



Welfare Benefits for EU Nationals

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Praxis

Aims and Objectives

- To identify the different eligibility tests linked to immigration status for different benefits
- To increase understanding of the “right to reside” for EU migrants
- To identify potential ways forward for EU migrants who fail the right to reside test
- To increase understanding of the practical challenges facing EU migrants when proving eligibility for welfare benefits



Key concepts in Welfare & Migration

- Not all benefits have eligibility requirements linked to immigration status – e.g. many contributions based benefits do not
- For the majority of benefits, where immigration may be a factor, there are 2 key issues:
 - Are you “a person subject to immigration control”?; and
 - Are you “a person from abroad”?



“A person subject to immigration control”

- “subject to immigration control” means very different things in immigration law and welfare benefits/housing law



Immigration lawyer

Under Immigration Act 1971, anyone who requires the permission of the Home Secretary to reside in the UK is a person subject to immigration control



Welfare benefits lawyer

A person subject to immigration control is defined by s115 of the Immigration & Asylum Act 1999

S115 (9)

S115 (9) defines “a person subject to immigration control” as, a person who:

(a) requires leave to enter or remain in the United Kingdom but does not have it; or

(b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds; or

(c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or

(d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4 [a person with leave only because they are appealing a decision to refuse to vary or extend limited leave]

People not subject to immigration control

- Therefore, under s115, the following people are NOT subject to immigration control:
 - British & Irish citizens
 - Commonwealth citizens with a right of abode
 - A person who entered the UK under EEA rights before 01/01/2021 and is awaiting a decision on their application to the EUSS
 - Has pre-settled status under the EUSS
 - Has ILR (including EU Settled Status)
 - Has refugee status, Humanitarian Protection status or Discretionary Leave
 - Has any kind of Limited Leave which is NOT subject to an NRPF condition
 - Has been granted leave under the Destitution Domestic Violence Concession
 - Falls within one of the prescribed exceptions set out in the regulations

S115 Immigration & Asylum Act 1999

A person who is “subject to immigration control” is not entitled to:

- Universal Credit under Part 1 of the Welfare Reform Act 2012
- Income-based JSA under the Jobseekers Act 1995
- State Pension Credit under the State Pension Credit Act 2002
- Income-related ESA under Part 1 of the Welfare Reform Act 2007
- PIP
- Attendance Allowance
- Severe Disablement Allowance

Cont...

S115 Continued

- Carer's Allowance
- Disability Living Allowance
- Income Support
- A social fund payment
- Health in pregnancy grant
- Child Benefit
- Housing Benefit

Persons from Abroad

- If you are not deemed “ a person subject to immigration control”, many benefits (including UC and HB) have a further test, are you “a person from abroad”,
- To evidence you are not “a person from abroad” you must pass the Habitual Residence Test, which has two elements:
 - (i) do you have a “right to reside” in the UK; and
 - (ii) are you “habitually resident” in the UK?
- Some groups of people are expressly excluded from the Habitual Residence Test

Benefits which require the HRT

- Income Support
- Income-based ESA
- Income-based JSA
- Pension Credit
- Housing Benefit
- Universal Credit

Benefits with other residence tests

- Resident in the UK for last 3 months
 - Child Benefit
- “Past Presence Test” – residence for 2 out of the last 3yrs
 - Attendance Allowance
 - Disability Living Allowance
 - Personal Independence Payments
 - Carers Allowance

Right to Reside

- The “right to reside” is not defined in welfare benefits law and so is given its ordinary immigration meaning of a right of residence in the UK
- Benefits regulations expressly exclude pre-settled status as a right of residence



Actual Habitual Residence

- Second strand of the test, actual habitual residence:
 - has the person resided in the UK for “an appreciable time”; and
 - is there an intention to settle in the UK
- Case law suggests “an appreciable time” is somewhere between 1 & 3 months
- In assessing habitual residence, consideration will be given to:
 - length and continuity of residence
 - reasons for coming to the UK
 - future intentions
 - employment prospects, and
 - centre of interest

Pre-settled status – Rights to reside

Pre-settled status does not of itself give a “right to reside” for benefits purposes. You must also show another right to reside. These include:

- A worker
- A self-employed person
- A person who has retained worker/self-employment rights during temporary unemployment, sickness or maternity leave
- A retired worker/self-employed person
- The family member of an EEA worker/self employed person as above
- An EEA family member with retained rights
- The primary carer of a child in school whose parent is an EEA national who has worked in the UK

Pending EUSS application

- A person who has applied to the EUSS and is awaiting a response will be deemed to have a right to reside if they can show:
 - They had a right to reside in the UK on 31/12/2020; and
 - They can evidence 5 years residence in the UK; or
 - They can evidence another right to reside, as for a person with pre-settled status



“Genuine & effective” work

- To qualify as a worker, work must be “genuine & effective”, not “marginal & ancillary”
- If the person meets the Minimum Earnings Threshold, then the work will be considered “genuine & effective. Enough to pay class 1 NI contributions – in 2022-23 = £190 a week
- Wages assessed over a period of 3 months
- If the work does not meet the MET, other factors will be considered including whether work is regular or intermittent, length of time in employment, intended period of employment, number of hours, whether employee has a contract, entitlement to sick and holiday pay etc.
- No hard and fast criteria

Case study

- Sandra, a Spanish national with pre-settled status
- Working as bank staff in several care homes – variable hours
- In the last three months earned an average of £175 a week – less than MET
- Sandra has done this work for 18 months and has a contract with the company that owns the care homes. She usually works between 21-30 hours a week
- The last three months included a period where she could not work for 2 weeks due to Covid
- She does not get sick pay but for every six month period she works she gets an additional payment in lieu of holiday pay

Evidencing work

- Ideally – contract & payslips
- Other forms of evidence
 - HMRC SAR
 - Letter from employer confirming dates worked, hours worked, wages
 - Any evidence from other benefit applications?



Cash in hand work

- Give as much info as possible about who worked for, how long have been working, hours, pay, duties etc
- If been putting money from work regularly into the bank, submit bank statements
- If have not claimed benefits for first time as has been supporting self through employment, say so.



How long can worker/self-employed status be retained?

- If involuntarily unemployed and looking for work =
 - up to 6 months if employment was less than a year
 - up to 12 months if employment was a year or more
- If temporarily incapacitated through illness or injury = as long as the temporary incapacity lasts
- On a maternity break = up to 12 months
- A person who is involuntarily unemployed must register as a job seeker as soon as possible to retain worker status (tribunals have sometimes accepted gaps of up to 6 weeks before registration)

Case study

- Sandra is pregnant and stops working 4 weeks before her baby is due. She intends to return to work at some point after the baby is born – retains worker status for up to 12 months
- Sandra's friend, Jorge, has been working as a barrista in a coffee shop for 4 months when the shop closes down – retains worker status for up to six months
- Karl, a Polish national with pre-settled status, has been working as a cleaner for 13 months. Following a row with his supervisor, he resigns from his job – does not retain worker status as not “involuntarily” out of work

Family members

- Family members generally means spouse, durable partner, dependant child/grandchild or dependant parent/grandparent
- Will need to prove relationship & prove that relative is a “qualifying person”
- DWP have power to check HMRC & other records where necessary to check work history of a relative – will need to give as much info as possible about relative



Retained rights

Family members may in some circumstances retain a right of residence even when family connection to EEA national is broken

- Qualified person dies but family member has resided in UK for at least 1yr and is him or herself employed, self-employed or self-sufficient or having another right to reside
- Child in education in the UK where EEA national dies or departs UK
- Following divorce if qualified person is exercising treaty rights in UK at time of divorce and that the spouse is him or herself employed, self-employed or self sufficient at point of divorce if
 - prior to initiation of proceedings they had been married for at least 3yrs and in the UK for at least 1yr during the marriage's duration; or
 - the person has custody or rights of access to a child in the UK; or
 - Continued residence is warranted by 'particularly difficult circumstances' e.g. DV

Case study

- Habiba is a Bangladeshi national with pre-settled status as the wife of an Italian national citizen who also has pre-settled status. She has been in the UK for 2 years. Habiba is working in a factory when her husband is killed in a road traffic accident – retained right
- Fatima is a Somali national with pre-settled status married to a Dutch national, Abdi, who has settled status. They have two children, both with pre-settled status, the younger of whom, Shukri is a Dutch national, the elder, Hamza being a Somali national. Abdi is working in the UK. The older child, aged 7 is in school. The younger child, age 3, is in nursery. The relationship breaks down and Abdi returns to Holland – Hamza retains a right to reside, Fatima & Shukri derive rights from Hamza

Did not pass the Right to Reside test – next steps?

- Seek specialist benefits advice
- Refer to employment programme
- Check if now has 5yrs residence & refer to immigration adviser
- Eligible for social services support?



Assistance from social services

Social Services support may be available to some limited class of people who are destitute & ineligible for benefits:

- Section 17 of the Children Act 1989 – families with a child under 18
- Leaving care provisions of the Children Act 1989 – former looked after children up to age 21 (or 25 if in education/ training)
- Sections 18 or 19(1) of the Care Act 2014 – adults with care and support needs
- Section 117 of the Mental Health Act 1983 – adults being discharged from compulsory detention under the Mental Health Act 1983

Legal Challenge

SSWP v AT [2022]

Decision given 12/12/2022

- Before refusing universal credit on a right to reside ground to a claimant with pre-settled status, Secretary of State must be satisfied that refusal would not prevent them living in dignity
- The Secretary of State has applied for and been granted permission to appeal to the Court of Appeal

Who may benefit from AT?

- Pre-settled status
- Unable to work
- No sufficient/regular support from third party
- No other adequate support from Local Authority
- Actual and current risk that applicant might not have adequate resources
- Unable to meet basic needs

Destitute EU nationals with PSS can rely on EU Charter of Fundamental Rights to obtain Universal Credit | CPAG

Interpreting

From DWP standards:

“DWP is committed to ensuring effective communication with customers where English is not their first language...meeting our obligations under the Equality Act 2010. DWP staff are instructed to consider the following translation options:

- 1.A claimant's own interpreter
- 2.Local community-based interpreting services
- 3.Using staff expertise
- 4.Using Friends or Relatives

If these four options are either inappropriate or unavailable, then staff request telephone or face to face interpretation via the department's language services provider.”

Other barriers/issues

- Contact DWP Borough Relationship Managers/Partnership Managers – details to be shared
- Document issues on the Praxis Slack channel - https://join.slack.com/t/praxis-xb74081/shared_invite/zt-19csz1d5c-WB6Zl8dM~P5tzwMZrfmgDA - to be raised through GLA



Feedback

<https://www.surveymonkey.co.uk/r/W9TFKJX>

