



Citizens' Rights Project Research Briefing

EU citizens' access to welfare benefits and pensions

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Introduction

This paper addresses a number of questions relating to the welfare benefits and pension entitlements of European Union citizens who began living in Scotland (or the UK) before the end of the transition period (31 December 2020) and who continue to live here. The Withdrawal Agreement (WA) governs the rights of this group of Union citizens. The rights of Union citizens who move to Scotland after the end of the transition period are governed by the UK-EU Trade and Co-operation Agreement, in particular the Protocol on Social Security Co-ordination, this paper does not look at the rights under the UK-EU Trade and Co-operation Agreement.

This paper is intended to provide an overview of the rules it is not intended as advice. This area of law is complex and Union citizens engaging with it should take advice on their individual circumstances.

This paper is divided into two sections. The first section looks at the rights of Union citizens to access social assistance benefits in Scotland and the related terms of title II WA. The second section looks at the rights of Union citizens to access pensions and other social security benefits in Scotland and the related terms of title III WA.

Social assistance benefits are, in general, benefits that do not require prior contributions to have been made by the individual. They are cash or in-kind benefits. They often include a means test, and they are intended to provide a



minimum level of income support for individuals and households who have low incomes. Some examples are: Universal Credit, Income Support, Jobseeker's Allowance, Housing Authority Accommodation, State Pension Credit, and Tax Credits. Eligibility of Union citizens for social assistance benefits is based on residence or immigration status, therefore, to establish the eligibility of a Union citizen for social assistance it is necessary to refer to title II WA and the UK's EU Settlement Scheme which sets out different categories of residence status for Union citizens.

Social security benefits are benefits that relate to the past contributions paid by the Union citizen whilst they were working, this includes pensions but also a number of other benefits such as certain job seekers allowances and employment support allowances. There are benefits known as "special non-contributory benefits" (SNCBs) that are treated as social security benefits for the purposes of EU law, they are for example certain disability benefits, carers benefit or family benefits. Whether a benefit is defined as social assistance or social security is determined by case law. New benefits are given a classification by the "Administrative Commission for the co-ordination of social security systems". The eligibility of Union citizens for social security benefits in Scotland, including whether their previous contributions made in another Member State may be taken into account, and whether these benefits can be paid across Member States is not made with reference to their residence status, instead it is governed by title III WA.

1. Rights of Union citizens to receive social assistance benefits in Scotland and the rest of the UK

Overall, Union citizens who fall within the scope of the WA will continue to enjoy access to social assistance benefits after the end of the transition period with the greatest access being afforded to those with settled status but there is complexity for some Union citizens depending on their residence status, as set out below.

- **Union citizens with settled status**

Can Union citizens with settled status (and their family members) access social assistance benefits?

Yes, settled status is a right to reside and it is the equivalent of indefinite leave to remain upon which “no conditions may be imposed”.¹

For example: there is no restriction to Universal Credit on the basis of this residence status. This is evidenced through the omission of settled status in the list of excluded rights of residence. (Universal Credit Regulations 2013 SI 2013/376, s9).

Remember that the other conditions relating to the benefit must also be met.

- **Union citizens with pre-settled status**

Can Union citizens with pre-settled status (and their family members) access social assistance benefits?

Yes, but there is more than one legal route and there are some qualifications.

- The Court of Appeal *Fratila* case.

¹ Adrian Berry, Garden Court Chambers, Cosmopolismigration blog, <https://cosmopolismigration.com/2020/01/27/universal-credit-means-tested-benefits-pension-credit-tax-credits-and-universal-benefits-for-eu-citizens-in-the-uk-after-brexit-under-the-withdrawal-agreement/>

The Universal Credit Regulations 2013 SI 2013/376, s9(3)(c)(1) exclude those with pre-settled status from accessing this benefit however a Court of Appeal case has found this to be directly discriminatory and has stated that those with pre-settled status are entitled to Universal Credit. The reasoning in the case was based on the application of the principle of non-discrimination found in Article 18 of the Treaty on the Functioning of the EU, (because it was decided during the transition period when EU law was in force), the principle of non-discrimination is replicated in the Article 12 WA and therefore the case will apply to benefits applications after the end of the transition period. An order to quash the original legislation was made by the Court and the order is due to come into force on the 22 February 2021. Leave to appeal to the Supreme Court was not granted. This area should nevertheless be monitored for the new legislation and for any future challenges that the government may bring.

The Court of Appeal case is **Fratila and Tanase V SSWP [2020] EWCA Civ 1741.**

For further commentary on the case see this blog from CPAG:

<https://cpag.org.uk/sites/default/files/files/resource/Fratila-advice-for-claimants-18-12-2020-v.2.pdf>

- Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020

On a separate legal basis, there is a “savings” provision in regulation 83 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 which is set out in Schedule 4. It states that those with pre-settled status who can demonstrate that they have a right to reside in terms of the old Immigration (EEA) Regulations 2016 are indefinitely entitled to access social assistance benefits.



Schedule 4 lists the following benefits (amongst others applying to different parts of the UK):

Universal Credit; Income Support; Jobseeker's Allowance; Housing Authority Accommodation; State Pension Credit; Tax Credits; Maternity and Funeral Expenses; Housing Benefit; Child Benefit; Employment and Support Allowance; Council Tax Reduction (Scotland); Housing Authority Assistance.

- **Union citizens who have not yet applied to the UK EU Settlement Scheme but who have either, a permanent right to reside, or who have not yet acquired a permanent right to reside but were legally resident before the end of the transition period.**

The **Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020**, the "Grace Period" Regulations, provides a grace period for Union citizens and their family members who were resident before the end of the transition period but who have not yet applied to the UK's EU Settlement Scheme. These regulations provide that the Immigration (EEA) Regulations 2016 continue to apply for this group of Union citizens from the period after 31 December 2020 until 30 June 2021. The effect is that if a Union citizen was entitled to social assistance before the end of the transition period under the EU free movement regime then they will continue to be. Furthermore, the regulations permit fluidity between the Union citizen's status during the grace period, meaning, for example, that a Union citizen who was originally a job seeker (with no access to social assistance) who later becomes a worker will have the social assistance rights of a worker.

Section 11 of the Grace Period Regulations lists the benefits that it relates to.

For further information see this blog by Rebecca Walker on the CPAG website:

<https://askcpag.org.uk/content/205718/ending-of-free-movement--rights-to-reside-and-benefits>



2. Rights of Union citizens to receive pensions and other social security benefits in Scotland

Below is a short summary of the pension and other social security rights including SNCBs (special non-contributory benefits) (such as many of the benefits devolved to Scotland) of Union citizens who were resident in Scotland prior to the end of the transition period which ended on 31 December 2020.

This field has not received the same amount of attention as the above rights of residence and access to social assistance of Union citizens. The law governing social security is more complex but there are a number of blogs and briefings that provide good explanations, summaries, and examples of how the rules will work. These resources are by Professor Tamara Hervey who is running an ESRC project relating to Union citizens and access to health care after Brexit, Adrian Berry of Garden Court Chambers who is a barrister practising in this field, and Dr Simon Roberts who is providing a series of blogs and briefings for SPICe. These works were referred to when producing this part of the paper and are listed at the end.

The main points to be aware of and that will be discussed in this section of the paper are:

- The social security provisions are found in title III of the WA. It states that Regulation 883/2004 continues to apply after the end of the transition period and if you fall within the scope of the Withdrawal Agreement (explained below) you have lifelong coverage (provided you remain within the scope of the Withdrawal Agreement, explained below). This means that Union citizens can still benefit from the principles in Regulation 883/2004 of equal treatment, aggregation and exportability in terms of pensions and other social security benefits (note: generally SNCBs cannot be exported).
- Who falls within the scope of title III WA is different from title II WA (residence rights). It involves considering whether a Union citizen has been “subject to” social security legislation of the UK or another Member State

before the end of the transition period and a number of other saving provisions.

CRP asked about the pension and other social security rights of Union citizens in terms of their immigration status of the Union citizen, in other words, whether they have settled or pre-settled status or prior residence but have not yet applied through the UK's EU Settlement Scheme. However because the WA does not use residence status as a means of determining whether a Union citizen is within the scope of the social security provisions therefore it is not appropriate to set out the rights according to residence status. Instead, who falls within the scope of title III WA will be explained below.

- The final point to be aware of is the question of how onward migration effects Union citizen's rights, for example can a Union citizen continue to aggregate their contributions after leaving the UK? Furthermore, once rights under the WA are lost they cannot be regained.

What happens after the end of the transition period and what is covered?

Article 31 WA provides that the EU law that governs the co-ordination of the social security, Regulation 883/2004, will continue to apply after the end of the transition period. Therefore, if a Union citizen falls within the scope of the WA then their rights and entitlements will continue unchanged including equal access (with nationals of the UK) to for example unemployment benefits, healthcare and pension entitlements, the aggregation of contributions (if relevant) from previous work in another Member State, and for certain benefits the possibility of exporting benefits to and from another Member State. Article 39 WA provides that this is for the rest of the Union citizen's life, providing they continue to meet the conditions of the WA. Furthermore, Article 36 WA provides that the UK will make the necessary legislative amendments to keep pace with any future changes in EU law regarding these matters.

A number benefits that have been devolved to Scotland are classed as social security benefits - SNCBs - and therefore a Union citizen will be eligible for those benefits if they fall within the scope of title III WA.

These Scottish benefits are: Carers Allowance Supplement; Young Carer Grant; Best Start Grant (pending classification as an SNCB); Best Start Foods (pending classification as an SNCB); Funeral Support Payment (pending classification as an SNCB); Scottish Child Payment (pending classification as an SNCB) and; Child Winter Heating Allowance. The following benefits are currently administered by the DWP but will be devolved to Scotland, they are: Disability Living Allowance; Personal Independence Payment; Attendance Allowance; Industrial Injuries Disablement Benefit; Carers Allowance; Severe Disablement Allowance; Cold Weather Payment and; Winter Fuel Payment. The following Scottish benefits have been proposed: Child Disability Payment and; Adult Disability Payment.

For further information see Roberts, *SPICe Briefing, The treatment of Scotland's devolved benefits in the Withdrawal Agreement* <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2021/2/8/97076f5b-85a4-479c-89b8-a942d7cad6c1/SB%2021-08.pdf>

To demonstrate how the social security rules work Simon Roberts gives a case study:

“Dolores, who is Spanish, has lived in Dundee for the last four years. She works locally and receives Working Tax Credit (WTC). She has ‘worker’ status under EU law. Dolores has a two year old daughter and has applied for the Early Learning Payment element of Best Start Grant. Under the principle of applicable legislation, the ‘competent state’ to provide a Special Non-Contributory Benefit is the place of residence. This means that Dolores must meet Scotland’s conditions of entitlement for Best Start Grant. The Coordinating Regulation principles of equal treatment and aggregation of periods are designed to ensure that these conditions do not affect Dolores more than they would a Scottish national. The principle of equal treatment prevents EU member countries treating EU nationals from other member

countries less favourably than their own nationals. While the principle of aggregation requires a member country, when assessing entitlement to a benefit, to take account of periods of social insurance, work or residence in other member countries as if they had been completed under its own legislation. As Dolores has ‘worker’ status under EU law she is exempt from the Habitual Residence Test but needs to satisfy the requirement to be ‘ordinarily resident’ in Scotland to be eligible for a Best Start Grant. If Dolores did not have ‘worker status’ and been in receipt of WTC, or another qualifying benefit, she would have been able to qualify for the Best Start Grant if she was aged under 18 (or 18 or 19 and dependent on someone else). If this had been the case and she had applied for the Best Start Grant before the end of the Transition period she would have needed to show that she was both ordinarily resident in Scotland and ‘Habitually Resident’ in the EEA. In selecting this test Scotland's legislators had applied the principles of Coordination to Best Start Grant: “We have chosen to apply the condition of habitual residence to the EEA rather than e.g. the CTA or Scotland, as a way of simplifying the process and to broaden the evidence base that an applicant is able to draw on to establish eligibility. This is consistent with practice across the EEA where periods of residence in one member state can often be taken into account to establish eligibility for social security in another.” (Scottish Government, 2018). Under the Withdrawal Agreement, the principles of applicable legislation, equal treatment and aggregation of periods of social insurance, work or residence continue to apply to Dolores’ claim for a Best Start Grant.

Who falls within the scope of title III WA?

The scope rules of title II WA are different from title III WA, the two titles are not related, and it is important to clarify whether a Union citizen falls within the scope of title III WA before addressing the rights that they may enjoy.

Title III WA does not use residence to determine whether a Union citizen is within the scope of the WA. The starting point, set out in Article 30 WA, is whether they have been insured, in other words, if they satisfy the conditions of entitlement to benefits under the social security legislation in the UK or another Member State.

If a person falls outwith the scope of the WA, they lose their rights and entitlements permanently; they cannot be regained. That being said, the scope rules under title III WA are relatively wide.

Adrian Berry sets out the rules as they appear in Article 30 of title III WA in his blog here: <https://cosmopolismigration.com/2019/11/17/the-withdrawal-agreement-social-security-healthcare-and-pensions-after-brexit/> and I have summarised them below as they apply to Union citizens in Scotland.

Union citizens in Scotland (and the rest of the UK) are covered where:

- The Union citizen is insured under UK legislation at the end of the transition period (this also includes the Union citizen's family members and survivors under the same terms as Regulation 883/2004);
- The Union citizen resides in the UK but is insured under the legislation of another Member State at the end of the transition period (this also includes the Union citizen's family members and survivors under the same terms as Regulation 883/2004);
- If they are not covered by the above a Union citizen is also covered if they are self-employed or employed in the UK at the end of the transition period and are insured under the legislation of another Member State (this also includes the Union citizen's family members and survivors under the same terms as Regulation 883/2004). This is intended to capture Union citizens who are in the special situations that are set out in title II of Regulation 883/2004 such as "posted workers".
- If a Union citizen is not or no longer in a situation listed above, ie involving the UK and another Member State's social security system there is a savings provision in Article 30(3) WA. It states that if such a Union citizen falls within Article 10 WA then they are also within the scope of title III WA.

Article 10 WA refers to Union citizens (and their family members) who had a right to reside in the UK under the EU free movement provisions in Directive 2004/38 before the end of the transition period and continue to reside there thereafter. It is a complex provision and there are a number of conditions, but it may bring in someone who would not otherwise be within the scope of title III WA. It is important to note here that it appears that unlike the UK's EU Settlement Scheme where presence, rather than a right to reside is sufficient to gain settled status, under Article 10 WA the Union citizen must have a *right to reside*. This would mean, for example, that for a Union citizen who has been in Scotland for several years but has been economically inactive, they will have to have had comprehensive sickness insurance before they will be regarded as having had a right to reside and qualifying under Article 10 WA.

- If a Union citizen is not or is no longer within the scope of Article 30 WA (including the cross reference to Article 10 WA) then Article 32 WA makes provision for special circumstances. It provides for Union citizens in the UK (and other categories of person eg stateless persons, refugees etc) who fulfil the conditions of Regulation (EC) No 859/2003 and who have been subject to the legislation of the UK before the end of the transition period, as well as their family members and survivors. It provides that such Union citizens are covered by title III WA for the purposes of reliance on and aggregation of periods of insurance, employment, self-employment or residence, including rights and obligations deriving from such periods in accordance with Regulation (EC) No 883/2004. Such periods can include periods completed both before and after the end of the transition period in accordance with Regulation 883/2004.

Onward movement

To be within the scope of the WA, Article 30(2) WA states that a Union citizen must continue to be in one of the qualifying situations which involves the UK and another Member State “without interruption”. Tamara Hervey notes,

“The major gaps in coverage concern ... the provision to the effect that, once lost, rights cannot be regained, effectively precluding retention of rights after ‘onward movement’”.

If a Union citizen with settled status moves away from the UK for 5 years they will lose their settled status. If a Union citizen with pre-settled status moves away from the UK for 2 years they will lose their pre-settled status. Social security legislation requires lawful residence as one part of the eligibility criteria for a benefit. Therefore, to be “subject to” the social security legislation of the UK in terms of Article 30 WA, the Union citizen must still possess settled or pre-settled status.

Hervey gives the following example,

“A UK citizen who has lived and worked in France for 6 years before the end of the transition period. Under Article 15(1) [Immigration (EEA) Regulations 2016] that person has gained permanent residence status and will continue to be a permanent resident of France unless they leave France for ‘period exceeding 5 continuous years’ (Article 15(3) [Immigration (EEA) Regulations 2016]). Therefore, if the UK citizen decides to move to a different Member State to retire, Italy for example, they would lose their permanent residence in France if they did not return to France within 5 years. In terms of the UK citizen’s pension entitlements, they are ‘subject to’ the French social security system, and, as they retain their permanent residence right in France for the first five years of moving to Italy, they therefore fall within the scope of the Withdrawal Agreement by virtue of Article 30(3) coupled with Article 10(1)(b). This means that the UK citizen will benefit from the pension benefits required by the Withdrawal Agreement, including the principle of aggregation of periods. However, it is far from clear whether the principle of exportability applies, given that the scope rules mean that the Withdrawal Agreement only applies so long as the person concerned formally continues to be resident in France (irrespective of their actual residence in Italy). What is clear is that, after five years of the UK citizen living in Italy, they will no



longer fall under the Withdrawal Agreement and their access to their pension will be solely based on French national law, not the Withdrawal Agreement.”

For further discussion and examples relating to onward movement, pensions and title III WA see:

Hervey et all, Coordination of social security under the Withdrawal Agreement
Nov 2020 <https://eurelationslaw.com/blog/coordination-of-social-security-under-the-withdrawal-agreement>

Hervey et all, Scenario Analysis: the Withdrawal Agreement Analysis of the Withdrawal Agreement concerning access to cross-border healthcare and related rights post-transition, Sep 2020

[file:///C:/Users/2107084w/Downloads/Briefing%20paper%20for%20NHS%20Confederation%20on%20access%20to%20cross%20border%20healthcare%20and%20related%20rights%20under%20the%20Withdrawal%20Agreement%20Sept%202020%20\(1\).pdf](file:///C:/Users/2107084w/Downloads/Briefing%20paper%20for%20NHS%20Confederation%20on%20access%20to%20cross%20border%20healthcare%20and%20related%20rights%20under%20the%20Withdrawal%20Agreement%20Sept%202020%20(1).pdf)

The secondary sources referred to throughout this paper are listed below.

Resources

Social Assistance - title II WA

Berry, Garden Court Chambers, Cosmopolismigration blog,
<https://cosmopolismigration.com/2020/01/27/universal-credit-means-tested-benefits-pension-credit-tax-credits-and-universal-benefits-for-eu-citizens-in-the-uk-after-brexit-under-the-withdrawal-agreement/>

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Rebecca Walker on the CPAG website:

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Social security - title III WA

Berry, *The Withdrawal Agreement: Social Security, Healthcare and Pensions after Brexit* Nov 2019 <https://cosmopolismigration.com/2019/11/17/the-withdrawal-agreement-social-security-healthcare-and-pensions-after-brexite/>

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Hervey et al, *Scenario Analysis: the Withdrawal Agreement Analysis of the Withdrawal Agreement concerning access to cross-border healthcare and related rights post-transition*, Sep 2020 [file:///C:/Users/2107084w/Downloads/Briefing%20paper%20for%20NHS%20Confederation%20on%20access%20to%20cross%20border%20healthcare%20and%20related%20rights%20under%20the%20Withdrawal%20Agreement%20Sept%202020%20\(1\).pdf](file:///C:/Users/2107084w/Downloads/Briefing%20paper%20for%20NHS%20Confederation%20on%20access%20to%20cross%20border%20healthcare%20and%20related%20rights%20under%20the%20Withdrawal%20Agreement%20Sept%202020%20(1).pdf)

Hervey et al, *ESRC project* <https://www.sheffield.ac.uk/law/news/health-governance-after-brexite-law-language-and-legitimacy>

Roberts, *SPICe Briefing, The treatment of Scotland's devolved benefits in the Withdrawal Agreement*, Dec 2020 <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2021/2/8/97076f5b-85a4-479c-89b8-a942d7cad6c1/SB%2021-08.pdf>