

ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at www.ilpa.org.uk

Nicole Francis, ILPA Chief Executive Nicole.francis@ilpa.org.uk

Jonathan Kingham, Chair, ILPA EU Referendum Sub Group

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

EU Citizens' Access to Welfare Benefits: Past, Present and Future

Desmond Rutledge, Barrister, Garden Court Chambers 13 May 2016

Introduction

Since the UK joined what is now called the European Union (EU), migrant workers, who are nationals of other EU member states, and their family members, have enjoyed extensive rights of residence in the UK under EU law.

The non-discrimination provisions in EU law mean that those EU citizens who are exercising EU rights of free movement in the UK are – as a matter of principle - entitled to the same tax, housing and 'social advantages' in the UK as British citizens. It has been settled by the courts that social security benefits are part of these advantages.

The eligibility rules for EU citizens

How the rules developed over time

Until the mid-1990s, EU citizens exercising rights of free movement were entitled to receive benefits on the same basis as British citizens. Over time, UK legislative changes have been introduced that, as regarding EU citizens migrating into the UK, restrict or exclude access to mainstream welfare benefits.

In 1994, a habitual residence test was introduced for the main UK means-tested benefits. The aim of the test was to stop someone claiming welfare benefits in the UK where such a person had only recently arrived in the Common Travel Area (the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland). The test was aimed principally at EU citizens but it applied to British citizens as well.

In May 2004, the habitual residence test was altered by the addition of the requirement of a 'right to reside' as a precondition for accessing mainstream benefits. Only those EU citizens who are able to demonstrate that they have a legal right of residence in the UK, based on EU law, can access mainstream welfare benefits. This right to reside requirement is contained in

the relevant benefit regulations but it is underpinned by the provisions that regulate EU free movement in the UK: the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

Around the same time, additional restrictions were introduced for nationals from eight of the Accession States (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia (the A8 states)) that joined the EU on 30 April 2004. Nationals of these countries, who wanted to work in the UK, had to register their employment under the Worker Registration Scheme. Such restrictions lasted from 1 May 2004 until April 2011.

Similar but harsher restrictions were imposed on nationals of Romania and Bulgaria (A2 nationals) from 1 January 2007 (when their countries joined the EU) until 31 December 2013. They were only classed as 'workers' if their employment was categorised as authorised work under the Workers Authorisation Scheme (subject to certain exemptions). A similar scheme was put in place for Croatian nationals when their country joined the EU in July 2013.

Changes since 2014

More recently, further changes have been driven by the view, repeated in Government press statements, that the UK is 'vulnerable to benefit tourism' (because entitlement to certain benefits is based on residence rather than contributions based on the person's employment record), and that this acts as an 'incentive' to EU citizen migrants and to those from Eastern Europe in particular.

Against this highly-charged political background, in 2014, the Coalition Government introduced a package of measures aimed at limiting EU citizens' access to benefits as newly-arrived work-seekers. These changes also affected EU citizens who were already settled in the UK but who then become unemployed. The principle changes being:

- a statutory presumption that entitlement to income-based Jobseeker's Allowance (JSA) would end after three months for newly-arrived work seekers, and after six months for former workers now unemployed, with a limited discretion to extend entitlement to income-based JSA, but only if the EU citizen can produce evidence of an actual job offer.
- the removal of any entitlement to Housing Benefit for certain EU citizen jobseekers (who were not former workers);
- a complete exclusion from income-based JSA and benefits for children until the EU citizen has been living in the UK for a period of three months.
- the introduction of a minimum earnings threshold to help decision makers determine whether an EU citizen is or was in 'genuine and effective' work.

Universal Credit

The rules for Universal Credit (UC) have also been amended with EU citizens in mind. First, newly arrived EU citizens are barred from claiming UC as jobseekers. Secondly, anyone in self-employment will, after 12 months been deemed to be working 35 hours a week have an income equivalent of the national minimum wage rate (regardless of their actual income), if they seek to claim means-tested benefits.

Future changes to in-work benefits

In 2015, the Government turned its attention to *in-work* benefits for EU citizens as the next 'problem' that needed to be solved. Prior to the 2015 Election, David Cameron proposed that EU citizen migrants could be denied in-work benefits (e.g. tax credits) until they had been in the UK for four years. This proposal was agreed at a meeting of the European Commission in February 2016 in an effort to reach a "new settlement" for the UK. The agreement provides that access to in-work benefits can be limited to newly-arrived EU workers in the UK for up to four years in order to (take into account of the "pull factor arising" from the UK's in-work

benefits regime.

It was also agreed that child benefit paid to EU citizens in the UK, for their children living outside the UK, but in the territory of the EU, will no longer be paid at UK rates but at a rate that reflects the conditions - including the standard of living and child benefit paid - of the country where the children live. The settlement applies to 'new claims made by EU workers in the host Member State'; but after 1 January 2020, it 'may' be extended to 'existing claims already exported by EU workers'.

The main types of benefits

The main benefits that EU citizens and their families can access if they satisfy the relevant eligibility rules are:

- *Income-replacement benefits* which meet the day-to-day living costs of those who are unemployed or unable to work because they are sick. Such benefits include income-based JSA, income-related Employment and Support Allowance (ESA), Universal Credit (UC) and, in limited circumstances (e.g. as a family member of an estranged partner), Income Support (IS). These benefits are subject to a right to reside condition.
- *Additional income benefits* which deliver additional income to people *in work* and with children, such as Tax Credits and Child Benefit (CHB). These benefits are subject to a right to reside condition.
- *Extra costs benefits* which provide support to alleviate the extra costs associated with disability and housing costs, such as Housing Benefit (HB), which is subject to a right to reside condition, as well as Personal Independence Payment (PIP), Disability Living Allowance (DLA) and Carer's Allowance (CA), which are subject to a past presence test such that the claimant must be living in the UK for at least 2 years prior to making the claim.

When can EU citizens claim benefits? - a summary

Under the current rules, EU citizens are eligible or ineligible for the following benefits:

- EU citizens who are currently working in the UK in work that is 'genuine and effective' can access in-work benefits, including Working Tax Credit.
- EU citizens who are first-time work seekers in the UK are not entitled to HB, and their entitlement to income-based JSA (as well as other benefits) is limited to three months (subject to a short extension if they have a job offer).
- EU citizens who are currently registered as looking for work, who have worked in the UK and have retained their worker status through employment only are entitled to income-based JSA (and out-of-work benefits) up to a limit of six months (subject to a short extension if they have a job offer).
- EU citizens who are currently temporarily incapable of work but who have been in 'genuine and effective work', either through employment or self-employment in the UK, are entitled to income-related ESA and other out-of-work benefits
- EU citizens who are on a break from employment due to maternity may still be entitled to IS or income-based JSA for up to 52 weeks: see [Saint Prix v Secretary of State for Work and Pensions \(C-507/12\)](#).
- EU citizens who have acquired a permanent right to reside (i.e. those who have resided in the UK legally for more than five years as workers or family members of workers) can access benefits on the same basis as British citizens.

EU citizens excluded from benefits

EU citizens who become unemployed are excluded from mainstream benefits if they do not find work within three months (or for former workers six months). For those who are unable to work, e.g. due to a long-term disability or caring responsibilities, they can be denied benefits in order to prevent them from becoming an unreasonable burden on the UK's social assistance system.

Case law has confirmed that a refusal of benefit to an EU citizen in these circumstances does not require an individual assessment of the claimant's personal circumstances: see [Mirga v Secretary of State for Work and Pensions & Anor \[2016\] UKSC 1](#).

Housing Assistance

EU citizens wishing to access housing assistance (for example because they are homeless) are subject to similar eligibility rules to those EU citizens claiming welfare benefits, save that work seekers are not eligible for any housing assistance.

Conclusions

It will be apparent from the above that the eligibility rules governing EU citizens' access to welfare benefits are strongly linked to an EU citizen either being engaged in work or retaining a link to previous employment. Those EU citizens who manage to remain in work (or retain their worker status), for a continuous period of at least five years will acquire a permanent right to reside in the UK. However, many EU citizens struggle to meet the residence test because they are only able to obtain transient or casual work associated with certain industries, for example, agriculture, catering, hospitality etc. which pay minimal earnings under zero hours contracts. Further many EU citizens are unable to produce the necessary documentation needed to establish an entitlement to benefit. Against this background, talk of the UK being vulnerable to benefit tourism appears far-fetched.

Further Reading

[Measures to limit migrants' access to benefits](#), House of Commons Briefing Paper, Number 06889, 17 June 2015, by Steven Kennedy.

[Migration and welfare benefits](#), by Madeleine Sumption, William Allen, Last updated: 04 May 2015, available on <https://fullfact.org/>

[EEA nationals and the habitual residence test](#), available on the Citizens Advice website at <https://www.citizensadvice.org.uk/benefits>.

[FactCheck: Do 43 per cent of EU migrants claim benefits?](#) 10 Nov 2015, Channel 4 News, available on <http://blogs.channel4.com>

Benefits for Migrants Handbook, 6th edn, Child Poverty Action Group (Oct 2014).