**Brexit, right to reside and older EEA nationals seeking advice as to how to protect their right to remain living in the UK**

**Introduction**

Following the decision to leave the European Union (EU) in the 2016 Referendum, advisers may be approached by older European Economic Area (EEA) citizens about their rights to remain in the UK. Decisions are subject to negotiations so currently, we have no definite answers but this short information briefing sets out some of the options that people might want to consider if they want to protect their immigration status.

**Giving advice**

Responding to requests from EEA citizens as to how they might seek to protect their rights to remain in the UK should not in general constitute “*immigration advice*” (which is formally regulated) and so advisers can advise people of their options, rather than simply offering information and guidance.

**[Permanent residence card](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505032/EEA_PR__03-16.pdf)/document**

An EEA citizen who has resided lawfully in the UK for 5 years or more can apply for a permanent residence card. In this context, “*residing lawfully*” means having lived here as a “*qualified person*” which means as a:

* Worker or self-employed person
* Jobseeker
* Self-sufficient person
* Student
* Family member of any of the above

5 years lawful residence (which in general must be continuous, although there can be short breaks) brings about the status of having a “*permanent right to reside*” in the UK. The card or document confirms that you have acquired this status but it does not grant that status – it is merely a declaratory object.

In its [policy paper](https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu) setting out the UK government position on EEA nationals post-Brexit, the government say that anyone who has already acquired a permanent residence card will have to reapply for ‘*settled status*’. They also state that people with a residence card may have a streamlined application process compared to other people who have not. It is also a requirement to have a card if you seek to acquire [British citizenship](#British_citizenship).

The rules around lawful residence and qualified persons were introduced in 2004 through [*EU Directive 2004/38*](https://eumovement.wordpress.com/directive-200438ec/), which in turn was transposed into domestic law through the [*Immigration (European Economic Area) Regulations 2016*](http://www.legislation.gov.uk/uksi/2016/1052/contents/made).

A permanent right to reside can also be acquired if you worked for three years and then reached retirement age, or took early retirement, as well as in certain other specific situations. A derived right to reside based on being the primary carer of a child in education and similar situations (known as [*Teixeira rights*](http://www.cpag.org.uk/content/right-reside-some-positive-case-law)) do not count towards the five years needed for permanent right to reside).

Receipt of a state retirement pension can help someone satisfy the self-sufficient person category of qualified person, although there can be additional complications related to having comprehensive sickness insurance. This applies to UK state pension as well as other EEA countries state pensions.

**Acquiring permanent right to reside through periods of residence prior to 2004**

The case of *Lassal v Secretary of State for Work and Pensions Case C-162/09* established that periods of residence lawful under predecessor provisions to those now found in Article 7 of *Directive 2004/38* could also count i.e. if someone was a worker/self-employed or retained those statuses, or was self-sufficient or a student or family member of any of those).

Thus, someone who had already resided in the UK for five years as a worker prior to 30 April 2006 (which is when the Directive came into force in UK law) could acquire a permanent right of residence on that date as the Directive entered into force.

Lassal also considered what would happen if, having completed five years as a worker (or with a similar right) before the coming into force of the Directive, there was then a period of absence from the UK. Ms Lassal, who was French, had lived in the UK and had a right of residence as a worker from September 1999 to February 2005.

However, in February 2005 she returned to France to visit her mother and remained there for 10 months. She returned to the UK and after a period on jobseeker’s allowance (JSA), she claimed income support in November 2006. The European Court of Justice (ECJ) decided that such absences should be treated analogously with absences after the Directive came into force. It said:

*‘absences from the host Member State of less than two consecutive years, which occurred before 30 April 2006 but following a continuous period of five years’ legal residence completed before that date do not affect the acquisition of the right of permanent residence pursuant to Article 16(1).’*

A different issue arose in *SSWP v Dias Case C325/09*. Ms Dias had resided in the UK with a relevant right of residence for a five-year period before the coming into force of the Directive. However, she had then had a period before the Directive came into force, during which she had remained in the UK but had not been a worker, etc. or had another relevant right of residence.

Had that period been after the Directive became binding, it would of course have had no effect on her permanent right of residence – those with a permanent right of residence are not required to meet any other conditions such as being a worker/self-sufficient, etc. Her difficulty was that during the period at issue, she did not have a permanent right of residence (as that could only come into existence on or after 30 April 2006).

The ECJ decided that her period of presence in the UK where she did not have a right of residence should be treated analogously with Ms Lassal’s period of absence. In other words, provided the period was less than two consecutive years, it would not prevent a permanent right of residence arising on the day the Directive entered into force on the basis of her earlier period of five years as a worker.

The cases also looked at the situation where the claimant did have a right of residence for a five-year period, and then, before the Directive became binding, had a period of over two consecutive years in which s/he was either absent or had no right of residence?

The decisions in Lassal and Dias were to the effect that, where such periods of absence/no right to reside were less than or equal to two years, the permanent right of residence still crystallised on 30 April 2006. The Court did not explicitly rule that a permanent right of residence would not exist if the absence was in excess of two years.

In practice, this means older people who may have been in the UK for many years prior to the Directive coming into force can still use periods during which they would have been a “*qualified person*” to have established a permanent right to reside, even though they may have retired many years previously.

Note, however, that if a person lived in the UK legally for five years or more and thus acquired a permanent right to reside, but then had a period of more than two years where they did not reside “*legally*” within the provisions above, nor for example had they retired or stopped work due to permanent incapacity, they may lose that permanent right to reside, if this all took place prior to 30 April 2006 (when the EU Directive 2004/38 came into force). Seek advice if this applies.

**Indefinite leave to remain**

Indefinite leave to remain (ILR) or permanent residency is an immigration status granted to a person who does not hold the right of abode in the UK, but who has been admitted to the UK without any time limit on his or her stay and who is free to take up employment or study, without restriction.

Some older EEA citizens may have already acquired this status, for example, through marriage to a British national. An EEA citizen with 10 years continuous residence can also [apply for ILR](https://www.gov.uk/settle-in-the-uk).

Their passport will be stamped with a blue stamp confirming that they have been granted ILR. Indefinite leave is not a permanent status. It can lapse if the holder has stayed outside the UK for a continuous period of more than two years.

**British citizenship**

In order to apply for British citizenship, an EEA national must first acquire a [permanent residence card/document](#Permanent_residence). There are [various other requirements](https://www.gov.uk/becoming-a-british-citizen) that must be satisfied. There are [fees attached](https://www.gov.uk/government/publications/fees-for-citizenship-applications) to this option which can be significant. You are invited to book a place at a citizenship ceremony if your application is successful and you are over 18, which is a compulsory part of the process.

The Home Office maintain that someone must have acquired the permanent residence card for at least one year prior to the citizenship application happening, although this [view has been challenged](https://www.freemovement.org.uk/eu-nationals-must-apply-for-permanent-residence-card-for-british-nationality-applications/).

Once British citizenship is acquired, you have a right to remain in the UK indefinitely. Legally, you have dual nationality with the UK and with the EEA country of origin. Dual nationality is allowed in the UK. This means once you acquire British citizenship, you do not risk losing your original nationality (unlike elsewhere in the world).

However, there may be problems if your country of original citizenship does not recognize dual citizenship. You may be regarded by that country as having renounced your first nationality upon acquiring British citizenship. Alternatively, the authorities from your home country may refuse to recognise your second, UK nationality.

For these reasons, if you are considering applying for British citizenship, it is vital to make enquiries with the authorities of your home country as to the potential implications should you obtain British citizenship.

If you have family members who rely on your status as a qualified person to remain in the UK, you should also consider their position if applying for British citizenship because, once granted, they can no longer take advantage of derived or inherited rights to reside.

**Advice**

Right to reside legislation is an extremely complex area of law. This briefing note cannot reflect, or cover, all of the variations and situations whereby people may be affected by these rules.

Local Age UK I&A advisers can use the [Age UK Email Enquiry Service](http://theloop/Interact/Pages/Content/Document.aspx?id=22479) for further advice about any particular situation.

[The Aire Centre](http://www.airecentre.org/pages/get-advice.html) are a small independent charity who can offer advice to individuals and organisations on right to reside issues, although they cannot promise to assist with every case due to lack of capacity. In particular, note that they do not help with form filling or basic procedural issues, but they can help with challenges against decisions refusing social security benefits and other residence problems.

Paul Treloar [paul.treloar@age.uk.org.uk](mailto:paul.treloar@age.uk.org.uk)

Senior Technical Advice Support Officer

June 2017