

THE GUIDANCE NOTE

Part 1 - residence rights and procedures

Introduction

Those of you who've read the [citizens' rights chapter of the Withdrawal Agreement \(WA\)](#) will know that the wording is very precise. This is because it is an international agreement with what's known as 'direct effect', which means that the rights it contains are directly binding in national law, and you can rely on them directly before the courts even if the country where you are living doesn't apply the provisions of the WA correctly in national law. Any dispute is also subject to the jurisdiction of the European courts.

In May 2020 the European Commission published a [Guidance Note](#), which will be used by the national authorities in all EU countries and the UK to help make sure that the citizens' rights provisions of the WA are correctly implemented. The Guidance Note explains what it may and may not cover, and much of what it has to say is useful for all of us as we prepare for the post-transition period.

This is the first of three British in Europe information articles designed to help you understand the most important clarifications in the Guidance Note and how they may affect you.

In this article we focus on residence rights and procedures in your host country. There is useful information here for everyone, but especially for those whose host country is applying a constitutive scheme (see page 7) under which British nationals will have to **apply for** a new residence status and card. This article complements, and is designed to be read alongside, our earlier [WA explainer on residence rights and procedures](#). It assumes that the transition period will end on 31 December 2020 and focuses on individual rights - those of family members are covered in the next article.

The later articles in the series will look at:

- Family members, family reunification, and dual nationals;
- Pensions, health care and social security.

About British in Europe

British in Europe is a coalition of grassroots citizens' organisations and the largest grouping of UK citizens in the EU. It was founded in early 2017 to give UK citizens living, working and studying across the EU a voice in the Brexit negotiations.

We are the organisation of reference **on citizens' rights for UK nationals in the EU**. Since 2017 we have been recognised by the British government, the European Commission, the Council and the European Parliament as trusted interlocutors, meeting secretaries of state, ministers in member states and key EU and British officials. Our ten-person **Steering Team** has campaigned jointly with **the3million**, which represents EU27 citizens in the UK. Together, we have pressed to keep our existing rights and to prevent Brexit from destroying the lives and families we have created whilst exercising those rights.

For our advocacy, we have produced dossiers highlighting **the human and legal cost of Brexit** for the 1.2 million UK citizens in the EU. We have given evidence at the European Parliament, Westminster and national and regional parliaments around the EU. With the3million, we have explained our plight to senior politicians such as Michel Barnier and Stephen Barclay, as well as Brexit coordinators and MEPs from all the main political groups in the European Parliament. We have provided expert analysis across the media and built up a strong social media presence to show how losing our rights will affect our everyday lives.

WHAT WE HAVE ACHIEVED SO FAR:

The Withdrawal Agreement

Working with the3million, British in Europe ensured that citizens' rights was the top priority in negotiations. We had a major impact on the citizens' rights chapter, feeding into each round of negotiations. We highlighted areas such as **dual national rights** and the need for **clarity on healthcare and social security**. We persuaded both sides to extend the **right of absence** for permanent residents from two to five years. We widened the initial focus of negotiators to ensure that issues affecting **UK nationals of working age** and particularly **young people** were prioritised.

Implementation of the Withdrawal Agreement

The advocacy of BiE country groups has affected member states' decisions to choose between **declaratory and constitutive systems** to secure our rights. For example, we believe that **British in Germany's** campaign for a declaratory system has had a clear impact given the recently published draft legislation proposing that option.

UK Government Issues

We obtained a commitment that UK nationals in the EU27 wishing to study in Britain will be entitled to pay **home university fees instead of** expensive international fees for seven years from the end of the transition period. We also obtained **a grace period** until 2022 for British citizens returning to the UK with non-British family members without having to meet the requirements of normally applicable UK immigration law.

Information

BiE has provided **clear and accurate information on citizens' rights** for the UK nationals we represent. To governments and the media, we have supplied expert analysis with a strong legal basis on complex issues such as working rights, professional qualifications, pensions, healthcare and mobile citizens.

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www.britishineurope.org

What's covered in this article?

1. Two reminders about residence
2. Being resident in your host country before the end of transition
3. Your first five years: changing your status
4. Permanent residence
5. What is the difference between declaratory and constitutive schemes and what does it mean for you?
6. Applying for residence in countries adopting a constitutive scheme
7. Confirming residence in countries adopting a declaratory scheme
8. Applications for residence status during the transition period under a constitutive scheme
9. Applications for a residence document during the transition period under a declaratory scheme
10. Right of entry and exit

Important note: this explanation is designed to help UK citizens in the EU by giving them a general overview of the Withdrawal Agreement and our understanding of its provisions. Anyone who wants advice on the Withdrawal Agreement on which they intend to rely should consult a practising lawyer. We are a campaigning group and not in a position to give legal advice. British in Europe is unable to accept liability for any loss or damage sustained directly or indirectly as a consequence of any statement or omission in this explanation.

1. Two reminders about residence

1. All residence is not legal residence

- Remember that you can only be covered by the WA if you are *legally resident* in your host country at the end of the transition period on 31 December 2020.
- Legal residence is more than just having a foot on the soil - it means that you meet the conditions that currently apply to you as a UK citizen protected by the WA (the same as those for EU citizens).
- This means that after 3 months in your host country, and for the first 5 years of your residence there, you have to fall into one of the following categories: employed, self-employed, non economically active but living on your own resources and self-sufficient, student (also must be self-sufficient).
- People who are self-sufficient or students must have health insurance (for pensioners or others who hold one, the S1 form is sufficient).
- A family member of any nationality who doesn't meet the conditions for residence in their own right is also covered.
- **If you have never registered your residence in your host country, you may not be considered to be legally resident so it is important to do this before 31 December 2020 (this does not apply in France where registration is not compulsory for EU citizens).**
- Under EU free movement rules if you move from the UK to an EU country as a jobseeker you have the right to stay for a given period (which varies in different member states) while you seek work.

2. Ordinary residence and permanent residence

- You have to meet the conditions in one of the above categories for the first 5 years of your residence in your host country. This is what we refer to in this article as **ORDINARY RESIDENCE**.
- After 5 years of continuous residence, you can acquire permanent residence status. Once you have acquired **PERMANENT RESIDENCE** status the conditions fall away - you can then live in your host country condition-free.
- When you acquire permanent residence status, you will be required to prove that you *have met the conditions* for a previous 5 year period, which does not need to be immediately preceding the date of application.
- Your family member can also acquire for permanent residence status after 5 years of continuous residence.

2. Being resident in your host country before the end of transition

- You will be covered by the WA for residence if you (a) lived legally (see above) in your host country before the end of the transition period **AND** (b) you continue to do so afterwards.

- All possible situations where the right of residence stems from free movement rules are included. This includes ordinary residence, whether you're employed, self-employed, self-sufficient or a student; permanent residence; residence as a family member; and residence under the special rules for jobseekers.
- There is no minimum duration for having lived legally before the end of the transition period.

***Example 1:** you move to Finland to take up employment on 1 December 2020 and remain there after 31 December 2020. You are covered by the WA.*

***Example 2:** you move to Germany as a jobseeker on 27 December 2020 and remain there after 31 December 2020. You have the right to stay as a jobseeker under the WA and the same rules will apply to you as they did before the end of transition.*

- You don't need to be physically **present** in your host country at the end of the transition period to be covered by the WA, as long as you remain legally **resident** on that day. This is because as a legal resident you are allowed to be absent from your host country for certain periods without losing your residence rights:
 - o As an **ordinary resident**, you can be away from your host country for no more than 6 months every year without losing your resident status. You're allowed one longer absence of up to 12 months in the 5 year period for 'important reasons': eg childbirth, serious illness, study, vocational training or posting elsewhere (this is not an exhaustive list).
 - o Once you have acquired **permanent residence** under the Withdrawal Agreement, you can be away from your host country for 5 years - an increase on the 2 years permitted for EU citizens - and still retain the right to return and keep your rights of permanent residence.

***Example 3:** you move to Portugal in July 2018 and you have a residence card. On 30 October 2020 you return temporarily to the UK to visit family. As long as you return to Portugal by 30 April 2021 AND have not spent further time outside Portugal within the previous 12 months, you will remain legally resident even if you are still in the UK on 31 December 2020. You will be covered by the WA as long as you continue to meet the conditions for residence.*

***Example 4:** you move to Greece in April 2017 and you have a residence card. You decide to tour Europe in your camper van and you leave Greece on 20 June 2020. You return to Greece in April 2021. You have been absent for more than the permitted 6 months, which means you have lost your residence rights and are no longer considered legally resident. You will not be covered by the WA and you will have to re-enter Greece under national immigration rules.*

***Example 5:** you have lived in France for 16 years and have permanent residence rights. In September 2017 you leave France to work in Thailand, where you remain for 4 years, returning to France in September 2021. Because you have not been absent from France for over 5 years your residence is treated as if it were continuous and you retain your permanent residence rights. You will be covered by the WA - but you will (because France has adopted a constitutive scheme - see Section 5) have to apply for your new residence status under the WA by 30 June 2021.*

3. Your first five years: changing your status

- Your 'status' for this purpose represents the category under which you are exercising your free movement rights:
 - o employed
 - o self-employed
 - o non economically active and
 - o self-sufficient or student.
- Your right of residence under the WA in your host country is not affected if you change your status - for example if you stop being a student and start work, if you stop working and become non-economically active and self-sufficient, or if you move between the categories in any other way.
- You can also hold more than one status at one time - for example you can be a student who is simultaneously self-employed.
- There are no procedural consequences attached to a change of status - you don't have to report it to your registration authority or apply for or request a new residence document.

4. Permanent residence

- After 5 years of legal residence in your host country you become eligible for permanent residence status. (In some cases you can acquire legal residence status in less than 5 years - see [FAQ 14 here](#).)
- If you already hold permanent residence status under current free movement rules at the end of the transition period, you will be eligible for permanent residence status under the WA.

If you have not been resident long enough to acquire permanent residence status under the WA at the end of the transition period, you can continue to build up your years until you reach 5 years, when you will be eligible for permanent residence under the WA. Periods both before and after the end of transition will be taken into account.

***Example 6:** you move to Italy in March 2017 to work. You will have less than 5 years' residence on 31 December 2020 but you can count this period towards the total period needed for permanent residence (the 'qualifying period'). Provided you continue to meet the conditions for legal residence, you will become eligible for permanent residence in March 2022.*

- One very important precision is that **the qualifying period of residence does not have to be immediately before the moment when the right of permanent residence is claimed**. This means, for example, that if you have been resident in your host country for over 5 years but your circumstances changed recently, leaving you struggling to meet the conditions, you can call upon an earlier period of residence during which you did meet the conditions to use as your qualifying period. You will still need to prove that you met the conditions during this period.

***Example 7:** you move to France in July 2012 and you set up a small business selling jewellery on local market stalls, which you run successfully for over 5 years. In January 2018 you give birth to a daughter but your boyfriend doesn't live with you or support you; you have to give up your business and after a while you apply for French income support benefits, which you continue to receive as a single parent. You have never applied for a residence card in France as it has not been required. Since January 2018 you may be unable to meet the conditions for legal residence as you are reliant on public funds, but as you previously met the conditions for legal residence for more than 5 years as a self-employed person you should be able to rely on the period between July 2012 and January 2018 to claim the right of permanent residence. Once you have acquired permanent residence your right of residence becomes condition-free and is henceforward not affected by your receipt of income support benefits.*

- See Section 2 for information about temporary absences during the 5 year qualifying period. Note that **absences longer than the permitted periods will break the continuity of your residence and therefore would bring to an end your right to be covered by the WA**. You would not be able to re-exercise your right to move or reside under free movement rules and it is therefore important to manage your absences carefully.
- See Section 2 also for information about absences for those with permanent residence rights. The Guidance Note explains that the permitted absence period of 2 years under free movement rules has been increased to 5 years under the WA to reflect the fact that free movement rights are lost under the WA.
- Concretely, this means that even if you have permanent resident status, if you are away from your host country for more than 5 years you would lose your automatic right to return under the WA and would have to return under the normal immigration rules in your country for third country nationals. You would lose your rights under the WA as you would no longer have the status of a permanent resident.

5. What is the difference between declaratory and constitutive schemes and what does it mean for you?

Thirteen countries are opting for a constitutive scheme, while the rest will apply a declaratory scheme. British in Europe is actively seeking definitive confirmation of which countries are on that list of 13 countries and will publish an update on this as soon as we have clarity from the European Commission.

- In a declaratory scheme your residence status derives directly from the law (in this case, from the WA) and you don't need to have completed any administrative procedures or application to obtain it. In other words, the 'source' of your residence status and the rights that stem from it is the fact that you meet the conditions for legal residence. No application to, or decision from, your registration authority is required to have the status. Your host country may require you to register and/or apply for a residence document, but this simply attests (ie 'declares') the residence status that you already hold, it doesn't confer it. This corresponds to the current system in place for the confirmation of residence rights as EU citizens under EU free movement rules.

- In a constitutive scheme you acquire residence status only if (a) you make an application for it and (b) that application is granted. In other words, the 'source' of your residence status and the rights that stem from it is the decision on your application made by the registration authority in your host country. It's that decision, and the residence document that is issued as a result, which confers your residence status. This is how 'settled status' works in the UK, and it also corresponds to the type of system used to deal with residence applications in EU member states from third country nationals.
- In a constitutive scheme, if you miss the deadline to apply for a new status under the WA or your application isn't successful you will have no residence status and therefore in principle no legal right to reside (see however Section 6 below). This is not the case under a declaratory system, where your residence status and rights derive directly from the fact that you meet the conditions under the WA, even if you don't have a residence document. However in a declaratory country you may be required to register (just as this can be a requirement for EU citizens under free movement law) and may even be required to apply for a residence card.
- **This means that, if your host country is operating a constitutive scheme, it is crucial that you meet the deadline for applying for your new residence status.** This deadline cannot be earlier than 30 June 2021 (6 months after the end of the transition period) and in some host countries may be later - but don't miss it!

6. Applying for residence in countries adopting a constitutive scheme

This section builds on and gives some more precision on the information in the article on [Residence Rights and Procedures](#) that we published in January 2020, especially pages 3-5. It's best to read the two together.

- You must make your application for residence status within the deadline set by your host country, which can't be earlier than 30 June 2021 (6 months from the end of the transition period), although it may be later if your host country chooses. This applies even if you are temporarily absent from your host country (while remaining legally resident - see Section 2 above).
- Applications may be made from abroad in the latter case, although the Guidance Note doesn't specify how this can be done in host countries where applications are made in person.
- Once you have made your application to your registration authority, this is what should happen:
 - o The registration authority will immediately issue you with a certificate of application. Note that this is not discretionary - it must do this.
 - o It will then check whether your application is complete. If not - for example if you haven't provided all the required documents - the registration authority should help you put right any errors or omissions in your application. It should do this before taking a decision to refuse your application.

- o If your application is complete, the registration authority will check that you are entitled to the residence status and rights. If so, it will issue you with your new residence document.
- You are deemed to enjoy the right of residence under the WA until your registration authority has made a final decision on your application - this safeguards you against any administrative delays. This is why it is so important to ensure you receive a certificate of application as it will evidence this.
- If your application is refused and you appeal, you are also deemed to enjoy the right of residence under the WA while you go through the appeal process, and until your national court has decided on your appeal. This safeguards you against wrong decisions and judicial delays.
- Once again, it's important to stress how important it is under a constitutive scheme to make your application before the deadline - if you fail to do so without good reason, you may end up unable to acquire the new WA residence status even if otherwise you meet all the conditions. This could have serious consequences and could mean that you would have no rights to residence under the WA.
- If, however, you do miss the deadline, your registration authority cannot automatically reject your late application. It must instead decide whether you had 'reasonable grounds' for not respecting the deadline. There is no precision on what might constitute 'reasonable grounds', but the decision should take into account 'all the circumstances and reasons' and out-of-time applications should be treated 'in a proportionate manner'.
- You are deemed to enjoy residence rights under the WA until the end of the grace period for applications - ie until 30 June 2021, 6 months after the end of transition (or later if this is extended due to 'technical difficulties' in your host country). This means that your residence rights are protected after the transition period and during this time even if you have not yet made your application for your new status.
- If you hold a current permanent residence card or document as an EU citizen before the end of the transition period, you can exchange this for a new residence document with few formalities. Note though that does not apply if you have permanent residence rights **but** you don't hold a current permanent residence document - in that case you will have to apply under the standard procedure and supply all the required supporting documents.
- Your host country is permitted to carry out systematic criminal record checks if it chooses to do so. This means that you could be required to self-declare criminal convictions that still appear in your criminal record, in any country in the world. You do not need to declare spent convictions. Your host country may also check its own criminal databases, and (exceptionally, and not as a matter of routine) those of other member states.

7. Confirming residence in countries adopting a declaratory scheme

- The Guidance Note confirms that the declaratory scheme mirrors the current scheme for EU citizens and allows member states to continue to apply this scheme if they choose.
- Your host country may decide to require you to register if it chooses, just as this can be a requirement in the declaratory system for EU citizens under EU free movement rules. If it does so, the rules (covering deadlines, fees, supporting documents and residence documents to be issued etc) that are currently applied to EU citizens will continue to apply. In addition, you may be required to apply for a residence card. Note that this is not an application in the constitutive sense - any new document simply attests to the rights that the WA has conferred on you.
- Whether or not your host country requires you to request a new residence document, you have the right to ask for and to receive one. This should include a statement to say that it has been issued under the WA. You are strongly advised to do this so that you have evidence that you are protected by the WA (see Section 5 above).

8. Applications for residence status during the transition period under a constitutive scheme

- Applications for a new residence status can be made during the transition period if your host country has begun implementation, even though free movement rules still apply.
- If your host country has chosen to begin receiving applications during the transition period, this remains a 'voluntary' scheme until the end of the transition period and applying doesn't affect your current rights under free movement rules. This is because the citizens' rights part of the WA doesn't enter into legal effect until after the end of the transition period.
- Applying for a new residence status during the transition period doesn't prevent you from applying at the same time for a residence document under current EU free movement rules (either ordinary or permanent residence). Similarly, your host country should continue to meet its obligations under current EU free movement rules - for example, deciding on pending applications or processing new applications for residence documents.
- What all this means is that decisions to accept or refuse an application don't come into effect until after the end of the transition period - the decision itself is valid, but its legal effect is postponed.
- If you apply for a new residence status and **your application is refused before the end of the transition period**, you can reapply within the grace period (ie up until 30 June 2021). If you need to make certain changes to your situation in order to meet the conditions for residence, you would need to do this before the end of the transition period as it is your circumstances at that point which would be assessed when you reapply.
- If you apply for a new residence status and **your application is refused after the end of the transition period**, you can no longer reapply as in the previous bullet point but would have the

right to lodge an administrative and/or judicial appeal according to the procedures in your host country. This will examine both the legality of the decision and the facts and circumstances on which it was based.

- Once you have been granted a new residence status, this can only be withdrawn on grounds of public policy, public security, public health or abuse or fraud. These are the same grounds that currently apply under free movement rules. It cannot be withdrawn on administrative grounds (ie those relating to the conditions attached to right of residence), whether made before or after the end of the transition period. This means that there is no risk attached to applying for your new status before the end of the transition period. Note though that residence rights can be restricted more easily for conduct committed after the transition period, when national immigration rules may be applied.

9. Applications for a residence document during the transition period under a declaratory scheme

- Applications for a new residence document under the WA can be made during the transition period if your host country has begun implementation.
- If you are granted a new residence document, this comes into effect immediately. It does not affect your parallel free movement rights which you will retain until the end of the transition period.
- If you are refused a new residence document, this also comes into effect immediately but does not affect your parallel free movement rights which you will retain until the end of the transition period. There is no provision under a declaratory scheme to reapply if you are refused a new residence document, but you would have the right to lodge an administrative and/or judicial appeal according to the procedures in your host country.
- Note that British in Europe is asking the European Commission to clarify the position as set out in the Guidance Note on applications in declaratory systems during transition.

10. Right of entry and exit

- If you fulfil the conditions for the status under the WA, you can exit or enter your host country with a valid passport or national identity card. No other conditions can be attached under national law (for example that your passport must have a certain length of validity).
- However the WA also states that you will not be required to have a visa or equivalent formality **where you hold a valid residence document that has been issued under the WA.**
- There is obviously a contradiction here and British in Europe is raising this issue with the European Commission.
- This means that after the end of the transition period **you may need to hold a residence**

document that specifically states that it has been issued under the WA in order to be automatically dispensed from the need to produce a visa on exit from or entry into your host country. You may not yet hold such a residence document if, for example, either (in a constitutive country) you have not yet applied for your new status, or (in a declaratory country) because your host country has not made it compulsory to request one or it has not begun the process by which you can request one.

- If you need to travel outside your host country from the end of the transition period, our current recommendation would be to:
 - o **apply as soon as possible** for your new status (in constitutive countries) or for a new residence document issued under the WA (in declaratory countries); and
 - o in constitutive countries to ensure you **obtain and carry with you a certificate of application** until you receive your new residence document. The Guidance Note is not clear on whether this will be accepted as a 'residence document issued under the WA'; British in Europe is clarifying this with the European Commission.
- There will undoubtedly be those who will need or wish to travel before applying for a residence status and/or document or before it is possible to do so. British in Europe is also raising this issue with the European Commission and we will update you when we get a response.

This is the first article in British in Europe's June 2020 information campaign about the Guidance Note to the Withdrawal Agreement and how it affects you as a British citizen living in an EU country.

If you have found this useful, please donate to our funds at www.britishineurope.org

We are a volunteer organisation and rely upon individuals to support us.