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Guidance on implementing the overseas visitor hospital charging regulations 2015

Ways in which people can be lawfully resident in the
UK

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Guidance on implementing the overseas visitor hospital charging regulations 2015

Ways in which people can be lawfully resident in the UK

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Ways in which people can be lawfully resident in the UK

1. Entitlement to free NHS hospital treatment is principally based on Ordinary Residence (OR) in the UK. An overseas visitor is any person who is not “ordinarily resident” in the UK. A person will be “ordinarily resident” in the UK when that residence is lawful, adopted voluntarily, and for settled¹ purposes as part of the regular order of their life for the time being, whether of short or long duration. Nationals of countries outside the European Economic Area (EEA) must also have indefinite leave to remain in the UK in order to be ordinarily resident here. A person who is ordinarily resident in the UK must not be charged for NHS hospital services.
2. Decisions on ordinary residence are a matter for the relevant NHS body but in deciding whether someone is lawfully resident in the UK (in order to pass the ordinary residence test) the relevant NHS body is recommended to seek the advice of the Home Office when nationality is unknown or immigration documents are not available. The following notes provide general guidance but relevant NHS bodies should consult the Home Office guidance for detailed commentary.
3. A person may be considered ordinarily resident in the UK, and therefore outside the scope of the Charging Regulations, if he or she is living lawfully here (and the other requirements of the ordinary residence test are met). Whilst a non-EEA national subject to immigration control needs to have the immigration status of indefinite leave to remain (ILR) to be able to pass the ordinary residence test, other individuals do not need to be permanent or indefinite residents in order to be ordinarily resident here. Lawful, properly settled residence here for the time being is sufficient.
4. This document sets out some of the ways in which a person can lawfully reside in the UK.

British citizens and their family members

5. “British citizens” have an automatic right of abode in the UK. A British citizen who has been living abroad, or who is migrating to the UK for the first time, can therefore pass the ordinary residence test upon taking up settled residence here. British Citizens who are no longer living and settled in the UK cannot be said to be Ordinarily Resident in the UK.

Non-EEA family members of British citizens or settled persons

6. A non-EEA national may seek to enter or remain in the UK on the basis of their family life with a person who
 - i) is a British Citizen, or
 - ii) is “settled” in the UK.
7. To meet the definition of being “settled” in the UK from this immigration context, a person must have indefinite leave to enter or remain, which means he is free from any restriction on the

¹ The word ‘settled’ in the Ordinary Residence definition does not have the same meaning as for the purposes of UK immigration law.

period for which he may remain, and be ordinarily resident in the United Kingdom; or has permanent residence under the Immigration (European Economic Area) Regulations 2006, or is an Irish national in the UK who is treated as a settled person by virtue of the Ireland Act 1949.

8. A spouse, civil partner (or unmarried partner who has lived in a relationship akin to marriage or civil partnership for a minimum of two years) of a person who is a British citizen or settled in the UK who applies to come to live with that person in the UK, will normally be granted a period of leave to enter for up to 33 months and must apply for leave to remain no more than 28 days before their leave to enter expires. Leave to remain in the UK is normally granted for a period of no more than 30 months. Children are normally granted leave in line with the parent entering the UK. Other relatives are a separate immigration category - Adult Dependent Relatives (ADRs). ADRs who apply as the dependent of a settled person can be granted indefinite leave to remain. Therefore, they are not subject to the surcharge.

9. From 6 April 2015, unless an exemption applies or the requirement is waived, the applicant for leave to enter or remain will have to pay the surcharge to cover this period of time. The applicant will then be entitled to free NHS hospital treatment whilst their visa remains valid. Family members may be eligible to apply for ILR (settlement) after they have completed a minimum of 60 months with leave to enter or remain on the basis of family life. Those who apply for ILR are not required to pay the surcharge. If granted ILR the applicant would be able to pass the ordinary residence test. Those granted leave to enter or remain in this way prior to 6 April 2015, but without ILR, are likely to be exempt from charge under transitional arrangements (see Chapter 5 of the main guidance). This will cover both those already living here and a small number of people arriving after 6 April 2015 who applied for leave to enter or remain here before this date.

10. A non-EEA national can also be given leave to enter the UK by the Home Office to marry or become the civil partner of a British citizen or settled person. They usually have a marriage/CP visa for 6 months during which time they must marry/register the civil partnership. They will be directly chargeable during this period unless a further exemption applies. After they have married/formed a civil partnership they can apply for leave to remain as a partner and at that point would be subject to the surcharge. The Home Office will usually grant that spouse/civil partner leave to remain for 30 months, followed by a further 30 months during which time they would be entitled to free NHS treatment in the same way as a resident whilst their visa is valid, and they can apply for ILR after 60 months². Those granted leave to enter or remain as a partner in this way prior to 6 April 2015, but without ILR, will be exempt from charge under transitional arrangements (see Chapter 5 of main guidance).

11. Some visas allow a person entry to the UK to marry or become a person's civil partner, but they do not allow that person to live here. This will usually be marked as a visit visa and they must leave the UK by the end date of that visa. Such persons are therefore chargeable, unless another exemption category applies (e.g. they are covered by a reciprocal healthcare agreement).

12. In some circumstances, non-EEA national direct family members of British citizens may have EU free movement rights (see the section on EEA/Swiss nationals and their family

² Those who applied to marry/take part on a civil partnership and then settle permanently with their UK-resident family member before 9 July 2012 will be covered by transitional arrangements. Such persons were, after marrying/registering their civil partnership, usually granted entry clearance for two years (with a spouse/civil partner visa) after which they could apply for ILR.

members below), as established by the ruling of the Court of Justice of the European Union in the case of Surinder Singh (which is given effect in UK law by regulation 9 of the Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations').

13. This applies where the British citizen has moved the centre of their life to another EEA member state and exercised Treaty rights there as a worker or self-employed person before returning to the UK. Where the family member is the spouse or civil partner of the British citizen, they must have been living together in the relevant EEA state (and must have been the spouse or civil partner at the material time) before returning to the UK. If these conditions are met, the British citizen will be treated as though they are an EEA national for the purposes of the EEA Regulations, and their non-EEA family members may have a right of residence under the Regulations if the qualifying criteria in regulation 9 of the EEA Regulations are met. Such non-EEA nationals will not pay the surcharge as they are not subject to immigration control. They should be assessed as to whether they are ordinarily resident here similar to British citizens/EEA nationals.

EEA/Swiss nationals and their family members

14. EEA and Swiss nationals have an initial right to reside in the UK for three months, provided they hold a valid national identity card or passport and do not become an unreasonable burden on the social assistance system. Under Directive 2004/38/EC (the Free Movement Directive) they have an extended 'right to reside' beyond that period if they are 'exercising a Treaty right' as:

- i) a worker (see below about Croatian nationals),
- ii) a self-employed person,
- iii) a student,
- iv) a self-sufficient person, or

v) a job seeker, but only up to 91 days. (This does not apply to Croatian nationals subject to worker authorisation – see below).

15. There are certain requirements that students and self-sufficient persons (i.e. economically inactive people) need to fulfil in order to be exercising the Treaty right. See 'Sufficient Resources' and 'Comprehensive Sickness Insurance', below.

16. Once an EEA/Swiss³ national has been resident for a continuous period of five years in accordance with the EEA Regulations (i.e. he or she has been exercising Treaty rights), they acquire a right of permanent residence which can be lost through an absence from the UK of more than two consecutive years.

17. EEA nationals with a right of permanent residence are not required to exercise Treaty rights in order to have an ongoing right of residence in the UK.

18. However, it is very important to note that an EEA national who is not exercising Treaty rights and does not otherwise have a right of residence under the Directive will not automatically be considered to be in the UK unlawfully. Therefore an EEA national who is not residing in accordance with the Directive may still be considered to be ordinarily resident, provided that they meet the other requirements of that test. The relevant question to consider is if they are

³ On 1 June 2002 the Agreement between the EU and its Member States and the Swiss Confederation on the free movement of persons came into force. The Agreement confers on Swiss nationals and their family members the same free movement rights as those enjoyed by EEA nationals and their family members.

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properly settled in the UK for the time being, and not are they exercising Treaty rights, or do they have a right to reside or a permanent right to reside. Paragraphs 20-29 must be read in this context.

19. However, where the non-EEA family member of an EEA national is claiming to be lawfully resident in the UK, it will be necessary for the EEA national to be exercising Treaty rights (i.e. have a right of residence) or to have a right of permanent residence in order for that family member to meet the conditions of the ordinary residence test. For this reason it is still important to know when a person has a right to reside or permanent right to reside under the Directive. See further detail below on family members.

Croatian nationals subject to worker authorisation

20. Nationals of Croatia (which joined the EU on 1 July 2013) do not have an automatic right to work in the UK as employees. Unless they qualify under an exemption, they require permission from the Home Office before they can start working. Accession state nationals subject to worker authorisation are not entitled to reside in the UK as jobseekers and only have a right to reside as workers if they hold a valid accession worker authorisation document and are working in accordance with the conditions of that document.

21. Not all Croatian nationals are subject to worker authorisation. Those who are exempt include those who have worked without a break for 12 months in accordance with a valid accession worker authorisation document, spouses and civil partners of British citizens, and family members of EEA nationals who have a right to reside in the UK (and are not themselves subject to restrictions).

22. The restrictions on Croatian nationals do not affect Croatian nationals' rights to reside as a student or as a self-employed or self-sufficient person. Those residing on this basis will, however, become subject to worker authorisation in the event that they commence employment, although students holding a registration certificate will be exempt from worker authorisation in respect of part-time or vacation employment and employment which forms part of a vocational course of study.

23. Further information on the rights of Croatian nationals and their family members are available here: <https://www.gov.uk/croatian-national>

Sufficient resources

24. Any EEA national who wishes to exercise Treaty rights as a student or self-sufficient person must have sufficient resources to prevent themselves and their family members becoming an unreasonable burden on the social assistance system of the UK.

25. Therefore, EEA nationals residing as students or self-sufficient persons who are receiving any of the benefits below cannot generally be said to be exercising the Treaty right:

- income support,
- income-based jobseeker's allowance,
- employment support allowance (income-related),
- housing benefit,
- state pension credit,
- universal credit.

26. However, EEA nationals with a right to reside are able to claim other benefits such as child benefit. Also, EEA nationals exercising treaty rights as workers, self-employed, job

seekers and workers who are involuntarily unemployed or inactive due to illness or injury are able to claim certain income-related benefits without their right of residence being affected.

27. Whether an EEA national is an unreasonable burden on the State must be assessed on an individual basis.

28. NHS treatment is not classed as social assistance/public funds.

29. An EEA national can be self-sufficient on the basis of funds provided by someone else, for example family or friends. The funds do not have to come from the EEA national themselves, they simply need to be available to them to prevent them from becoming a burden.

Comprehensive Sickness Insurance

30. An EEA national who is residing in the UK as a student or self-sufficient person must also have “comprehensive sickness insurance” (CSI) in order to be exercising Treaty rights in those capacities. A self-sufficient person and student must also hold CSI for their family members.

31. A person would be considered as having CSI if:

- i) he or she has a comprehensive private health insurance policy, or
- ii) he or she is validly entitled, in accordance with Regulation 883/2004 EC on the coordination of social security systems, to access NHS healthcare (as in such cases the UK is able to be reimbursed for the cost of that care by the home Member State).

32. A valid European Health Insurance Card (EHIC) issued by a Member State other than the UK satisfies the CSI requirement under ii), above. Students who are insured in their home Member State and who intend to return home after their studies in the UK will usually have a valid EHIC, even if they intend to be here for several years. The registration in the UK of an S1/E106 for an EEA/Swiss pensioner who moves their residence to the UK also satisfies the CSI requirement under ii), above.

33. Remember that exercising Treaty rights or having a permanent right to reside are not necessary for an EEA national to meet the OR test and thereby be entitled to free NHS treatment. However, they are relevant in relation to whether their non-EEA family members can then be in the UK lawfully and consequently whether they can themselves meet the OR test.

Family members of EEA nationals who are exercising Treaty rights

34. A family member of an EEA national means either a ‘direct’ or an ‘extended’ family member and can be either an EEA or non-EEA national. Direct family members of EEA nationals have an automatic right of residence in the UK if they are accompanying or joining an EEA national who is exercising Treaty rights, or has a right of permanent residence.

35. Direct family members are:

- Spouse or civil partner of the EEA national
- Direct descendants of the EEA national, his spouse or his civil partner, who are under 21, or
- are dependent on the EEA national or his spouse or his civil partner
- Direct ascendants (parents/grandparents/great grandparents) of the EEA national, his spouse, or civil partner, who are dependent on the EEA national or his spouse or his civil partner.

36. For EEA nationals who are exercising Treaty rights as students in the UK only the spouse/civil partner and dependent children of either the EEA national or their spouse/civil

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partner qualify as direct family members. Direct dependent relatives in the ascending line are treated as extended family members where the EEA national is a student.

37. Non-EEA nationals who are direct family members of EEA nationals are not required to have a residence card in order to have a right of residence, although they may choose to apply for one as confirmation of their right. As long as a person can demonstrate that they are the direct family member of an EEA/Swiss national, and that that EEA/Swiss national is exercising Treaty rights (or is within the first three months of the stay or has acquired permanent residence) then the non-EEA/Swiss family member has the right to reside here. This applies regardless of the previous immigration status of the family member.

38. Extended family members are:

- Other relatives of the EEA national or their spouse or civil partner who:
- were dependent on the EEA national or a member of the EEA national's household before coming to the UK; and are dependent or a member of the EEA national's household in the UK
- on health grounds strictly require the personal care of the EEA national or their spouse or civil partner; or
- would meet the requirements under the Immigration Rules for indefinite leave to enter as the dependent relative of a British citizen or settled person; or
- the durable partner of the EEA national.

39. Being 'dependent' on the EEA national means that the family member is financially dependent on the EEA national for the majority of their essential needs. Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources. It should be noted that there is no requirement for the durable partner of an EEA national to be dependent on the EEA national.

40. Non-EEA nationals who are extended family members only have a right of residence under the EEA Regulations where they hold a valid EEA family permit or residence card issued by the Home Office under the EEA Regulations. Residence where the non-EEA extended family member is not in possession of a valid EEA family permit or residence card is not lawful residence under the EEA Regulations, and such a person cannot be ordinarily resident here.

41. As set out in paragraphs 24-29 above, if the EEA/Swiss national sponsor is exercising a Treaty right as a self-sufficient person or student they and their dependent family members must have sufficient resources of their own so that they are not a burden on the UK's social assistance system, and must also meet the relevant requirements to hold CSI.

42. The website below has more information on the rights of EEA/Swiss nationals and their families, should they wish to come to the UK to live or work <https://www.gov.uk/eea-registration-certificate> whilst this one gives details of the definition of a family member in this context: <https://www.gov.uk/apply-for-a-uk-residence-card>. This website may also be helpful: <https://www.gov.uk/government/collections/eea-swiss-nationals-and-ec-association-agreements-modernised-guidance>

'Derivative' Rights of Residence of non-EEA nationals

43. There are other circumstances, arising out of the case law of the Court of Justice of the European Union, when non-EEA nationals have a right to reside under EU law. The category of right is referred to as a 'derivative right' as they are derived from the rights enjoyed by another

person. A person who has a derivative right will be lawfully resident in the UK and may therefore pass the test for ordinary residence, provided that the other components of the test are met.

44. A person who has a derivative right of residence is not entitled to all of the benefits which flow from a right of residence arising under the Directive. In particular, those who acquire a derivative right of residence cannot rely on their status as a basis for bringing other family members to the UK under the Regulations or acquire permanent residence in the UK.

45. Relevant NHS bodies must therefore be aware of the existence of these rights when assessing if a patient is entitled to free NHS hospital treatment by virtue of being ordinarily resident here. Establishing the existence of such rights requires a factual analysis of a person's circumstances. These notes signpost relevant NHS bodies to these rights and where to obtain further information. Relevant NHS bodies can seek advice on derivative rights of residence from the Home Office. Contact details are provided at paragraph 61.

46. Persons with a derivative right of residence may choose to apply for a 'derivative residence card' in order to confirm their right, but are not obliged to do so. The derivative right of residence exists at the point that the conditions for that right are met, and a person with such a right is lawfully resident in the UK whether or not they hold a derivative residence card.

Types of derivative right

The primary carer of a EU citizen who is resident in their home member state ("Zambrano" rights)

47. The Zambrano⁴ judgment established that Member States cannot refuse a person the right to reside and work where:

- that person is the primary carer of a Union citizen who is residing in their Member State of nationality; and
- refusal of a right of residence to that primary carer would deprive the Union citizen of the substance of their rights to move and reside freely within the territory of the EU.

48. In practice, this means that the primary carer of a British citizen who is residing in the UK has a right to reside under EU law if their removal from the UK would force the British citizen to leave the EEA. The British citizen in question will usually be a child but will sometimes be a dependent adult with, for instance, a severe physical or mental disability.

49. The person claiming a Zambrano right must be the direct relative or legal guardian of the British citizen.

Direct relatives are set out in published HO guidance as:

- parents
- grandparents
- children
- grandchildren
- spouse or civil partner

50. In addition, they must show that they are the primary carer of the British citizen. For a child, this might include demonstrating that the child lives with them, or spends the majority of

⁴ Case C-34/09 Ruiz Zambrano

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the time at their abode, that they make the day to day decisions for the child, e.g. about their education and health, and that they are financially responsible for the child. In the case of an adult dependant the level of evidence of dependency will be higher than that for a child. It should be noted that a person will not be regarded as having responsibility for a person's care on the basis of a financial contribution alone. A person may also share responsibility for the British citizen's care with another person, provided that person is not exempt (an exempt person is defined in regulation 15A(6)(c) and includes a person who is already exercising free movement rights as an EEA national; a person who has a right of abode in the UK, for example a British citizen; a person who is exempt from immigration control or who is not subject to any immigration time restrictions.)

51. It is also necessary for the person claiming the Zambrano right to demonstrate that the British citizen would be forced to leave the EEA if they themselves are removed from the UK. The preference of the primary carer to remain in the UK with the British citizen, or claimed unwillingness or financial concerns of another parent or primary carer to assume caring responsibility for the British citizen are not sufficient to engage Zambrano.⁵

The primary carer of a self-sufficient EEA national child ("Chen" rights⁶)

52. A person will have this type of derivative right to reside where they are the primary carer of an EEA national and that EEA national is:

- a) under the age of 18;
- b) residing in the UK as a self-sufficient person; and
- c) would be unable to remain in the UK if the primary carer was required to leave the UK.

53. The child must be self sufficient. The primary carer must have sufficient combined resources to ensure that the primary carer and the child do not become a burden on the social assistance system of the UK during their period of residence. Equally, both must have comprehensive sickness insurance.

54. As with Zambrano carers, the primary carer must be a 'direct relative' or legal guardian of the EEA national child. Direct relative is defined in paragraph 49 above.

Person, or primary carer of a person, in general education ("Ibrahim⁷ and Teixeira⁸ rights)

55. A person will have a derivative right of residence if

- a) they are the child of an EEA national, and
- b) they resided in the UK at the time when the EEA national parent was residing in the UK as a worker, and
- c) they are currently in education in the UK and were in education here at a time when the EEA national parent was in the UK.

⁵ See Case C-256/11 Dereci and Joined Cases C-356/11 O and S and Case – C-357/11 L

⁶ Case C-200/02 Chen

⁷ Case 3-310/08 Ibrahim

⁸ Case C-480/08 Teixeira

56. If the EEA national is no longer in the UK, or is in the UK but does not have a right of residence, the child will continue to have a right of residence in order to complete their education in the UK.

57. The primary carer of a person who meets the conditions set out in the above paragraph will qualify for a right of residence where requiring that primary carer to leave the UK would prevent the child from continuing their education in the UK. As with Zambrano, A primary carer must be the 'direct relative' or legal guardian of the child (see paragraph 49 above).

Dependent children of primary carers with a derivative right of residence

58. A dependent child of a primary carer will have a derivative right of residence where his or her primary carer is entitled to any of the above mentioned derivative rights to reside. This is provided that the dependent child is under 18, does not have leave to enter or remain in the UK and where requiring the child to leave the UK would prevent the child's primary carer from residing in the UK. It should be noted that comprehensive sickness insurance and sufficient resources are not required for these dependent children.

59. The decision as to whether someone is ordinarily resident is for the relevant NHS body to make. This therefore means that NHS bodies will need to determine whether a person is "lawfully resident" as part of the 3-stage test for Ordinary Residence. However, the Home Office can offer advice and guidance on a person's status where official documents to evidence this are not available. Detailed guidance on derivative rights of residence is available on the Home Office website: <https://www.gov.uk/government/publications/derivative-rights-of-residence>

60. Relevant NHS bodies can also email the Home Office at EuropeanOperational@homeoffice.gsi.gov.uk for specific advice on how best to establish if a person has a derivative right of residence.

61. Periods of residence in the UK as a result of a derivative right to reside do not count towards the five year qualifying period for a right of permanent residence.

Other residence rights which mean that a person may be ordinarily resident here

62. Some Commonwealth nationals have an automatic right of abode in the UK the same as a British citizen and are free from immigration control. Therefore, if moving here to settle, will likely pass the OR test.

63. Those granted refugee status or humanitarian protection can reside lawfully in the UK. These individuals are exempt from having to pay the surcharge if they apply for leave to remain. They are entitled to free NHS treatment under an exemption and once they acquire ILR they will be able to pass the OR test.

64. Any other persons coming to temporarily reside in the UK under the Immigration Rules, such as those here for the purpose of refugee family reunion, or elderly dependent relatives and other dependents coming for settlement, will either pay the surcharge or be exempt from that requirement, and for that reason will be entitled to free NHS hospital treatment whilst their visas remain valid.