

What are the options and best practice advice for clients already in the UK under the EEA provisions (both EEA nationals and non-EEA family members)?

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Introduction

- The fundamentals of EU / EEA free movement law well-established
- But still much development in Luxembourg and domestically
- And Brexit promises radical change
- 3 parts to the talk:
 - Brief recap on the basic options
 - Key related issues of interest to clients in this field
 - Brexit – what next?

PART 1

THE OPTIONS

EEA routes to residence in the UK

- 3 key EEA routes to residence in the UK
 - Core rights in Directive 2004/38, Citizens Directive (implemented in Immigration (EEA) Regs 2016)
 - Court-developed derivative rights
 - EU citizenship
- The Treaties still provide the underlying basis for the law here
- But the Court has moved a long way past the core rights

Background: The Treaties

- Treaty on the Functioning of the European Union (TFEU)
- Key provisions in this context:
 - Art 20: citizenship (and free movement)
 - Art 21: right to move and reside freely
 - Art 45: free movement of workers
 - Art 49: freedom of establishment
 - Art 56: free movement of services
- Rights of residence dealt with in Directive 2004/38/EC – the Citizens Directive

Route 1: The Citizens Directive

- The key piece of EU legislation in this field
- Codifies and expands previous “piecemeal” approach: recital (4)
- 3 key residence rights:
 - Right of residence up to 3 months: Art 6
 - No conditions, just passport or ID card
 - Right of residence for more than 3 months: Art 7
 - Worker, self-employed, self-sufficient, education
 - Right of permanent residence: Art 16 (new)
 - 5 years’ continuous lawful residence

Route 2: Derivative rights

- Not found in the Treaties or Citizens Directive
- Developed from core Treaty rights in Arts 20 and 21
- Often designed to ensure effectiveness of EU family member free movement rights
- Key examples:
 - *Surinder Singh / Eind*
 - *Baumbast*
 - *Chen*
 - *Ibrahim / Teixeira*
 - *Zambrano*

Route 3: EU Citizenship

- Introduced by Maastricht Treaty from 1993
- Art 20 – establishes EU citizenship
- Art 21 – associated rights of free movement
- Significant, especially post-Brexit:
 - *Grzelczyck* – fundamental status of MS nationals
 - *Baumbast* – start of process of deriving rights from citizenship status
 - *Zambrano / McCarthy No 1* – limits / no limits
 - *Lounes* – even applies in dual national situation
 - *Kovacevic* – limits of *Lounes*

PART 2

THE RIGHTS IN PRACTICE

Workers 1

- Worker = for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration: *Lawrie Blum*
- The work must be genuine and effective, not marginal or ancillary (“supplementary” in Guidance)
 - Does not have to be full time
 - As for income, HO EEA Qualified Persons Guidance refers to HMRC PET

Workers 2



- You do not need to have a job to be a worker: also covers work-seekers
 - EEA Regs, reg 6: 91 day limit
- And it is possible to retain worker status even if not working:
 - Temporary ill health
 - Involuntary unemployment
 - Vocational training
 - Pregnancy – *Saint-Prix*

Self-employed 1

- Relates to establish and services provisions in TFEU
- *Jany* – self-employment = economic activity:
 - No relationship of subordination about choice of activity, working conditions, remuneration
 - Under person’s own responsibility
 - In return for remuneration paid directly and in full
- Genuine and effective, not marginal or ancillary (“supplementary”)
 - Marginal and supplementary if so little time and money that largely irrelevant to lifestyle

Self-employed 2

- Proof can be difficult
- HO Guidance suggests (no older than 6 months):
 - Proof of registration for tax and NI
 - Self-employment letter
 - Invoices for work done
 - Copy of business accounts
 - Accountants letter
 - Lease on business premises
 - Adverts for their business
 - Business bank statements

Workers v. Self-employed: Ever Closer Union?



- Distinct treaty bases
- Traditionally seen as very different
- But distinction may, for some consequential rights, be eroded
 - *Gusa* – concerned retention of self-employed status where no work available – Art 7(3)(b)
 - Employment and self-employment the same:
 - UK / Irish position incompatible with remedying sectoral / piecemeal approach
 - Unjustifiable distinction in treatment – both contributed to economy

Self-sufficient persons

- 2 criteria (EEA Regs, reg 4(1)(c)):
 - Sufficient resources to avoid becoming a burden on the UK social assistance system
 - Comprehensive sickness insurance in the UK
- On resources, provided they are available, they do not have to be their own
 - E.g. non-EEA family member present under Rules could support (see Guidance)
- Comprehensive sickness insurance = covers “the costs of the majority of medical treatment they may receive in the UK” – and cf. *Baumbast*

Students



- Must be:
 - Enrolled for main purpose of following course of study (including vocational training)
 - At private or public establishment which is
 - Financed from public funds
 - Recognised by SSHD as accredited
 - Have enough money to meet living expenses and so not become burden on social assistance system
 - Have comprehensive sickness insurance

Permanent Residence 1

- Art 16 – a new right
- See reg 15 of the EEA Regs
- Criteria:
 - Resided legally (“in accordance with” the EEA Regs)
 - For a continuous period
 - Of five years

Permanent Residence 2: exemptions

- Workers or self-employed persons who have:
 - Reached pension age / taken early retirement
 - Worked there for previous 12 months
 - Resided there for previous 3 years
- Worker and self-employed who have:
 - Resided continuously for more than 2 years
 - Stopped work because of permanent incapacity
- Workers and self-employed who have:
 - Resided and worked for 3 years continuously and
 - Work in another MS but retain residence in host MS and return at least once a week
- NB: residence must be legal: *Gubeladze*

Family Members 1

- In all three cases of residence rights, the EEA national is entitled to install non-EEA family members
- Of central importance to ability to exercise free movement – see e.g. *Surinder Singh*
- Family member =
 - Spouse
 - Registered partner (if provided for in national law)
 - Direct descendants under 21 / dependent / those of spouse / partner
 - Direct ascending dependents / those of spouse / partner
- Extended family members: facilitate entry and residence
- NB: AGO in *Coman* – application to same-sex spouses
- Durable relationships – see HO Guidance

Family Members 2

- What is “dependency”?
- See *Reyes* – question of fact
- Dependency = material support + not in a position to support him/herself in home state without it
- Support him/herself = meet essential needs
- Reason for dependence is irrelevant
- However, receipt of financial support not enough in itself if recipient does not need it to meet essential needs: *Lim v. ECO*
- HO Guidance: essential needs includes accommodation, utilities, food
- Proof: e.g. bank statements, money transfers, evidence of co-habitation

Family Members 3

- Art 12 – provides for retention of right of residence by family members in event of EU citizen's death or departure from EU
 - Death or departure does not affect right of residence
 - But before acquiring permanent residence, EU national family member must satisfy Art 7(1)(a), (b), (c) or (d) (workers, self-employed, self-sufficient, students or joining family members)
 - Before acquiring permanent residence, right of residence of non-EU nationals subject to them showing they are workers, self-employed, self-sufficient or family members of such a person
- Art 13 – retention of right of residence in case of divorce etc

Citizenship: Dual Citizenship



- Traditional UK position was that dual UK citizens resided under national law, not EU law, and so could not rely on EU family member rights
- See now *Lounes*
- CJEU Grand Chamber rejected this argument
- Key appears to be earlier exercise of free movement rights
- Cf. position of someone moving pre-accession - *Kovacevic*

Accession State Nationals

- Eastern expansion of the EU in the last 15 years
- In the UK, accession state nationals were made subject to workers registration schemes (and their extensions)
- The original scheme was challenged and upheld in *Zalewska*
- *Gubeladze* – CoA found extension was disproportionate
- So although residence has to be lawful, non-compliance with the WRS is irrelevant because the scheme was unlawful
- Very important for e.g. clocking up time for permanent residence
- *Prefeta* – reference heard on 16 January, AGO 28 February – retained rights for accession state nationals

PART 3

BREXIT

Brexit 1

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Brexit 2

- Position remains very unclear
- White Paper due to have been published summer 2017
- Still not published
- Could be summer 2018 or later
- Leaked draft document last year suggested possible options:
 - Removing job-seeking rights
 - Evidence of job offers
 - Minimum income requirements
 - Discouraging low-skilled migration
 - Discouraging settlement
- But no more than guess work without proposals