

Right to Reside

You must have a Right to Reside in the Common Travel Area (or UK) to claim:

- Pension Credit
- Income Related Employment and Support Allowance
- Income Support
- Income Based Jobseeker's Allowance
- Housing Benefit
- Universal Credit
- Council Tax Reduction
- Child Benefit - UK
- Child Tax Credit - UK

A Right to Reside means a legal right to live here. You have a legal right to live in the United Kingdom if you are:

- A British citizen
- An Irish citizen
- A Commonwealth citizen with *right of abode*
- Someone who has leave to be in the UK
- Someone who has an EEA Right of Residence

EEA Rights of Residence

You have an EEA right of residence if:

- You are an EEA worker
- You are an EEA retained worker
- You are an EEA Jobseeker
- You are an EEA student
- You have a permanent right of residence
- You have a derivative right of residence
- You are a family member of someone with a right of residence
- You are an EEA self-sufficient person
- You have an initial right of residence

EEA Worker

You can be an EEA worker in employment or self-employment. A two stage process is used to establish whether you are an EEA worker:

The Minimum Earnings Threshold Test. DWP guidance says that you should be automatically treated as a worker if you can show that for the three months before you claim benefit your average gross earnings from work in the UK were more than £166pw/£720pcm.

The Genuine and Effective Test. The law says that even if you do not meet the Minimum Earnings Threshold you should be treated as a worker whether you are doing paid full-time or part-time work, so long as your work is *genuine and effective* and is not on such a small scale that it is *marginal and ancillary*. The Decision Maker will consider:

- Whether the work is regular or intermittent.
- The period of employment.
- Whether the work is intended to be short-term or long-term at the outset.
- The number of hours worked.
- The level of earnings.

EEA Retained Worker

If you stop work you can sometimes keep your worker status and the right to reside that goes with it. This is known as retained worker status.

EEA Workers on Maternity Leave – You are still an EEA worker while you are on maternity leave from your employment, so long as you intend to return to work. It does not matter whether you are paid during your leave or not.

If you have stopped work because of your pregnancy and you are not covered by a contract of employment you retain your worker status for a period from eleven weeks before you are due, until fifteen weeks after your pregnancy ends; so long as you intend to resume work or jobseeking once the 15 week period is over.

Retained Employed Worker Status While You Are Unemployed – If you are an employee and you become involuntarily unemployed, you can retain your worker status by *registering as a jobseeker with the relevant employment office*.

You meet this rule if you make a claim for Jobseeker's Allowance and then regularly sign on.

You should claim Jobseeker's Allowance as soon as possible after stopping work, but short gaps should not affect your retained worker status so long as you have not 'withdrawn from the labour market'.

If you were employed for less than a year your retained workers status lasts for six months.

If you employed for a year or more your retained worker status can continue for more than six months if (according to UK law) you can *provide compelling evidence that you are continuing to seek employment and have a genuine chance of being engaged*. This is known as the *Genuine Prospect of Work Test*.

If you do not pass the Genuine Prospect of Work test and you have used up your six months the clock can only be re-started if you leave the UK for more than a year

If you claim benefits other than Jobseeker's Allowance when you stop work (you might claim Income Support because you are the lone parent of a young child, or because you have significant caring responsibilities) you must clearly indicate that you are continuing to look for work and that you have a genuine chance of finding employment.

You cannot retain self-employed worker status while you are unemployed.

Retained Worker Status While You Ill – You retain your worker status if you are temporarily incapable of work because of an illness or accident.

Retained Worker Status While You Are In Vocational Training – You retain you employed worker status if

- You are involuntarily unemployed and you are in vocational training.
- You are voluntarily unemployed and you are in vocational training related to your last employment.

EEA Jobseekers

If you are an EEA national who does not have retained worker status and you are looking for work in the UK you must register with the Jobcentre to establish your status as an EEA Jobseeker. You then have a right of residence and pass the Right to Reside Test for iJSA, Child Benefit and Child Tax Credit.

UK law says that your status as an EEA Jobseeker and your right of residence will be limited to 91 days unless you can *provide compelling evidence that*

you are seeking employment and have a genuine chance of being engaged.
This is known as the *Genuine Prospect of Work Test*.

If you do not pass the Genuine Prospect of Work test and you have used up your 91 days the clock can only be re-started if you leave the UK for more than a year.

EEA Students

If you are a student, and when you started your course you could show that had enough resources for you and your family not to become a burden on the UK social security system; and you have comprehensive sickness insurance; you have an extended right of residence and so pass the Right to Reside Test.

What counts as *sufficient resources* is not always clear. EU law says that this should be considered on an individual basis and should not be higher than the threshold below which host state nationals become eligible for social assistance. This is often taken to mean your means-tested benefit applicable amount plus your rent liability.

Comprehensive sickness insurance can include private insurance policies or having a European health insurance card where the UK can be reimbursed by another country.

EEA Permanent Residence.

Once you have lived in the UK with a right of residence (except a derivative right of residence) for a continuous period of five years you gain a permanent right of residence.

Some breaks are allowed in this five year period if:

- They are not more than six months each year
- They are for military service
- It is one period of upto 12 consecutive months for important reasons such as pregnancy, childbirth, illness, study, training or a posting abroad.

Permanent residence can only be lost if you are absent from the UK for a period of more than two years.

You acquire permanent residence before five years if:

- You are an employed or self-employed worker who has stopped working because you are permanently incapable of work and;
 - You had lived in the UK for two years before stopping work, or,
 - You became ill as a result of an industrial accident or disease, or,
 - Your spouse is a British citizen, or,
- You had lived and worked in the UK for three years and since then been working in another EEA state but returning to your home in the UK at least once a week.
- You are an employed or self-employed worker who has retired on or after pension age; or an employed worker who has taken early retirement. You must have worked in the UK for 12 months immediately before you retired and lived in the UK for at least three years; or be the spouse of a British citizen.

Derivative Right of Residence.

You have a derivative right of residence if:

- You are a child of someone who counted as an EEA worker at some time while you were living in the UK. You must be receiving education. This usually applies until you are 18, but could continue after this if you are dependent on the EEA worker.
- You are the primary carer of a child in the bullet point above, if the child would be unable to continue their education if you had to leave the UK
- You are the primary carer of a self-sufficient child who is an EEA national, if the child would be unable to stay in the UK without you.
- You are the dependant child of a primary carer from the two bullet points above.
- You are the primary carer of a British national who would be unable to live in the UK or Europe if you left the UK – This right of residence does not work for benefit claims

You can only count as a primary carer if you are a “direct relative or legal guardian”.

According to UK law you cannot have a derivative right to reside if you have any other EEA right of residence or if you have indefinite leave.

Family Members and Rights of Residence

If you are a *family member* or *extended family member* of an EEA national you have the same right of residence as the EEA national.

If you are a Person Subject to Immigration Control and also a family member of an EEA national, your status as an EEA family member overrides the Person Subject to Immigration Control Restrictions.

UK law says that you and your family members do not have an EEA right of residence in your home country unless you have *genuinely* lived together with a right of residence in another EEA state and then returned home. These rules are harsher than EU law.

A family member is a:

- Spouse or civil partner
- Child or grandchild up to the age of 21
- Child or grandchild aged 21 or over who is dependent on the EEA national
- Dependent parents or (great) grandparents.

An extended family member is someone who has a residence card, EEA family permit or registration certificate who is

- An EEA national's partner in a 'durable relationship'
- A relative who requires personal care from the EEA national
- Some other dependent relatives who were dependent on the EEA national before coming to the UK.

A dependant relative must receive *material support* from you towards their *basic necessities*.

Family Members' Rights of Residence after Separation, Divorce or Death.

You acquire a permanent right of residence if you are the family member or extended family member of an EEA worker who died while still working and; you lived with them at the time of their death and; they had lived in the UK for two years, or, they died as a result of an industrial accident or disease.

Under UK law you keep your right of residence as a family member or extended family member of an EEA national if:

- You have separated but are still married or civil partners
- They have died, and
 - You are not an EEA National, and
 - You had been living in the UK for a year before the death, and
 - You are a worker or are self-employed
- They have died or left the UK, and
 - You are their (step) child or grandchild, and
 - You were in education at the time they left or died, and
 - You are in education now
- They have died or left the UK, and
 - You are a parent with custody of their child, and
 - The child was in education at the time they left or died, and
 - The child is enrolled in education now.
- You have divorced them while you were living in the UK, and
 - You are a worker or self-employed or self-sufficient, and
 - You had been married/civil partners for at least three years, of which at least one year had been spent in the UK, or
 - You have custody of or access to that person's child, or
 - Retaining residence is warranted by particularly difficult circumstances such as domestic violence during the relationship

European law may allow you to retain your right of residence following a divorce, separation or death even if you do not come into this list.

Right to Reside Jargon

Qualified person means someone who is an EEA worker, retained worker, jobseeker, student or self-supporting person.

Exercising a treaty right means going to live in another EEA country to be an EEA worker, retained worker, jobseeker, student or self-supporting person.

Person from Abroad means someone who has failed the Right to Reside test or the Habitual Residence test.

Self-sufficient EEA Citizens

If you are economically inactive but throughout your stay, you have sufficient resources not to become an unreasonable burden on the UK social security system; and you have comprehensive sickness insurance; you have an extended right of residence and so pass the Right to Reside Test.

Initial Right of Residence

You have a right live in any other EEA state for up to three months. This does not allow you to claim UK benefits.

Right to Reside and Brexit

At the time of writing Brexit has not been finalised. It is not known whether there will be a no-deal Brexit or a Brexit agreement.

If the UK leaves the EEA on the same terms as the current draft agreement a transition period maintaining existing arrangements would exist until 31st December 2020.

The government has introduced the EU settlement scheme as a way of implementing the draft rights of EEA nationals and their family members.

The scheme comes under the immigration rules and so it is unlawful to offer advice on it unless you are registered with the office of the Immigration Services Commissioner.

Essentially the settlement scheme gives EEA and Swiss nationals, their family members and people with derivative rights of residence:

- Settled status – or indefinite leave, if they can show that they have lived in the UK for five years.
- Pre-settled status – or limited leave for five years, if they can show that they have lived in the UK for less than five years.

If you get pre-settled status you must then apply for settled status before your pre-settled status expires

The five year qualifying period includes any time that you have been living here, even if you did not have a right of residence at that time.

Under the draft withdrawal agreement you must begin living in the UK before 31st December 2020 to apply under the scheme. You must apply before 30th June 2021.

In the event of a no-deal Brexit you must be living in the UK on Brexit day and must apply before 31st December 2020