered that such access must take place in the UK; or
   iv) the continued right of residence in the UK of the person is warranted by particularly difficult circumstances,[165] eg, he or she or another family member has been a victim of domestic violence while the marriage or civil partnership was subsisting.[166]

**Other rights of residence**

*Self-sufficient families*

59 Rights of residence can exist outside the scope of the Directive. In ***Chen***,[167] Mrs Chen and her husband were both Chinese nationals and worked for a company established in China but, for the purposes of work, Mr Chen travelled frequently to various member states of the EU, in particular the UK.[168] Their daughter was born in Belfast and had Irish nationality.[169] The child was dependent both emotionally and financially on her mother, Mrs Chen, who was her primary carer, and she re-

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158 EEA Regs 2016 reg 10.

159 EEA Regs 2016 reg 10(2).

160 EEA Regs 2016 reg 10(3).

161 EEA Regs 2016 reg 10(4).

162 In ***Singh and others v Minister for Justice and Equality and Immigrant Council of Ireland***, Case C-218/14, [2016] QB 208, the ECJ held that a third country national, divorced from an EU citizen, whose marriage had lasted for at least three years before the commencement of divorce proceedings, including at least one year in the host member state, cannot retain a right of residence in that member state where the commencement of the divorce proceedings is preceded by the departure from that member state of the spouse who is the EU citizen. This decision was followed and applied by the CJEU in the later case of ***Secretary of State for the Home Department v NA (Pakistan)***, Case C-115/15, [2017] QB 109.

163 In ***Ahmed v Secretary of State for the Home Department*** [2017] EWCA Civ 99, per Arden LJ at [14] to [19], the Court of Appeal held that the non-EU national former spouse must have been working at the date of the decree absolute in the divorce proceedings and that the non-EU national former spouse will not retain a right of residence if he or she only started working after that date. Both ***Singh*** and ***NA (Pakistan)*** - see last footnote - were followed and applied; the court did not consider that there was sufficient lack of clarity on the issue to justify a reference to the CJEU.

164 EEA Regs 2016 reg 10(5)(d)(i).

165 In ***Secretary of State for the Home Department v NA (Pakistan)***, Case C-115/15, [2017] QB 109, CJEU, the former non-EU national spouse of an EU national claimed a derivative right of residence because of domestic violence, even though her former spouse had left the UK before the divorce proceedings began. The CJEU held that she did not retain any right of residence and that a non-EU national spouse of an EU national had a derivative right of residence in a member state only if the EU national spouse was resident in that member state at the start of the divorce proceedings.

166 EEA Regs 2016 reg 10(5).

167 ***Zhu and Chen v Secretary of State for the Home Department,*** Case C-200/02, [2004] ECR I-9925.

168 ***Zhu*** at [7].

169 ***Zhu*** at [8].

ceived private medical and childcare services in the UK.[170]

60 The CJEU held that Article 18 of the EC Treaty and Council Directive 90/364/EEC[171] confer on a minor who is himself or herself an EEA national a right to reside for an indefinite period in a host member state, where that minor is covered by appropriate sickness insurance and is in the care of a parent who is not an EEA national but who has sufficient resources for that minor not to become a burden on the public finances of the host member state; in such circumstances, the parent who is the primary carer is also entitled to reside with the child in the host member state.[172]

61 The Court of Appeal[173] has held that the requirements to have both comprehensive sickness insurance and sufficient resources such as to avoid becoming a burden on the social assistance system of the host member state applied to the parents and the child, and must exist before any right of residence can arise. It has also been held that the right to reside in such circumstances is directly effective and exists independently of the terms of the EEA Regs 2016 and the Immigration Rules which must, in any event, be interpreted compatibly with EU law where it is possible to do so.[174]

*Primary carers*[175] *of children in education*

62 The CJEU has also derived a right of residence from Article 12 of Regulation (EEC) No 1612/68[176] which has now been repealed and replaced by Article 10 of Regulation (EU) No 492/2011.[177] This provides that the child of a national of a member state who is or has been employed in the territory of another member state is to be admitted to that state's general educational, apprenticeship and vocational training courses on the same conditions as nationals of that state, if the child is residing in its territory.

63 In ***Baumbast and R v Secretary of State for the Home Department***,[178] the CJEU held that children of an EU citizen who have installed themselves in a member state during the exercise by their parent of rights of residence as a migrant worker are entitled to reside there in order to attend general educational courses.

64 The CJEU also held that Article 12 must be interpreted as entitling the parent who is the primary carer of those children, irrespective of nationality, to reside with them in order to facilitate the exercise of their right. It did not matter that the parents had divorced or that the parent who was an EU citizen had ceased to be a migrant worker in the host member state.[179]

65 ***Baumbast*** was reconsidered by the CJEU in ***Ibrahim***[180] and ***Teixeira***,[181] two homelessness appeals referred by the Court of Appeal[182] to the CJEU, which were heard together.

66 Ms Ibrahim was a Somali national, married to but separated from Mr Yusuf, a Danish citizen.

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170 ***Zhu*** at [12]–[14].

171 Of 28 June 1990.

172 ***Zhu*** at [41], [46] and [47].

173 ***W (China) and another v Secretary of State for the Home Department*** [2006] EWCA Civ 1494, [2007] 1 WLR 1514.

174 ***ECO (Dubai) v M (Ivory Coast)*** [2010] UKUT 277 (IAC).

175 EEA Regs 2016 reg 16(8) defines a 'primary carer' as a person who is a direct relative or legal guardian of another person (AP), and either the person has primary responsibility for AP's care, or shares equally the responsibility for AP's care with one other person who is not an exempt person. An exempt person is a person who has a right to reside under the EEA Regs 2016, or who has a right of abode under IA 1971 s2, or to whom IA 1971 s8 applies, or in respect of whom an order has been made under IA 1971 s8(2), or who has indefinite leave to enter or remain in the UK.

176 Of 15 October 1968.

177 Of 5 April 2011. This right was recognised as a derivative right of residence in EEA Regs 2006 reg 15A as inserted by Immigration (European Economic Area) (Amendment) Regulations 2012 SI No 1547 Sch 1 para 9 with effect from 16 July 2012. This is now EEA Regs 2016 reg 16.

178 Case C-413/99, [2002] ECR I-7091, [2002] 3 CMLR 23.

179 ***Baumbast***, at [63] and [75].

180 Case C-310/08, [2010] HLR 31.

181 Case C-480/08, [2010] HLR 32.

182 ***Harrow LBC and Secretary of State for the Home Department v Ibrahim*** [2008] EWCA Civ 386, [2009] HLR 2; and ***Teixeira v Lambeth LBC and Secretary of State for the Home Department*** [2008] EWCA Civ 1088, [2009] HLR 9.

They had four children, who were Danish. The two eldest were at school in the UK. Initially, Mr Yusuf worked but he then ceased to enjoy a right to reside as a worker and left to live in Eastern Europe. Although he returned to live in the UK, he never regained a right to reside. Ms Ibrahim did not work, was entirely reliant on means-tested benefits and had no medical insurance. She applied with her children for homelessness assistance under HA 1996 Part 7, but was refused on the basis that she had no right to reside under EU law.

67 Ms Teixeira was a Portuguese national. She came to the UK in 1989 with her husband, from whom she subsequently divorced. Her daughter was born in 1991. Ms Teixeira worked from 1989 to 1991, after which time she had intermittent periods of employment. She last worked in early 2005. The daughter entered education in the UK at a time when Ms Teixeira was not a worker; in November 2006, she enrolled in a child-care course and, in March 2007, she went to live with her mother. In April 2007, Ms Teixeira applied under HA 1996 Part 7, but was refused on the basis that she had no right to reside.

68 On both references, the ECJ held that where a child of an EU citizen is in education in a member state in which that citizen is or has been employed as a migrant worker, the parent who is the child's primary carer enjoys a right of residence in the host state, derived from Article 12.[183] The child also has a right to reside in those circumstances.

69 The right of residence of the parent is not subject to a requirement that the parent should have sufficient resources and comprehensive sickness insurance cover, nor is it subject to a requirement that the parent should have been employed as a migrant worker in the host state when the child first started education.

70 It is sufficient for the child to have been installed in the host state during the exercise by a parent of rights of residence as a migrant worker in that state. The right of residence of the parent ends when the child reaches the age of 18, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education in the host member state.

71 The right to reside as the primary carer of a child in education who is the child of a migrant worker can apply to an A8 national, even where he or she has not completed 12 months of such work pursuant to the WRS.[184] A former self-employed worker who is the primary carer of a dependent child who is in education in the host state, does not have a right to reside.[185] In Hrabkova[186], the Court of Appeal approved and followed this principle.

72 It has been held that education for children, at least in England, starts for these purposes at around the age of five when compulsory education begins.[187] The term 'child' in Article 12 of Regulation (EEC) No 1612/68[188] should be read as including 'stepchild' as well.[189] This is consistent with the decision of the CJEU in ***Depesme***,[190] that 'child' includes not only a 'child' in a child–parent relationship with a worker, but also a child of the spouse or registered partner of that

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183 Now Article 10 of Regulation (EU) No 492/2011.

184 ***Secretary of State for Work and Pensions v JS (IS)*** [2010] UKUT 347 (AAC) which was approved in ***Secretary of State for Work and Pensions v MP (IS)*** [2011] UKUT 109 (AAC) at para [32]. See para 3.63 as to the WRS in respect of A8 nationals and their families.

185 ***Czop***, Case C-147/11; and ***Punakova***, Case C-148/11, at [33] and [40].

186 Hrabkova v Secretary of State for Work and Pensions [2017] EWCA Civ 794.

187 ***Secretary of State for Work and Pensions v IM*** [2011] UKUT 231 (AAC). This is reflected in the EEA Regs 2016 reg 16(7)(a) which states that education excludes nursery education but does not exclude education received before the compulsory school age where that education is equivalent to the education received at or after compulsory school age.

188 Now repealed and replaced by Article 10 of Regulation (EU) No 492/2011.

189 ***Alarape and another (Article 12, EC Reg 1612/68) Nigeria*** [2011] UKUT 413 (IAC) which was the subject of a reference to the ECJ, see ***Alarape and Tijani v Secretary of State for the Home Department and AIRE Centre***, C-529/11.

190 ***Depesme, Kerrou, Kauffmann and Lefort v Ministre de l'Enseignement superieur et de la Recherche***, Cases C-401/15 to C-403/15.

worker, where that worker supports the child in question.[191]

73 The Court of Appeal has held that Article 12 of Regulation (EEC) No 1612/68[192] does not provide a qualifying right for permanent residence under Article 16 of the Directive,[193] which is in conflict with the decision of the ECJ in ***Lassal***,[194] where it was held that continuous periods of five years' residence completed before the Directive came into force on 30 April 2006, in accordance with earlier legislation, had to be taken into account for the purposes of the acquisition of the right of permanent residence.

74 In ***Alarape***,[195] however, the CJEU held that the primary carer's right to reside under what was then Article 12 continued even after the child reached the age of 18, if that child remains in need of the presence and care of that parent in order to be able to continue and to complete his or her education, which it is for the referring court to assess, taking into account all the circumstances of the case. It was also held that periods of residence completed solely on the basis of Article 12, could not be counted for the purpose of acquiring permanent residence.

75 In ***Ahmed***,[196] the CJEU held that a third country national mother could not rely on Article 12, where she was not married to the EU worker, they were merely cohabiting and the child was not the EU worker's biological child, because the daughter could not be regarded as the child of the spouse of a migrant worker or former migrant worker.

76 In ***NA***,[197] the CJEU held that the right under Article 12 of Regulation No 1612/68 is a right both to commence or continue education in the host member state and, as a consequence, a right of residence. Whether the parent, the former migrant worker, did or did not reside in the host member state on the date when that child began to attend school is of no relevance.[198]

*British citizens and their families*[199]

77 In ***McCarthy***,[200] the applicant had both British and Irish nationality but was born and had always lived in England. She married a Jamaican national and argued that he had a right to reside in the UK as her spouse. The CJEU held that an EU citizen cannot have a right to reside in circumstances where he or she has never exercised a right of free movement, and where he or she has always resided in a member state of which he or she is a national, even though he or she is also a national of another member state, provided that the circumstances do not include the application of measures by

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191 ***Depesme*** at [64] and [65], which concerned the meaning of child of a frontier worker under TFEU Article 45 and Regulation (EU) No 492/2011 Article 7(2). A frontier worker is a worker or self-employed person who, after three years of continuous employment and residence in the host member state, works in an employed or self-employed capacity in another member state, while retaining his or her place of residence in the host member state, to which he or she returns, as a rule, each day or at least once a week.

192 Now repealed and replaced by Article 10 of Regulation (EU) No 492/2011.

193 ***Okafor and others v Secretary of State for the Home Department*** [2011] EWCA Civ 499, [2011] 1 WLR 3071. This was reflected in the EEA Regs 2006 reg 15(1A) inserted by Immigration (European Economic Area) (Amendment) Regulations 2012 SI No 1547 Sch 1 para 8(a), with effect from 16 July 2012. This is now contained in the EEA Regs 2016 reg 15(2).

194 ***Secretary of State for Work and Pensions v Lassal and Child Poverty Action Group (intervener)***, Case C-162/09, [2011] 1 CMLR 31, CJEU.

195 ***Alarape and Tijani v Secretary of State for the Home Department and AIRE Centre***, Case C-529/11.

196 ***ONAFTS v Ahmed***, Case C-45/12.

197 ***Secretary of State for the Home Department v NA (Pakistan)***, Case C-115/15, [2017] QB 109, CJEU.

198 ***Secretary of State for the Home Department v NA*** at [63].

199 The Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012 SI No 2560 amended the EEA Regs 2006 by inserting a new reg 15A(4A) which recognised a derivative right to reside for a person who is the primary carer of a British citizen, where the relevant British citizen is residing in the UK and would be unable to reside in the UK or in another EEA state if the person were refused a right of residence. The Eligibility (Amendment) Regs 2012 have amended the Eligibility Regs 2006 with effect from 8 November 2012 so that such a person is ineligible for an allocation of housing and for homelessness assistance. In ***Pryce v Southwark LBC*** [2013] EWCA Civ 1572, [2013] HLR 10, the Court of Appeal held, on a concession made by the local authority and the government, that such a person has a right to reside and, at least in respect of applications made before 8 November 2012, is eligible for homelessness assistance.

200 ***McCarthy v Secretary of State for the Home Department***, Case C-434/09.

a member state which would deprive him or her of the genuine enjoyment of the substance of the rights conferred by virtue of his or her status as an EU citizen nor would impede the exercise of her or his right of free movement and residence within the territory of the member states.

78 In ***Zambrano***,[201] the CJEU held that Article 20 of the TFEU is to be interpreted as precluding a member state from refusing a third country national upon whom his or her minor children, who are EU citizens, are dependent, a right of residence in the member state of residence and nationality of those children, insofar as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of an EU citizen. In that case, Mr Zambrano and his wife were Colombian citizens but their children were Belgian citizens who had been born in and never moved from Belgium. ***McCarthy*** was distinguished on the basis that Mrs McCarthy was not obliged to leave the territory of the EU. The ***Zambrano*** decision has been considered by the Upper Tribunal in both benefits appeals[202] and immigration appeals.[203]

79 In ***Dereci***,[204] the ***Zambrano*** principle was applied in a number of cases where there was no risk that the EU citizens concerned would be deprived of their means of subsistence.[205] It was held that EU law must be interpreted as meaning that it does not prevent a member state refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his or her family who is a citizen of host member state who has never exercised his or her right to freedom of movement. This is provided that such refusal does not lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his or her status as a citizen of the EU, which is a matter for the referring court to verify.

80 These cases led to the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012 which amended the EEA Regs 2006 so as to recognise, in domestic law, a derivative right to reside for a person who is the primary carer of a British citizen who is residing in the UK, which citizen would be unable to reside in the UK or in another EEA state if the carer was refused a right of residence.

81 The Eligibility Regs 2006 were, however, amended[206] so as specifically to exclude such persons from eligibility under HA 1996 Parts 6 and 7. The changes came into force on 8 November 2012 but only applied to applications under Parts 6 and 7 made on or after that date. In Wales, the equivalent changes were not made until the coming into force of the Eligibility (Wales) Regs 2014 on 31 October 2014.

82 The ***Zambrano*** principle has been applied by the CJEU in ***Iida***,[207] ***O and S***[208] and ***Ymeraga***,[209] In ***CS***,[210] however, the CJEU held that a decision to expel a third country national who was the sole carer of minors who were citizens of the EU could be consistent with EU law where it was founded on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or of public security, provided account was taken of fundamental rights, in particular the right to respect for private and family life.

83 In ***Pryce***,[211], based on concessions made by the local authority and the Secretary of State, the Court of Appeal held that an applicant with a ***Zambrano*** right to reside was not subject to immigration control

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201 ***Zambrano v Office national de l'emploi (ONEm)***, Case C-34/09, [2012] QB 265.

202 For example, ***Secretary of State for Work and Pensions v RR (IS)*** [2011] UKUT 451 (AAC), though the tribunal has now set aside this determination so it is no longer good law.

203 For example, ***Sanade and others v Secretary of State for the Home Department*** [2012] UKUT 48 (IAC).

204 ***Dereci and others v Bundesministerium fur Inneres***, Case C-256/11.

205 ***Dereci***, at para [32].

206 By operation of Eligibility (Amendment) Regs 2012 with effect from 8 November 2012.

207 ***Iida v Stadt Ulm***, Case C-40/11, [2013] Fam 203, CJEU.

208 ***O and S v Maahanmuuttovirasto***, Cases C-356/11 and C-357/11, [2013] CMLR 33, CJEU.

209 ***Ymeraga and others v Ministre du Travail, de l'emploi et de l'immigration***, Case C-87/12.

210 ***Secretary of State for the Home Department v Rendon Marin***, Case C-165/14; ***Secretary of State for the Home Department v CS***, Case C-304/14, [2017] QB 558, CJEU.

211 ***Pryce v Southwark LBC*** [2013] EWCA Civ 1572, [2013] HLR 10.

and was therefore eligible for homelessness assistance. The amended eligibility regulations did not apply because of the date of the application and the court therefore did not consider their lawfulness.

84 In ***Harrison***,[212] the Court of Appeal held that the ***Zambrano*** principle does not extend to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU;[213] the fact that the right to family life is adversely affected, or that the presence of the non EU national is desirable for economic reasons, will not of themselves constitute factors capable of triggering the ***Zambrano*** principle.

85 In ***Ahmed***,[214] the Upper Tribunal held that ***Zambrano*** only arises where a refusal decision would lead to an EU citizen child having to leave the EU, and only applies in exceptional circumstances.[215] ***Zambrano*** does, however, potentially apply even where the children are not citizens of the host member state but are nevertheless, EU citizens.[216]

86 In a case where the child had a parent who was a national of the host Member State, the CJEU held[217] that the fact that the EU national parent may be able to look after the child does not necessarily mean that the child would not be compelled to leave the EU if the non-EU parent could not remain there. The ability and willingness of the EU parent is a relevant factor, but an assessment of all of the child's circumstances must be carried out, taking into account articles 7 and 24(2) of the Charter of Fundamental Rights of the EU. This requires consideration of the best interests of the child, all the specific circumstances, including age and physical and emotional development, extent of emotional ties to both parents and the risks which separation from the third country parent might entail for the child's equilibrium[218].

87 In ***Hines***,[219] the Court of Appeal held that where a ***Zambrano*** carer has applied for homelessness assistance, the authority must consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the child's available alternative care.[220]

88 In R(HC)[221], the Supreme Court considered that the Zambrano right is exceptional; it only arises if the child would have to leave the EU if the right was not granted to the child's carer; the right is not concerned with the desirability of keeping a family together on economic or other grounds but is merely a right to reside in the EU not a right to a particular quality of life or to any particular standard of living.[222] It was held that the exclusion of Zambrano carers from homelessness assistance, allocations and most forms of welfare benefits, was not contrary to article 21 of the EU Charter of Fundamental Rights because the Charter had no application because of article 51. Not was the exclusion a breach of article 14 of the European Convention on Human Rights because its purpose was within the wide margin of discretion allowed to national governments in this field.[223]

89 In Lounes,[224] the Grand Chamber of the CJEU again considered the position of British citizens under EU law. Mr Lounes had married a Spanish national who had become a British citizen after exercis-

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[212] ***Harrison (Jamaica) and AB (Morocco) v Secretary of State for the Home Department*** [2012] EWCA Civ 1736, [2013] 2 CMLR 23.

[213] ***Harrison*** at [63].

[214] ***Ahmed v Secretary of State for the Home Department*** [2013] UKUT 89 (IAC).

[215] ***Ahmed*** at [67].

[216] ***Ahmed*** at [68].

[217] Chavez Vilchez and others v Raad van bestuur van de Sociale verzekeringsbank and others, Case C 133/15.

[218] see [72].

[219] ***Hines v Lambeth LBC*** [2014] EWCA Civ 660, [2014] HLR 32.

[220] ***Hines*** at [6] and [23].

[221] R(HC) v Secretary of State for Work and Pensions [2017] UKSC 73, [2018] HLR 6 .

[222] see [11] and [15].

[223] see [32].

[224] ***Lounes v Secretary of State for the Home Department***, Case C 165/16.

ing a right to reside in the UK. This distinguished his case from that of ***McCarthy***[225] who had dual nationality but had never exercised a right of free movement[226]. It was held that Mr Lounes had no right under the Directive[227] but did have a derivative right to reside under article 21(1) of the TFEU:[228] it would be contrary to the underlying logic of gradual integration that informs that article to hold that such citizens, who have acquired rights under that provision as a result of having exercised their freedom of movement, must forego those rights because they have sought, by becoming naturalised in that Member State, to become more deeply integrated in the society of that State.[229]

## Habitual residence

90 The test of habitual residence applies to all persons from abroad who are not subject to immigration control and are returning to the UK. This can therefore include British citizens.

91 Two basic requirements need to be fulfilled to establish habitual residence. The first is that an appreciable period of time must elapse before a person can be considered habitually resident. The second is that the person concerned must have a settled intention to reside in the UK.[230]

92 Whether a person is habitually resident is a question of fact to be decided by reference to all the circumstances of the particular case.[231] The requirement for an appreciable period of time is not for a fixed period and may be short.[232] A month can be an appreciable period of time.[233] Where the person concerned is not coming to the UK for the first time, but resuming a previous habitual residence, which frequently occurs with British citizens, no appreciable period of time is required.[234] In the context of a benefits appeal, it has been held that, in the general run of cases, the period required to establish habitual residence will lie between one and three months.[235]

93 The second requirement for habitual residence is settled intention. For this, there must be a degree of settled purpose; what is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.[236]

94 The English Code of Guidance states that if an applicant who was previously habitually resident in the UK is returning after a period spent abroad, and it can be established that he or she is returning to resume his or her former period of habitual residence, he or she will be immediately habitually resident.[237] The English Code recommends that applicants who have been resident continuously for a two-year period[238] prior to their housing application will be habitually resident but enquiries will need to be conducted where an applicant has less than two years' continuous residence.[239]

95 A useful definition of habitual residence is also to be found in EU law, which focuses on where the centre of interest of the person concerned is to be found, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

the duration and continuity of presence; and
the person's situation, including the nature and the specific characteristics of any activity pursued; his or her family status and ties; the exercise of any non-remunerated activity; in the case of stu-

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[225] Para 3.118.
[226] see [23].
[227] see [37].
[228] see [58].
[229] see [58], [62] and [63].
[230] ***R (Paul-Coker) v Southwark LBC*** [2006] EWHC 497 (Admin), [2006] HLR 32 at paras [19]–[28].
[231] ***Re J*** [1990] 2 AC 562, HL per Lord Brandon at 578F–G.
[232] ***Nessa v Chief Adjudication Officer*** [1998] 2 All ER 728 per Lord Slynn at 682–683.
[233] ***Re S*** [1998] AC 750 at 763A; ***Re F*** [1994] FLR 548 at 555.
[234] ***Lewis v Lewis*** [1956] 1 WLR 200; ***Swaddling v Adjudication Officer***, Case C-90/97, [1999] All ER (EC) 217.
[235] CIS/4474/2003.
[236] ***Shah v Barnet LBC*** [1983] 2 AC 309, HL, at 344D.
[237] English Code of Guidance annex 1 para 7; Welsh Code of Guidance annex 6 para 7.
[238] A period of about six months appears to be applied more regularly in practice.
[239] English Code of Guidance para 7.19 ; Welsh Code of Guidance annex 6 para 1.

dents the source of their income; their housing situation and in particular how permanent it is; and, the member state in which the person is deemed to reside for taxation purposes.[240]

### Provision of information

96 If there are doubts about an applicant's immigration status, an authority can contact the Home Office to obtain relevant information. When a request is made, in England HA 1996 s187, and in Wales H(W)A 2014 Sch 2 para 3, place a duty on the Secretary of State to provide the authority with such information as it may require to enable it to determine whether a person is eligible for assistance in England under HA 1996 Part 7, and in Wales under H(W)A 2014 Part 2, respectively.

97 The English Code of Guidance no longer explains how to contact the relevant immigration authorities. By contrast, the Welsh Code explains that contact should be made with the Home Office's UK Visa and Immigration Centre (UKVI).[241] Enquiries are dealt with by the Evidence and Enquiries Unit (EEU).

98 The EEU's Local Authorities' Team will only assist once the authority has registered. This requires:

the name of the enquiring housing authority on headed paper;
the job title/status of the officer registering on behalf of the local housing authority; and,
the names of officers, and their job titles, who will be making the enquiries.

99 Once registered, enquiries can be made by letter or fax, or by email,[242] but replies will be returned by post. If the authority makes a written request, the Secretary of State must confirm the information in writing.[243] The Secretary of State is under a duty to update an authority in respect of any change in information that has been provided. Such a correction must be in writing, detail the change, the date on which the previous information became inaccurate and the reason why the information changed.[244]

## Eligibility – homelessness: Housing Act 1996 Part 7 and Housing (Wales) Act 2014 Part 2

### Introduction

100 In England under HA 1996 Part 7 and in Wales under H(W)A 2014 Part 2, eligibility must be determined whenever an authority has reason to believe that an applicant may be homeless or threatened with homelessness.[245] The date for establishing whether an applicant is eligible is the date of the decision and not the date of application.[246] Where there is a review, it is the date of the review decision that is key.[247]

101 While an authority is entitled to reach its own decision as to an applicant's immigration status, any such decision is only for housing purposes and will be subject to any contrary decision by the immigration authorities.[248] An authority is entitled to take an immigration decision of the Home Of-

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240 Regulation (EC) No 987/2009 Article 11, but note that this is in the context of eligibility for social security and therefore not directly applicable to housing assistance.

241 See annex 5 of the Welsh Code. UKVI can be found by following the links on www.gov.uk.

242 In non-asylum cases, the email address is EvidenceandEnquiry@homeoffice.gsi.gov.uk.; Welsh Code of Guidance annex 5 para 2.

243 In England, HA 1996 s187(2); and in Wales, H(W)A 2014 Sch 2 para 3(2).

244 In England, HA 1996 s187(3); and in Wales, H(W)A 2014 Sch 2 para 3(3).

245 In England, HA 1996 s184(1)(a); and in Wales, H(W)A 2014 s62(4).

246 ***R v Southwark LBC ex p Bediako*** (1997) 30 HLR 22, QBD.

247 ***Mohamed v Hammersmith and Fulham LBC*** [2001] UKHL 57, [2002] 1 AC 547, [2002] HLR 7.

248 ***R v Westminster City Council ex p Castelli and Tristan-Garcia*** (1996) 28 HLR 617, CA; ***Tower Hamlets LBC v Secretary of State for the Environment*** [1993] QB 632, (1993) 25 HLR 524, CA.

fice at face value and is not required to carry out its own further investigations to determine eligibility.[249]

102 Where a full housing duty has been accepted in England under HA 1996 s193(2),[250] or in Wales under H(W)A 2014 s66, s68, s73 or s75, an authority may revisit the issue of eligibility and will cease to be subject to the duty if an applicant ceases to be eligible.[251]

*Other members of the household*

103 In England, HA 1996 s185(4), and in Wales, H(W)A 2014 Sch 2 para 1(5), require authorities also to consider the eligibility of household members.

104 The section formerly required[252] authorities to disregard ineligible household members[253] when determining whether an eligible applicant was homeless or had a priority need. The provision was, however, declared incompatible with Article 14 (prohibition of discrimination) when read with Article 8 (right to respect for one's private and family life) of the ECHR, to the extent that it required a dependent child or pregnant spouse of a British citizen, habitually resident in the UK but subject to immigration control, to be disregarded when determining whether the British citizen had a priority need for accommodation.[254]

105 The section was accordingly amended[255] so that it now[256] applies only to eligible applicants who are themselves subject to immigration control (except for EEA and Swiss nationals) – for example, those granted refugee status, indefinite leave to remain or humanitarian protection.[257] In Wales, the same approach has been followed.[258] When considering an application from such an applicant, authorities must continue to disregard any dependants or other household members who are ineligible for assistance for any reason, for the purpose of deciding whether the applicant is homeless or has a priority need[259] but, otherwise (ie, when the applicant is not himself or herself a person subject to immigration control[260]), they are to be taken into account.

106 The Court of Appeal granted permission for a challenge to the lawfulness of the restricted cases regime but the issue was not pursued in the substantive appeal because the appeal did not in fact involve a restricted case.[261]

107 It follows that applicants who are not subject to immigration control, plus EEA and Swiss nationals, will now be able to rely on ineligible household members to qualify as homeless or in priority need, and to confer an entitlement to be secured suitable accommodation in England under HA 1996 s193(2) and in Wales a duty under H(W)A 2014 s66, s68, s73 or s75. Typically, ineligible household members who could confer priority need in this way are likely to be dependent children and pregnant women who have been granted leave with a condition of no recourse to public

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249 ***R (Burns) v Southwark LBC*** [2004] EWHC 1901 (Admin), [2004] NPC 127.

250 See paras 10.11–10.219.

251 In England, HA 1996 s193(6)(a); in Wales, H(W)A 2014 s79(2).

252 In respect of all applications for accommodation or assistance in obtaining accommodation, within the meaning of HA 1996 s183, made before 2 March 2009.

253 For example, in ***Ehiabor v Kensington and Chelsea RLBC*** [2008] EWCA Civ 1074, the applicant could not rely on the dependent child to establish a priority need because the child, although born in the UK, was not a British citizen and therefore required leave to remain under IA 1971 s1(2) and was subject to immigration control.

254 ***R (Morris) v Westminster City Council (No 3)*** [2005] EWCA Civ 1184, [2006] 1 WLR 505, [2006] HLR 8.

255 By operation of the Housing and Regeneration Act 2008 s314 and Sch 15 Part 1.

256 In respect of all applications for accommodation or assistance in obtaining accommodation, within the meaning of HA 1996 s183, made on or after 2 March 2009.

257 See paras 3.22–3.44.

258 H(W)A 2014 Sch 2 para 1(6).

259 See the letter from the Department for Communities and Local Government (DCLG) to Chief Housing Officers dated 16 February 2009 and the accompanying guidance note.

260 See paras 3.18–3.20.

261 ***Lekpo-Bozua v Hackney LBC*** [2010] EWCA Civ 909, [2010] HLR 46.

funds.[262]

108 This does not, however, give such applicants the same rights as others. An application pursuant to which the authority would not be satisfied that the applicant had a priority need but for what is termed a 'restricted person' is called a 'restricted case'.[263]

109 A restricted person is a person who is ineligible and subject to immigration control[264] who either does not have leave to enter or remain in the UK[265] or who has leave subject to a condition of no recourse to public funds.[266] In a restricted case, in both England and Wales, a local housing authority must, so far as reasonably practicable, bring its duty to an end by securing a private rented sector offer.[267]

110 The discharge provisions governing restricted cases are considered in chapter 10 below,[268] both before and after the commencement of the LA 2011.

111 It may be noted that the European Court of Human Rights[269] (ECtHR) did not follow ***Morris***,[270] but has instead held that the immigration status of the child which resulted in his mother's differential treatment was reasonably and objectively justified by the need to allocate, as fairly as possible, the scarce stock of social housing available in the UK and the legitimacy, in so allocating, of having regard to the immigration status of those who are in need of housing.

112 Accordingly, there was no violation of Article 14, when taken in conjunction with Article 8 of the ECHR. The court expressly stated, however, that it was not ruling on the discriminatory effect of the amendments.[271]

## Homelessness assistance

113 The division into persons subject and not subject to immigration control[272] applies in both England and Wales. Eligibility for both homelessness assistance and for an allocation is the same in England and Wales for all persons, whether or not subject to immigration control.[273]

### *Persons subject to immigration control*

114 For a person subject to immigration control to be eligible for assistance, the person must fall within one of the prescribed classes.

#### *Class A*

115 Class A[274] is a person who is recorded by the Secretary of State as a refugee within the definition set

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262 For the purposes of UK immigration law, the term 'public funds' is defined in Immigration Rules (HC 395) para 6 as including housing under HA 1996 Part 6 or Part 7 and HA 1985 Part 2. The Rules have not yet been updated to reflect the position under the H(W)A 2014 Part 2, but there seems little doubt that the phrase will be interpreted the same way.

263 In England, HA 1996 s193(3B); in Wales, H(W)A 2014 s76(5).

264 See para 3.17.

265 See para 3.17.

266 In England, HA 1996 s184(7); in Wales, H(W)A 2014 s63(5).

267 In England, HA 1996 s193(7AD); in Wales, H(W)A 2014 s76(5).

268 See paras 10.205–10.211.

269 ***Bah v UK***, App No 56328/07, 27 September 2011.

270 See para 3.113.

271 See para 3.114.

272 Above, paras 3.85-3.91.

273 Eligibility Regs 2006 regs 3, 4. 5and 6 are the same as the Eligibility (Wales) Regs 2014 regs 3, 4 5, and 6. There were minor differences prior to 22 June 2017, *i.e.* prior to the amendments made by the Allocation of Housing and Homelessness (Eligibility) (Wales) (Amendment) Regulations 2017, as described in the 10th edition of this book.

274 Eligibility Regs 2006 reg 5(1)(a) and Eligibility (Wales) Regs 2014 reg 5(1)(a).

out in Article 1 of the Refugee Convention[275] and who has leave to enter or remain in the UK.

116 A refugee is any person:

who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country; or

who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.

117 A decision whether or not to recognise a person as a refugee must be taken in accordance with Council Directive 2004/83/EC[276] which lays down minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and for the protection granted. Such a decision is made by the Home Office.

118 Recognition as a refugee almost inevitably leads to a grant of leave to remain. Prior to 30 August 2005, refugees were granted indefinite leave to remain (ILR). From that date, the grant is normally five years' leave to remain.

119 During the limited five-year period, refugee status can be reviewed and removed, eg, if there has been a change in circumstances in the refugee's country of origin, or he or she has returned there. There is normally no review at the end of the five-year period but one can be triggered if there is evidence of criminality or if an application for settlement is made after the initial period of leave has expired. At the end of the five-year period, the refugee qualifies for indefinite leave to remain in the UK.

120 From early 2002, application registration cards (ARCs) have been issued to asylum-seekers and their dependants during the asylum screening process. The ARC is a credit card sized form of identity. If an application for asylum is successful, the applicant will be given a letter by the Home Office which explains the applicant's position as a refugee and some of his or her rights in the UK.

121 A refugee's national passport is not stamped, because the refugee cannot use it without forfeiting his or her refugee status. Instead, the refugee will be issued with an Immigration Status Document (ISD). These were phased in during late 2003 and early 2004 and are an A4 sheet of paper, folded into four, confirming the immigration status of the holder. An ISD is also designed to hold a UK Residence Permit (UKRP).

113 Since late 2003, the ink stamps that used to be endorsed in passports and travel documents have been progressively replaced by UKRPs which are issued to those granted more than six months' leave to enter or remain in the UK. The UKRP takes the form of a credit card sized sticker or vignette. It was introduced in accordance with Regulation (EC) No 1030/2002 which requires EU countries which have opted in to this regulation to issue uniform format vignettes to all non-EEA nationals granted more than six months' leave to enter or remain. They are a security measure.

114 Refugees may apply for a refugee travel document, which looks like a passport. This is issued by the Home Office under the United Nations Convention relating to the Status of Refugees and the applicant's leave will be endorsed in the document on a UKRP vignette.

*Class B*

115 Class B[277] is a person who has exceptional leave to enter or remain in the UK granted outside the provisions of the Immigration Rules, whose leave to enter or remain is not subject to a condition requiring the person to maintain and accommodate himself or herself and any person who is dependent on him or her without recourse to public funds, which includes housing and assistance under HA

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275 The Convention relating to the Status of Refugees was adopted by a Conference of Plenipotentiaries of the United Nations (UN) on 28 July 1951 and entered into force on 21 April 1954.

276 Of 29 April 2004, which entered into force on 20 October 2004.

277 Eligibility Regs 2006 reg 5(1)(b) and Eligibility (Wales) Regs 2014 reg 5(1)(b).

1985 Part 2 or HA 1996 Parts 6 and 7.[278]

116 Exceptional leave to enter or remain was abolished from 1 April 2003 so that only a dwindling group now has this status. Exceptional leave to remain (ELR) describes the leave granted to applicants who were not found to be refugees but whom the Home Office, for humanitarian or compassionate reasons, determined it would not be right to require to return to their country of origin.

117 Persons with ELR should have a letter from the Home Office, sometimes known as a 'grant letter', explaining that they have been granted ELR. They should also have their status stamped in their national passport. If they do not have a national passport, they will have been issued with an ISD containing a UKRP vignette. If such persons wish to travel but do not have a national passport, they may apply to the UKBA for a travel document known as a Certificate of Travel (COT).

*Class C*

118 Class C[279] applies to a person who is habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland and whose leave to enter or remain in the UK is not subject to any limitation or condition, other than a person:

who has been given leave to enter or remain in the UK upon an undertaking given by his or her sponsor;

who has been resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland for less than five years beginning on the date of entry or the date on which his or her sponsor gave the undertaking in respect of him or her, whichever date is the later; and

whose sponsor or, where there is more than one sponsor, at least one of whose sponsors, is still alive.

119 This class applies to any person with indefinite leave to remain in the UK unless that leave was granted on an undertaking by a sponsor less than five years ago and the sponsor is still alive.

120 Such a person should have a grant letter[280] from the Home Office, explaining that he or she has been granted indefinite leave to remain. He or she should have a stamp or UKRP in his or her national passport which shows that he or she has ILR. He or she may also have an ISD or a COT with a UKRP vignette which shows his or her status.

*Class D*

121 Class D applies to a person who has humanitarian protection granted under the Immigration Rules.[281]

122 From 1 April 2003, the Home Office abolished ELR and replaced it with humanitarian protection (HP) and discretionary leave (DL). HP is granted to someone who, if removed, would face a serious risk to life or person arising from capital punishment, unlawful killing or torture or inhuman or degrading treatment or punishment in the country of return.[282] Although not qualifying for refugee status, such persons would be at risk of treatment in violation of Articles 2 or 3 of the ECHR (right to life; and prohibition of torture, and inhuman or degrading treatment or punishment, respectively). The requirements in relation to HP can now be found in the Immigration Rules.[283]

123 From 30 August 2005, if someone is granted HP, he or she is also granted leave to remain for five years, after which an application can be made for settlement, at which point there is an automatic review of whether there is a continuing protection need.

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278 Immigration Rules (HC 395) para 6.

279 Eligibility Regs 2006 reg 5(1)(c) and Eligibility (Wales) Regs 2014 reg 5(1)(c).

280 See para 3.130.

281 Eligibility Regs 2006 reg 5(1)(d), substituted by Allocation of Housing and Homelessness (Miscellaneous Provisions) (England) Regulations 2006 SI No 2527 reg 2(1) and (3), from 9 October 2006 and Eligibility (Wales) Regs 2014 reg 5(1)(d).

282 Immigration Rules para 339C.

283 Immigration Rules para 339C.

124 Those with HP should have a grant letter[284] from the Home Office, explaining that they have been granted HL. Their ISD or national passport will contain a UKRP vignette granting leave for a period of five years. If they do not have a national passport, they may apply for a travel document or COT which, if issued, will contain the UKRP vignette.

*Class E*

125 Class E[285] has been repealed in England, and, from 22 June 2017, in Wales.[286] It applied to certain asylum seekers whose claims for asylum had been recorded by the Secretary of State as having been made before 3 April 2000.

*Class F*

126 Class F[287] applies to a person who is habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland and who has limited leave to enter the UK as a relevant Afghan citizen under para 276BA1 of the Immigration Rules.[288]

*Class G*

127 Class G[289] applies to a person who has limited leave to enter or remain in the UK on family or private life grounds under Article 8 of the ECHR, which leave has been granted under para 276BE(1), para 276DG or Appendix FM of the Immigration Rules[290] and is not subject to a condition requiring him or her to maintain and accommodate himself or herself and his or her dependants without recourse to public funds.[291]

128 *Class H*

Class H applies to a person who is habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland and who has been transferred to the UK under section 67 of the Immigration Act 2016 and has limited leave to remain under paragraph 352ZH of the Immigration Rules. This Class was added by the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2018 SI No. 730 reg 2(3)(c) with effect from 9 July 2018.

129 *Class I*

Class I applies to a person who is habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland and has Calais leave to remain under paragraph 352J of the Immigration Rules. This Class was added by the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (No.2) Regulations 2018 SI No. 1056 reg 4(c) with effect from 1 November 2018.

**Persons not subject to immigration control**

130 A person who is not subject to immigration control will only be eligible if he or she is habitually resident in the UK; certain rights of residence are, however, excluded and certain applicants are exempt from the habitual resident test.

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[284] See para 3.130.

[285] Eligibility Regs 2006 reg 5(1)(e).

[286] Allocation of Housing and Homelessness (Eligibility) (Wales) (Amendment) Regulations 2017.reg 2(4)(a) which repealed Class E in Wales.

[287] Added by the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2014 SI No 435 reg 2(5)(c) with effect from 31 March 2014.

[288] Eligibility Regs 2006 reg 5(1)(f)and Eligibility (Wales) Regs 2014 reg 5(1)(f).

[289] Eligibility Regs 2006 reg 5(1)(g)Added by Eligibility (Amendment) Regs 2016 reg 2(4)(c) with effect from 30 October 2016 and Eligibility (Wales) Regs 2014 reg 5(1)(g) inserted by and by Allocation of Housing and Homelessness (Eligibility) (Wales) (Amendment) Regulations 2017 reg 2(4)(c) with effect from 22 June 2017.

[290] This covers persons with leave to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection and reflects the requirements of article 8 of the European Convention on Human Rights.

[291] Eligibility Regs 2006 reg 5(1)(g) and Eligibility (Wales) Regs 2014 reg 5(1)(g).

131 A person who is not subject to immigration control is ineligible if:[292]

a) he or she person is not habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland;[293]

b) his or her only right to reside in the UK:
   i) is derived from his or her status as a jobseeker or as the family member of a jobseeker;[294] or
   ii) is an initial right to reside for a period not exceeding three months;[295] or
   iii) is a derivative right to reside to which he or she is entitled under EEA Regs 2006 reg 15A(1), but only in a case where the right exists under that regulation because the applicant satisfies the criteria in reg 15A(4A);[296] or
   iv) is derived from Article 20 of the TFEU in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen;[297] or

c) his or her only right to reside in the Channel Islands, the Isle of Man or the Republic of Ireland:
   i) is a right equivalent to one of those mentioned in b) above which is derived from the TFEU;[298] or
   ii) is derived from Article 20 of the TFEU in a case where the right to reside
      a) in the Republic of Ireland arises because an Irish citizen, or
      b) in the Channel Islands or the Isle of Man arises because a British citizen,

   also entitled to reside there would otherwise be deprived of the genuine enjoyment of the substance of his or her rights as an EU citizen.[299]

132 With effect from 7 May 2019, but subject to transitional provisions, the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019 SI No. 861 have added a new regulation 6(1A). This states that for the purposes of determining whether the only right to reside that a person has is of the kind mentioned in paragraphs (b) or (c) above, a right to reside by virtue of having been granted limited leave to enter or remain in the UK under Appendix EU to the Immigration Rules, is to be disregarded. This would seem to mean that a person who has been granted such leave will not be ineligible for housing assistance by virtue of that grant.

133 A person who is not subject to immigration control is exempt from the habitual residence test if he or she is:[300]

a worker;[301]

a self-employed person;[302]

a person who is a Croatian national who has a right to reside under the Croatian Accession Regulations;[303]

a person who is the family member of a person specified in a) to c) above;[304]

a person with a right to reside permanently in the UK by virtue of reg 15(1)(c), (d) or (e) of the EEA

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292 Eligibility Regs 2006 reg 6(1), as amended by Eligibility (Amendment) Regs 2012, which inserted a new reg 6(1)(b)(iii) and (iv) and a new reg 6(1)(c), with effect from 8 November 2012, though the amendments do not have effect in relation to an application for an allocation of housing under HA 1996 Part 6 or for housing assistance under Part 7 which was made before that date. See para 3.10 above.Eligibility (Wales) Regs 2014 reg 6(1).

293 Eligibility Regs 2006 reg 6(1)(a) and Eligibility (Wales) Regs 2014 reg 6(1)(a).

294 Eligibility Regs 2006 reg 6(1)(b)(i) and Eligibility (Wales) Regs 2014 reg 6(1)(b)(i).

295 Eligibility Regs 2006 reg 6(1)(b)(ii) and Eligibility (Wales) Regs 2014 reg 6(1)(b)(ii).

296 Eligibility Regs 2006 reg 6(1)(b)(iii) and Eligibility (Wales) Regs 2014 reg 6(1)(b)(iii).

297 Eligibility Regs 2006 reg 6(1)(b)(iv) and Eligibility (Wales) Regs 2014 reg 6(1)(b)(iv).

298 Eligibility Regs 2006 reg 6(1)(c)(i) and Eligibility (Wales) Regs 2014 reg 6(1)(c)(i).

299 Eligibility Regs 2006 reg 6(1)(c)(ii) and Eligibility (Wales) Regs 2014 reg 6(1)(c)(ii).

300 Eligibility Regs 2006 reg 6(2) and Eligibility (Wales) Regs 2014 reg 6(2).

301 Eligibility Regs 2006 reg 6(2)(a) and Eligibility (Wales) Regs 2014 reg 6(2)(a).

302 Eligibility Regs 2006 reg 6(2)(b) and Eligibility (Wales) Regs 2014 reg 6(2)(b).

303 Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013 SI No 1460 reg 5; Eligibility Regs 2006 reg 6(2)(c); see paras 3.12–3.18.Eligibility (Wales) Regs 2014 reg 6(2)(c).

304 Eligibility Regs 2006 reg 6(2)(d) and Eligibility (Wales) Regs 2014 reg 6(2)(d).

Regs 2006;[305]

(now repealed)[306] a person who left the territory of Montserrat after 1 November 1995 because of the effect on that territory of a volcanic eruption;

a person who is in the UK as a result of his/her deportation, expulsion or other removal by compulsion of law from another country to the UK.[307]

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305 Eligibility Regs 2006 reg 6(2)(e) and Eligibility (Wales) Regs 2014 reg 6(2)(e). This refers to workers or self employed persons who have ceased activity, or their family members, thereby acquiring permanent residence, or workers or self employed persons who have passed away in circumstances where their family members have acquired permanent residence.

306 Revoked by the Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2014 SI No 435 reg 2(6)(c), with effect from 31 March 2014.

307 Eligibility Regs 2006 reg 6(2)(g) and Eligibility (Wales) Regs 2014 reg 6(2)(f).