

# **EEA Clients**

## Options and best practice for clients already in the UK

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# EEA citizens and family members in the UK

- FoM rights currently exercised by 3-6 million people in the UK.
- No official number.
- No register.
- Practice of MS requiring registration with them varies and is partial at best.
- Includes not only EEA citizens but also non-EEA family members.

# EU Settlement Scheme

- In theory, agreement reached in December 2017 on reciprocal rights for EU citizens
- May's Withdrawal Agreement makes detailed provision for
- EUSS is to implement the negotiated withdrawal agreement.
- Also to provide for citizens' rights in the event of no deal. But the rights differ in each case.
- Misguided announcement of end of FoM abandoned as quickly as it emerged.

# The Rules

- The EU Settlement Scheme is found in the Immigration Rules in:
  - Appendix EU: EU Citizens and Family Members
  - Appendix EU: Family Permit
  - Appendix AR (EU)
- Key concepts:
  - Settled Status is simply ILR/ILE
  - Pre-Settled Status is limited LTR/LTE

# The Rules

- The key test for ILR: 5 years' continuous residence
  - Not broken by leaving UK for a period of not more than 6 months
  - Not broken by a single period of up to 12 months' absence for an important reason – such as pregnancy, childbirth, serious illness, study, vocational training, overseas posting
  - Not broken by any period of compulsory military service or of Crown service
  - It is broken by a sentence of imprisonment of any length, which sets the clock back to zero (and may give rise to rejection on suitability grounds)

# The Rules

- Applies to EU, EEA, Swiss citizens without ILR or British citizenship
- Non-EU/EEA/Swiss family members (except British citizens) must also apply
  - Parents can apply on behalf of children.
  - Applications can be linked.
- Must be made on time (before the specified date)

# When to apply

- Applications already open
- But **MUST** be made:
  - In the event of the Deal being ratified before Brexit: by 30 June 2021, in respect of arrivals up to 31 December 2020
  - In the event of a 'no deal' Brexit: by 31 December 2020, in respect of arrivals up to exit day

# The critical importance of applying

- Not merely *evidential* of a right to remain in the UK, but a substantive grant of the right to remain beyond the deadline date.
- Even for those who have previously formally acquired a right of permanent residence in EU law (under the Immigration (EEA) Regulations 2016)
- Those who have not applied by the deadline will – as the law stands – become overstayers, and are subject to removal: the hostile environment awaits.



# The Rules

- 3 requirements for applicants:
  - A valid application
  - Eligibility requirements are met for ILR, or if not, LTR
  - Not refused on grounds of suitability
- Applicants for LTR must continue to meet eligibility requirements at all times, and can then apply for ILR

# Valid application

- Made on the online form using Android (but not iPhone yet)
  - Or in paper form from gov.uk or issued individually (eg in case of Surinder Singh applications)
- With requires proof of identity and nationality
  - Valid passport or ID card (or residence card for non-EEA citizens)
  - Alternatives acceptable only where unable to produce due to circumstances beyond control or compelling practical/compassionate circumstances. See Guidance.
- Including required biometrics (photo)
  - Plus fingerprints if non-EEA citizen without existing residence card under EEA Regs

# Eligibility requirements for ILR

- The applicant is an EEA citizen/family member who
  - has ILR; or
  - has a documented right of permanent residence; or
  - has met the continuous qualifying period of 5 years beginning before the application deadline
- And in the latter two cases no supervening event has occurred:
  - More than 5 years' continuous absence from the UK and Islands
  - A deportation/exclusion order or revocation decision etc under EEA Regs

# Eligibility requirements for ILR

- Also provision for:
  - EEA citizens who have ceased activity (on retirement or incapacity, reflecting previous rights of residence under the 2016 Regs)
  - Surviving family members
  - Children under the age of 21 of relevant EEA citizens, their spouse, civil partner or durable partner, where the marriage/civil partnership/durable partnership pre-dates the specified date
  - Those with a Chen/Ibrahim/Teixeira/Zambrano right to reside and 5 years' residence
  - Surinder Singh family members with 5 years' residence

# Eligibility requirements for LTR

- All those who would qualify for ILR except for their lack of 5 years' continuous residence, provided residence is continuing at date of application, who are
  - EEA nationals
  - Family members of a relevant EEA citizen
  - A person with a derivative/Zambrano right to reside
  - A Surinder Singh family member (or child of one).  
(NB can extend to EFMs: Case C-89/17 *Banger*)

# Family members

- Spouse, civil partner, or durable partner (applicant must hold a relevant document in this capacity)
- Child under 21, or dependent child over 21, of the EEA citizen or of the spouse or civil partner
- Dependent parent of the EEA citizen or of the spouse or civil partner
- Dependent relative of the EEA citizen or of the spouse or civil partner (and the applicant holds a relevant document in this capacity which, where they are the dependent relative of the spouse or civil partner, must have been granted on the basis of an application made before 1 February 2017)

# Suitability

- An application will be refused if a deportation/exclusion order or decision to make one is in force
- An application may be refused if the SSHD is satisfied that it is proportionate to do so and
  - False or misleading information, representations or documents have been submitted, whether or not to A's knowledge, and that information is material to the decision
  - The applicant is subject to a removal decision on grounds of non-exercise or misuse of rights under Citizens' Directive

# Deportation decisions

- Distinguishes between conduct before and after the specified date
  - Any conduct after the specified date which leads to a deportation order under section 5 of the Immigration Act 1971
  - Any conduct before the specified date which meets the relevant test of being justified on grounds of public policy, public security or public health and proportionality assessment



# Pre-specified date triggers

- Proportionality assessment is *triggered* by:
- Receiving a conviction which resulted in their imprisonment in last 5 years
- Receiving a conviction which resulted in their imprisonment for 12 months or more as a result of a single offence (it must not be an aggregate sentence or consecutive sentences)
- Receiving 3 or more convictions (including non-custodial sentences) in the last 3 years unless they have lived in the UK for 5 years or more
- the applicant is in prison and the case is awaiting deportation consideration
- the applicant has entered, attempted to enter or assisted another person to enter or attempt to enter into a sham marriage
- the applicant has fraudulently obtained (or attempted to or assisted another person to do so) a right to reside in the UK under the EEA Regulations 2016 (or IE is pursuing action because of this conduct), or has been deprived of British citizenship as a result of their conduct

# Post-specified date deportation

- Either ILR or LTR can be taken away by a deportation decision
- The normal deportation rules apply (i.e. automatic provisions):
  - 4+ years' imprisonment: deportation unless very compelling circumstances
  - 1-4 years' imprisonment: deportation unless private life or family life exceptions engaged, or very compelling circumstances
  - Less than 1 year, non-persistent, no serious harm: may be deported if conducive to the public good.

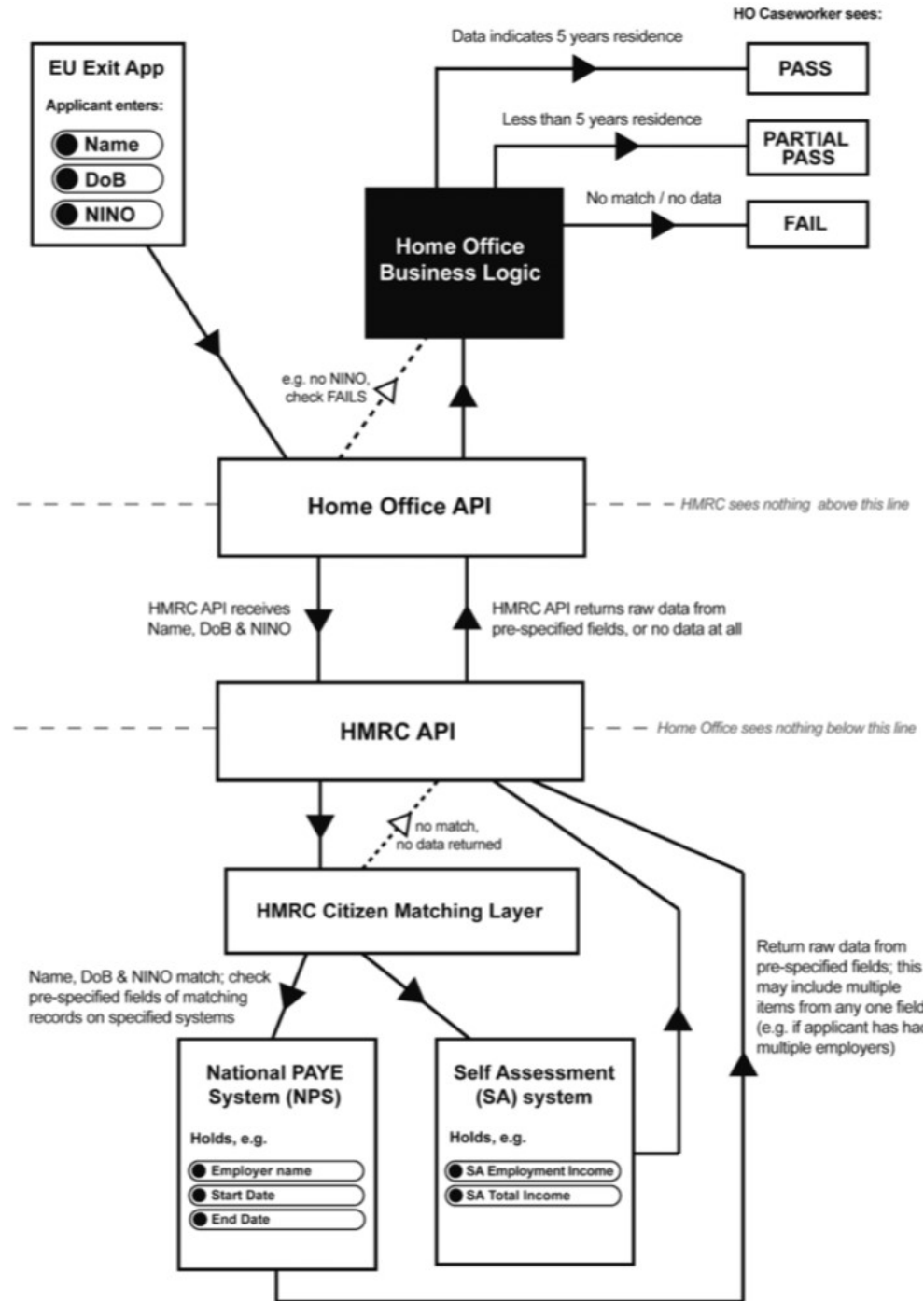
# ILR has some advantages over RPR

- ILR
- Acquired after 5 years' continuous residence
  - Lost only after 5 years' continuous absence
  - Or deportation decision is made
  - But must be applied for
- Right of Permanent Residence
  - Only gained after qualifying by exercising rights over 5 year period
  - Lost after 2 years' continuous absence
  - But better protection against deportation
  - And did not need to be applied for

# Practical matters

- Automated process
  - A practical necessity
  - Oxford Migration Observatory estimated (in 2016) that to register all EU citizens on the basis of the previous paper-based processing system, requiring an 85-page form, could take 140 years.
  - But obvious difficulties as well
- Initially may need only name, dob, NINO, passport, photo (plus evidence of family relationship)

Source:  
Public Law Project



# Practical matters

- Supplementary documentary evidence then required if HMRC/DWP records cannot in themselves demonstrate eligibility
- Opaque basis for decision-making
- Evidential difficulties – who has kept records they had to reason to expect to need?
- Cases reported in press show many individuals have considerable difficulty, especially the elderly, and disabled/sick

# Evidence of eligibility

- Home Office Guidance (*EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, v.1.0*, March 2019), Appendix A
- Preferred evidence (annual bank accounts, mortgage, employer's letter, council tax etc)
- Alternative evidence (only treated as evidence of the period they cover)
- Unacceptable evidence (references/testimonials, photos, scrapbooks)

# Results so far

- General success rates are high
  - Statistics published on 12 September 2019, up to August 2019
  - 1,339,600 applications received; 1,151,000 applications concluded
  - 62% granted settled status; 37% granted pre-settled status.
  - BUT many who expect settled status get pre-settled status
  - 0.7% other outcomes: withdrawn, invalid, void because the applicant was ineligible to apply, for example because they were a British citizen, or was refused on eligibility or suitability grounds. Only one application refused on suitability grounds in August 2019.



# Review

- Should always offer additional opportunity to submit further evidence before concluding case
- Simplest way forward is to make a new (free) application IF still in time to do so
- Means of review – administrative review (but not against a suitability decision). Cost £80 (refundable).
- Judicial review in UT – but costly. More of a credible answer in a business context. Potential for JR of algorithmically determined automated decisions!
- No right of appeal to FTT yet, nor will there be in the event of no deal (provision for a right of appeal was promised in the context of the Withdrawal Agreement only)

# Settle for less?

- Some may settle for PSS in expectation of future grant of SS. But precarious.
- Disadvantages include requirement of continuing EU qualifying status to access benefits
- Plus the risk of future rule changes post-Brexit (especially in No Deal scenario). Note that rules are Immigration Rules only: SSHD has ability to change w/o affirmative resolution in Parliament. In the event of no deal, vulnerability to change in political weather. (If a deal, constrained by terms of WA.)

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