

Brexit protected rights: Worker and family

In order to qualify for 'home' fees under this category, all of the following criteria (a) to (d) must be met:

(a) on the *first day of the academic year* you are paying fees for, you must fall into (i) or (ii) or (iii) or (iv):

(i) a 'person with protected rights'

Read about who counts as a '*person with protected rights*' on the Definitions page (it does include people who have pre-settled status or settled status under the EU Settlement Scheme, as well as others).

or

(ii) a *relevant person of Northern Ireland* who is either employed or self-employed in the UK (but you must not be someone who goes to a residence in the EEA or Switzerland at least once a week), or their family member

Look at paragraph (b)(iii) below to see who counts as a 'family member'.

or

(iii) the holder of a frontier worker permit, who still meets the definition of a 'frontier worker' from the Frontier Workers regulations

The note below (headed 'Note, if you are a frontier worker') explains who still meets the definition of a 'frontier worker' from the Frontier Workers regulations.

or

(iv) an Irish citizen who met the definition of a 'frontier worker' from the Frontier Workers regulations at 10.59pm on 31 December 2020, and who still meets that definition. Note that to meet the definition, you don't need to have been in the UK at 10.59pm on 31 December 2020.

To meet the definition of a 'frontier worker' in the Frontier Workers regulations, it must be the case that from 10.59pm on 31 December 2020 onwards, you carry on being A, B and C:

A. an EEA or a Swiss national

and

B. 'not primarily resident in the UK'

It is easier to satisfy this requirement than you might think: It is enough if you return to your country of residence outside the UK at least once every 6 months, or twice every 12 months; and this requirement can even be ignored sometimes if there are 'exceptional reasons' for not meeting it. An alternative way of satisfying the requirement is if you are in the UK for less than 180 days in 12 months.

and

C. a worker or self-employed person in the UK (or someone who has 'retained' that status – see the note towards the bottom of this category that is headed 'Note, if you are a frontier worker', to see who will retain that status)

Confusingly, this does not mean you need to stay in the UK. You will leave the UK for periods, and will only stop meeting the definition if you fail to come back to the UK for work at least once in every rolling 12-month period (you count the rolling 12 months from the end of the period of work in 2020 that you relied on to qualify you as a frontier worker in the first place).

Important: If you do not meet B or C for coronavirus-related reasons, go to the UK Home Office's 'Frontier worker permit scheme caseworker guidance' at www.gov.uk/government/publications/frontier-worker-permit-scheme-caseworker-guidance. Look under the heading 'Coronavirus (COVID-19)'. There are a number of useful policies there, which might mean you should be treated as though you do meet B or C.

(b) on the *first day of the academic year* you are paying fees for, you must be one of the following (you can be (i) or (ii) or (iii) or (iv) or (v)):

(i) an EEA national or a Swiss national, and resident in the UK as a worker

Here UKCISA uses the term 'worker' to include employed people and self-employed people.

Student Finance Wales' Assessing Eligibility Guidance includes these comments in their description of who is covered by the term 'worker':

- "the term 'worker'...must be interpreted broadly and not restrictively"
- "a person who enters the UK with the principal intention of pursuing a course of study, but who also pursues effective and genuine employment activities in the UK, is not precluded from having the status of a worker"
- "the services performed...must have some economic value and form part of the normal labour market"
- "a person is not precluded from being classified as a 'worker' where their work is part-time...low wage...below the minimum subsistence wage...on-call...or short-term"
- "a person is not required to complete a minimum period of employment before being able to attain the status of a worker"

- “the activity performed...must...be effective and genuine, to the exclusion of activities of such a small scale as to be regarded as purely marginal and ancillary”
- “work is marginal if it is minimal, negligible or insignificant”
- “work will be ancillary if it is done pursuant to some other relationship between the person providing the services and the person receiving the benefit of those services, such as where a lodger performs a small task for his landlord”
- “Guidance has set an indicative threshold of 10 hours of paid work per week either in term time or during holidays. Where a student works 10 or more hours per week and is paid for that work under an employment contract, that is a strong indicator the student is a worker. It is important to note that where this threshold is not met, a person may still qualify as a worker”
- “consistent work for an employer over several years but only for a few hours a week, this could indicate they were a worker”
- “Self-employed persons... are in a slightly different position to other workers. It is common for self-employed workers to have periods where no work is carried out. Irregular or intermittent work will not preclude a person from being properly regarded as self-employed (or as a worker). It must be considered whether the person is experiencing a temporary lull in work or whether the change in their working patterns means that they are no longer in continuing self-employment. It would be reasonable to consider a period of at least three months without work to represent that continuous self-employment has ceased”
- “Where a person has ceased work before undertaking higher education studies, the person will be able to retain their status as a worker...provided there is a link or connection between the previous work activities performed...in the United Kingdom, and the course of study...As an exception, such a connection may not be required where the person has involuntarily become unemployed and is obliged by labour market conditions to undertake occupational retraining in another field of activity...It is not necessary however to show any link or connection where the person works at the same time as studying”

For a more detailed explanation of the Government’s view of who is defined as a worker, read the following sections in the UK Home Office’s ‘Frontier worker permit scheme caseworker guidance’ at www.gov.uk/government/publications/frontier-worker-permit-scheme-caseworker-guidance: ‘Workers’, ‘Self-employed persons’ and ‘Assessing whether the EEA citizen has retained worker or retained self-employed person status’. The section headed ‘Coronavirus (COVID-19)’ includes some special policies that might also be relevant to some people. Even though the guidance is targeted at ‘frontier workers’, it tells us who the UK Government thinks counts as a worker in general.

or

(ii) a *relevant person of Northern Ireland* who is either employed or self-employed in the *UK* (but you must not be someone who goes to a residence in the EEA or Switzerland at least once a week)

When considering whether you are employed or self-employed, similar considerations will apply as the ones explained in the note just above, about the term 'worker' (the note under (b)(i)).

or

(iii) a family member of a person described in (i) or (ii)

For this category, the 'family member' of an EEA national or a *relevant person of Northern Ireland* (Swiss nationals are different – see below) means their:

- *spouse / civil partner*
- *direct descendant* of the person, or of their spouse / civil partner, who is:
 - under 21 years old; or
 - 21 or over and a *dependant* of the person or of the person's spouse / civil partner
- the dependent direct *ascendant* of:
 - the person; or
 - the person's spouse / civil partner

For this category, the 'family member' of a Swiss national means their:

- *spouse / civil partner*
- the child of:
 - the Swiss national; or
 - the Swiss national's spouse / civil partner

Special note: Here the child can be over 21 and not dependent on anyone.

The regulations simply state that "'parent' includes a guardian, or any other person having parental responsibility for a child and any person having care of a child and 'child' is to be construed accordingly".

You can read a Government explanation of what 'parental responsibility' is at www.gov.uk/parental-rights-responsibilities. If a person is already 18 then 'parental responsibility' cannot start if it has not already been established.

or

(iv) an EEA or a Swiss national who meets the definition of a ‘frontier worker’ from the fees regulations

The definition of a ‘frontier worker’ from the fees regulations is a person who:

- is a worker or self-employed person in the UK, and
- resides in an EEA country or Switzerland and goes back to their residence there at least once a week

Note that this is a different definition from the one you saw previously, which was from the Frontier Workers regulations.

See the note under (b)(i) if you do not know whether you will count as a worker or self-employed person.

or

(v) a family member of a person described in (iv)

See the note under (b)(iii) for who counts as a ‘family member’ of an EEA national, and who counts as the ‘family member’ of a Swiss national, for this category.

(c) you must be *ordinarily resident* in the *UK* on the *first day of the first academic year of the course* (unless you are EEA or a Swiss national who meets the definition of a ‘frontier worker’ from the fees regulations, or their family member)

The definition of a ‘frontier worker’ from the fees regulations is a person who:

- is a worker or self-employed person in the UK, and
- resides in an EEA country or Switzerland and goes back to their residence there at least once a week

(d) you must have been *ordinarily resident* in the *UK / EEA / Switzerland / overseas territories* (these include Gibraltar) for the full three-year period before the *first day of the first academic year of the course*

Note: A person who makes a late application to the EU Settlement Scheme (EUSS) will have any period of residence in the UK and Islands between missing the deadline for the EUSS and making their EUSS application treated as lawful residence, even if it was unlawful. This means the residence can count as ‘ordinary residence’.

If you or a relevant family member become an EEA or Swiss migrant worker part-way through your course, you might become entitled to pay 'home' fees. You should seek advice on this from your institution, from your Students' Union, or by telephoning UKCISA's student advice line.

Note, if you are a frontier worker:

To carry on meeting the definition of a ‘frontier worker’ in the Frontier Workers regulations, it must be the case that from the date your frontier worker permit is issued onwards, you carry on being A, B and C:

A. an EEA or a Swiss national

and

B. ‘not primarily resident in the UK’

It is easier to satisfy this requirement than you might think: It is enough if you return to your country of residence outside the UK at least once every 6 months, or twice every 12 months; and this requirement can even be ignored sometimes if there are ‘exceptional reasons’ for not meeting it. An alternative way of satisfying the requirement is if you are in the UK for less than 180 days in 12 months.

and

C. a worker or self-employed person in the UK (or someone who has ‘retained’ that status - see below for who will ‘retain’ that status)

Confusingly, this does not mean you need to stay in the UK. You will leave the UK for periods, and will only stop meeting the definition if you fail to come back to the UK for work at least once in every rolling 12-month period (you count the rolling 12 months from the end of the period of work in 2020 that you relied on to qualify you for the frontier work permit in the first place).

Important: If you do not meet B or C for coronavirus-related reasons, go to the UK Home Office’s ‘Frontier worker permit scheme caseworker guidance’ at www.gov.uk/government/publications/frontier-worker-permit-scheme-caseworker-guidance. Look under the heading ‘Coronavirus (COVID-19)’. There are a number of useful policies there, which might mean you should be treated as though you do meet B or C.

If you are a frontier worker, you will ‘retain’ the status of a worker or self-employed person in the UK even if you stop work, if any single one of the following bullet points is true:

- you are temporarily unable to do the work because of illness or accident, or
- you met the definition of a ‘frontier worker’ in the UK for at least one year immediately before that, and you are involuntarily unemployed, and you are seeking employment or self-employment in the UK, and you are registered as a jobseeker with a relevant unemployment office or recruitment agency (if you fall into this bullet, you will retain your status for 6 months, but after that you will have to provide ‘compelling evidence’ that you are continuing to seek employment or self-employment in the UK if you want to retain your status longer than 6 months), or

- you met the definition of a 'frontier worker' in the UK for less than one year immediately before that, and you are involuntarily unemployed, and you are seeking employment or self-employment in the UK, and you are registered as a jobseeker with a relevant unemployment office or recruitment agency (if you fall into this bullet point, you will only retain your status for 6 months), or
- you are involuntarily unemployed, and are doing vocational training, or
- you have voluntarily stopped work, to start vocational training related to your previous work, or
- you are temporarily unable to work in the UK due to pregnancy or childbirth. If it is more than 12 months since you stopped work, then you will additionally need to show that you are seeking employment or self-employment in the UK, and you are registered as a jobseeker with a relevant unemployment office or recruitment agency. One point worth knowing is that periods on paid maternity leave don't count as being 'temporarily unable to work' – instead they count as work.