

THE NEW CITIZENS' DIRECTIVE and the  
EEA REGULATIONS 2006 and the  
PERSONS FROM ABROAD REGULATIONS 2006

Definitions

1. The new Citizens' Directive:
  - 1.1. Is Directive 2004/38/EC, dated 29<sup>th</sup> April 2004.
  - 1.2. Is based on Community actions completed between September 2001 and March 2004 (so does not reflect recent case law of the ECJ).
  - 1.3. Required transposition into domestic law by the 30<sup>th</sup> April 2006.
2. The EEA Regulations 2006 are The Immigration (EEA) Regulations 2006, which came into force on the 30<sup>th</sup> April 2006 and which purportedly transpose the Citizen's Directive into UK law.
3. The Persons from Abroad Regulations 2006 are The Social Security (Persons from Abroad)(Amendment) Regulations 2006, which came into force on the 30<sup>th</sup> April 2006 and which amend income-related benefit regulations (CTB, HB, IS, JSA, SPC) in the light of the Citizens' Directive and the EEA Regulations 2006.

Out with the Old and In with the New

4. Preamble (4) and Article 38 of the Directive kill off and replace all existing secondary legislation relating to free movement<sup>1</sup> other than Regulation 1612/68<sup>2</sup> (the workers' regulation). Alas, poor Directive 90/365.....

The Preambles

5. The Preambles contain much to stir and excite. Note, in particular:
  - 5.1. Paragraphs 1 to 3 on the fundamental status of citizenship and the aim of the Directive to "simplify and strengthen the right of free movement and residence of all Union citizens".

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<sup>1</sup> Directives 64/221, 68/360, 72/194, 73/148, 75/34/EEC, 75/35, 90/364, 90/365 and 93/96.

<sup>2</sup> NB Articles 10 and 11 of 1612/68 (workers' families) are repealed; Regulation 1251/70 (right of retired workers to remain) is repealed by a separate instrument.

- 5.2. Paragraph 5 on the exercise of the right to move and reside being exercised “under objective conditions of freedom and dignity” – so that, for example, it must also be granted to family members irrespective of their nationality.
- 5.3. Paragraph 15 on the enduring rights of family members to remain in host Member State, justified by reference to considerations of “family life and human dignity”.
- 5.4. Paragraphs 17 and 18 on the acquisition of permanent rights of residence after 5 years.
- 5.5. Paragraphs 20 and 31 on protection against discrimination and adherence to general human rights.

### Who Benefits

6. The Directive applies to EU nationals and their family members: spouses, direct descendant dependants under 21, direct ascendant relatives and civil partners: Article 2. Other family members and partners where there is a “durable relationship” shall be treated equally save where there is good reason: Article 3.

### Residence Rights and Social Assistance

7. Article 6 provides for a right of residence for all EU citizens for up to three months, although Article 14(1) makes this conditional on not becoming an unreasonable burden on the social assistance system (and Article 14(3) then states that expulsion shall not be the automatic consequence of resource to social assistance). Article 24(2) makes it clear that there need be no entitlement to social assistance during these 3 months, or after that period for jobseekers.
8. Article 7 provides for a right of residence for a longer period than 3 months for workers or self-employed people, self-sufficient people, all students<sup>3</sup> who are self-sufficient, and family members of these groups.
9. Note in particular that:
  - 9.1. The status of worker or self-employed person is retained *indefinitely* if a person is (a) temporarily unable to work as the result of an illness or accident, (b) is involuntarily unemployed having been employed for more than 1 year and is registered

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<sup>3</sup> Potentially that includes primary and secondary school students.

as a jobseeker<sup>4</sup>, (c) undergoing vocational training (which must be related to the previous employment only if the person became voluntarily unemployed).

- 9.2. The status of worker or self-employed person is retained *for at least 6 months* if s/he is involuntarily unemployed having been employed for less than 1 year and is registered as a jobseeker or on vocational training<sup>5</sup>.
10. The right of residence of family members is retained if the EU national dies or leaves the host State if there are children in education or if the family member lived with the EU national for at least a year but the scheme works differently depending on whether the family member is himself or herself an EU national:
- 10.1. For EU national family members, the principal mover's death or departure or divorce (etc) does not affect the right of residence (but the family member will not obtain the right of permanent residence unless s/he becomes a worker, a self-employed person or self-sufficient): see Article 12(1); Article 13(1)
- 10.2. After the death of the principal mover, the non EU national retains a right of residence providing there was cohabitation for at least 12 months before death. If the principal mover<sup>6</sup> leaves, the children and non EU national parent with custody retain the right of residence providing the children are in education, until completion of their studies. Divorce does not affect rights if (a) the marriage/partnership lasted 3 years in total, including at least 1 year in the host Member State, (b) the non EU national has custody of the children, (c) there are particularly difficult circumstances e.g. domestic violence, (d) the EU national has custody of the children and the non EU national has a right of access which a court has ruled must take place in a Member State.
11. Article 14 makes it clear that Article 6 residents have the right of residence as long as they do not become an unreasonable burden on the social assistance system; Article 7, 12 and 13 residents have the right of residence as long as they meet the conditions in those Articles; no one can be expelled automatically for having recourse to the social assistance scheme; workers, self-employed persons and genuine work-seekers cannot be expelled for having recourse to the social assistance scheme (save under Chapter VI grounds).

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<sup>4</sup> See *Scrivner* Case C-122/84.

<sup>5</sup> After a period prescribed by domestic law, see *Antonissen* Case C-292/89.

<sup>6</sup> Whether a worker or exercising any other right of movement.

12. Article 16 provides for a right of permanent residence for Union citizens those who have resided legally in the host State for five years (and non Union family members).
13. As before (Regulation 1251/70), retiring or early retiring workers/self-employed persons get the right of permanent residence on retirement providing they have worked for at least 12 months preceding retirement in the host Member State and have been living there for 3 years, or have worked for 2 years but become permanently incapacitated.

#### Equal Treatment

14. Article 23: family members have the right to work irrespective of their nationality.
15. Article 24: there must be equal treatment for all Union citizens (and non Union family members who have a right of residence or permanent residence). The proviso at Article 24(2) is that the host Member State is not obliged to confer entitlement to social assistance during the first 3 months of residence (see Article 6) or the longer period of residence as a work-seeker (see Article 14(4)(b)) or to certain types of study grants and loans.

#### The EEA Regulations 2006

16. Broadly in line with the Citizen's Directive, but Reg. 6 is poorly drafted and does not make it clear that an involuntarily unemployed Union citizen who is registered with the relevant employment office, having been employed for less than 1 year, remains a worker for at least 6 months

#### The Persons from Abroad Regulations 2006 and the 1987 Regulations

17. As indicated above, Reg. 21 of the Income Support (General) Regulations 1987 is amended. The old definition of "persons from abroad" in Reg. 21(3) is removed and a new definition inserted, found in Reg. 21AA. The other benefits have effectively identical provisions.
18. Reg. 21(3) provides that a person from abroad has the meaning given in Reg. 21AA.

19. Reg. 21AA(4) provides a list of people who are *not* persons from abroad (all defined by reference to the Citizen's Directive):
  - 19.1. Workers;
  - 19.2. Self-employed people (ditto);
  - 19.3. Former workers or self-employed people who have stopped work due to temporary incapacity or involuntary unemployment;
  - 19.4. Family members of (a), (b) or (c);
  - 19.5. People with permanent rights to reside as retired or permanently disabled former workers;
  - 19.6. Registered A8 workers;
  - 19.7. Refugees;
  - 19.8. People with exceptional leave, humanitarian protection or discretionary leave;
  - 19.9. People deported to the UK;
  - 19.10. People from Montserrat.
  
20. Reg 21AA(1) provides that a person who is not habitually resident is a "person from abroad".
  
21. Reg 21AA(2) provides that a claimant cannot be treated as habitually resident unless they have a right to reside, unless that right to reside falls within 21AA(3).
  
22. Reg 21AA(3) covers the right to reside for three months for all EU citizens and the right to reside as a jobseeker.

So – who can claim benefits?

23. **Workers/Self-Employed Persons** - EU nationals who are workers or self employed have the right to reside from day 1 and are entitled to all social security benefits. The Article 24(2) derogation cannot apply to workers because Regulation 1612/68 has not been repealed. In any event, Reg. 21AA(4) of the 1987 Regulations makes workers, self-employed persons and the other categories listed above eligible from day 1.
  
24. **Workers temporarily unable to work because of illness or accident** – they remain within the definition of "worker" under the Directive (see Article 7(3)). Accordingly because of Reg. 21AA(4) of the 1987 Regulations they continue to be eligible for benefits.
  
25. **Involuntarily unemployed 1 year plus workers** – again, they remain within the definition of "worker" under the Directive (see Article 7(3)) and Reg. 21AA(4) of the 1987 Regulations. Having

worked for at least 1 year and become involuntarily unemployed and remaining registered as a jobseeker the Union citizen remains a worker – potentially indefinitely.

26. **Involuntarily unemployed minus 1 year workers** - again, they remain within the definition of “worker” under the Directive (see Article 7(3)) and Reg. 21AA(4) of the 1987 Regulations. However, having worked for less than 1 year they remain a “worker” for up to 6 months and thereafter for as long as they can provide evidence they are looking for work and have a genuine chance of being engaged (see Reg. 6 of the Immigration Regulations 2006).
27. **Involuntarily unemployed workers undertaking vocational training** - again, they remain within the definition of “worker” under the Directive (see Article 7(3)) and Reg. 21AA(4) of the 1987 Regulations. Having become involuntarily unemployed, these workers can do any type of vocational training – it need not be connected with the previous employment (see also Reg. 6 of the Immigration Regulations 2006). There is no qualifying time period i.e. it would be a good idea for the involuntarily unemployed minus 1 year worker to undertake vocational training – at least after 6 months.
28. **Workers who voluntarily cease employment and then undertake vocational training** - again, they remain within the definition of “worker” under the Directive (see Article 7(3)) and Reg. 21AA(4) of the 1987 Regulations. Having stopped work voluntarily, however, these workers must undertake vocational training connected with their previous employment (see also Reg. 6 of the Immigration Regulations 2006). Again, there is no qualifying time period.
29. **Family members of all the above** (within Article 2 of the Directive) – see Reg. 21 of the 1987 Regulations.
30. **Those with a permanent right of residence:** see Reg. 21 and Reg. 15 of the Immigration Regulations 2005 and Article 16.

#### Who is Excluded

31. **Article 6 persons** who are not workers or self-employed persons: see Article 24(2) and Reg. 21AA(2) and (3).
32. **Habitually resident work-seekers and their families** – the wording of Reg. 21(2) and (3) is tortuous but such persons appear to be excluded (as Article 24(2) permits) – although the *Explanatory Memorandum to The Social Security (Persons from Abroad) Amendment Regulations 2006* says the opposite. It is difficult to reconcile this provision, or Article 24(2) with Article 12 of the Treaty and cases on discrimination and habitual residence.

## Transitional Protection

33. There is transitional protection for anyone entitled to one of the means-tested benefits (IS/JSA/HB/CTB/PC) on 30/4/04. The effect of the protection is to exempt the claimant from the right to reside test. The protection is only lost if there is a complete break in entitlement to benefit.
34. Entitlement to any of the benefits will retain protection, i.e. claimant is on IS and HB on 30/4/04, loses IS when starts work but keeps some HB, will be able to reclaim IS if work stops. As long as you remain entitled to at least one of the above benefits you can continue to be eligible for any of the other benefits notwithstanding a break in claim. Note that even one day without entitlement to any means-tested benefit will break transitional protection.
35. For child benefit and child tax credit, only claims made after 1 May 2004 are caught by the regulation. As long as you were on benefit on 1 May 2004, you are protected, and retain your entitlement. However, there is no transitional protection if there is a break in claim, and periods in receipt of means-tested benefits will not help to retain entitlement to CB or CTC, or vice versa, nor will entitlement to CB help with entitlement to CTC or vice versa.
36. In practice, since HMRC do not appear to be implementing the right to reside test, the transitional arrangements are of little practical importance.
37. There is no specific transitional protection from the changes in April 2006. The transitional protection applies to those entitled to benefits continuously from May 2004 only.

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6<sup>th</sup> July 2006