EEA nationals: the 'right to reside' requirement for benefits

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People coming to the United Kingdom from European Economic Area (EEA) countries do not have unrestricted access to UK social security benefits and tax credits. Since 2004, access to most benefits for EEA nationals has depended on whether they have a 'right to reside' here. For most benefits the 'right to reside' requirement is part of the Habitual Residence Test, but for Child Benefit and Child Tax Credit the requirement needs to be satisfied for people to be treated as present in Great Britain. A separate Library standard note gives information on *The Habitual Residence Test*.

Having a 'right to reside' does not simply mean that a person can live in a particular country. Broadly speaking, a person who moves from one EEA country to another has a right to reside if they are economically active, or are able to support themselves. This applies to people from the 'old' EEA countries as well as those from the new 'accession countries'.

Until recently, most nationals of A8 accession countries were subject to the additional requirement to register with the Worker Registration Scheme (WRS) and could not access out-of-work benefits until they had been in registered employment for 12 months. EEA Member States were however only allowed to impose transitional arrangements on access to their labour markets for up to seven years, so on 1 May 2011 the WRS ended. A8 nationals are now subject to the same rules as nationals of other EEA countries, apart from Romania and Bulgaria (the A2 states). Transitional controls on access to the UK labour market remain in place for A2 nationals until December 2011, and may be extended until 2013.

In a recent judgment, the Supreme Court held that while the right to reside test was indirectly discriminatory on the basis of nationality, the discrimination was justified as a proportionate response to the legitimate aim of protecting the public purse. However, the European Commission has concluded that the test is discriminatory, contrary to EU law, and on 29 September 2011 issued a 'reasoned opinion' under EU infringement procedure. At Work and Pensions Questions on 28 November the Minister for Employment, Chris Grayling, said that the Government were "formally rejecting in the strongest possible manner" the Commission's reasoned opinion.

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1 The right to reside requirement: an overview

In May 2004 the legislation governing entitlement to certain social security benefits and housing assistance was amended so that a person cannot be 'habitually resident' unless they have the 'right to reside' in the Common Travel Area (the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland). This was in response to concerns about the impact of the 2004 enlargement of the European Union.

The benefits covered by the 'right to reside' requirement are:

- Income Support
- Income-based Jobseeker's Allowance
- Income-related Employment and Support Allowance
- Pension Credit
- Housing Benefit
- Council Tax Benefit
- Child Benefit
- Child Tax Credit
- Housing assistance from local authorities

The right to reside requirement does not apply to claims for other benefits, including extra costs benefits such as Disability Living Allowance and those where eligibility depends on National Insurance contributions such as contribution-based Jobseeker's Allowance and contributory Employment and Support Allowance. Indeed, under EC law people can use periods spent working and/or contributing in other EEA countries to help satisfy the contribution conditions for these benefits (but only if they also worked and paid contributions in the UK before making the claim). Other work-related benefits including Statutory Maternity Pay, Statutory Sick Pay and Industrial Injuries benefits are also payable regardless of immigration status or nationality.

A person has a 'right to reside' if they

- are a British Citizen or have the right of abode in the UK; or
- have leave to remain in the UK under UK Immigration rules; or
- have a right to reside under EC law

The main focus of interest has been on the test as it applies to people coming to the UK from other European Economic Area (EEA) countries.[1]

The term 'right to reside' in this context is perhaps a little confusing. Having a 'right to reside' does not simply mean that the person can live in a particular country. Not all EEA nationals

[1] The EEA comprises the EU Member States plus Iceland, Liechtenstein and Norway. Switzerland is not a member of the EEA but as a result of an agreement with the EU that came into force on 1 June 2002, Swiss nationals enjoy broadly the same rights as EEA nationals with regard to freedom of movement.

will have the 'right to reside' even though they can all exercise free movement rights whatever their personal circumstances. This is because not all migrants can move from one EEA country to another and engage in certain activities, such as claiming benefits. In other words, only certain categories of person moving within the EEA will have, under EU law, certain guaranteed rights attached to their residence in the host country. This is what is meant by EEA nationals having a 'right to reside'. It is perhaps more helpful to think of 'rights of residence', and indeed the EU Directive which sets out who has a right to reside when moving within the EEA is known as the *Rights of Residence Directive*.[2]

Broadly speaking, a person who moves from one EEA country to another has a right to reside if they are economically active, or are able to support themselves. This applies to people from the 'old' EU countries as well as those from the new 'accession countries'.

On 30 April 2006, the *Rights of Residence Directive* 2004/38/EC came into force, giving everyone, including economically inactive people, a right to reside for the first three months; but the UK Government amended the rules on access to benefits to ensure that people who have a right to reside solely on the basis of the new three-month right of residence will not satisfy the requirements.[3]

Article 7 of the Directive sets out who has 'the right of residence' after the initial three- month period. This includes:

- workers or self-employed persons in the host member state, and their families, and
- students attending institutions in the host member state and their families, provided they can support themselves

EEA nationals may also have a right to reside straight away as a work seeker, if they can show that they are looking for work and have a 'genuine chance of becoming engaged'.

All other groups only have the right of residence if they-

> have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State[4]

A 'worker' has the right of residence – and with it access to benefits and tax credits – for as long as they are in 'genuine and effective work'.[5] A worker can however retain worker status when they stop working in certain circumstances, e.g. if they are temporarily unable to work because of illness, or have been made unemployed and are looking for work.

EEA nationals who have 'resided legally' in the UK for a continuous period of five years (or less in certain circumstances) acquire a permanent right of residence and have access to benefits and tax credits on the same terms as UK nationals.

For most workers coming to the UK from one of the countries which joined the EU in 2004, until recently there were further conditions that had to be satisfied. To have a right of

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2 2004/38/EC

3 The *Social Security (Persons from Abroad) Amendment Regulations 2006* SI 2006/1026

4 Article 7(1)(b)

5 CH/3314/2005, CIS/3315/2005 paras 21-30; Case C-357/89 *Raulin* (1992) ECR 1027

residence, most workers from **A8 countries**[6] had to be in work and registered under the UK Border Agency's Worker Registration Scheme (WRS). They had the right of residence – and with it access to in-work benefits – for as long as they were in registered employment. Once an A8 national had legally worked in the UK without interruption for a period of 12 months they did not have to register with the WRS and had the same rights and access to means-tested benefits and tax credits as other EEA nationals. An A8 worker must not have been out of work for more than a total of 30 days in the 12 month period. If they had completed 12 months uninterrupted work they could only retain worker status if they claimed Jobseeker's Allowance (JSA), unless they were temporarily sick and had had an accident which temporarily prevented them working.

The Worker Registration Scheme was established under provisions in the Accession Treaty allowing the existing Member States to apply national measures regulating access to their labour markets for nationals of A8 countries for up to seven years. The period expired on 30 April 2011 and, along with all other Member States which introduced controls, the UK has no longer been able to apply national measures. The result is that A8 nationals are now able to access benefits on the same basis as other EEA nationals (apart from A2 nationals – see below). For A8 nationals who have already completed 12 months' registered work this change will make no difference, as they already have the same rights as other EEA nationals. Those who were in work and registered under the WRS at 30 April 2011 will however no longer need to have worked for 12 months in order to access out-of-work benefits. A8 nationals who have not previously worked in the UK are also now able to register with Jobcentre Plus on arrival as a job seeker and, provided they meet the same requirements imposed on UK nationals, should be able to claim income-based Jobseeker's Allowance (giving entitlement to Housing Benefit and Council Tax Benefit) and, if relevant, Child Benefit and Child Tax Credit.

The **A2 countries** – Bulgaria and Romania – joined the EU in January 2007. A2 Nationals were not covered by the Worker Registration Scheme. However, A2 nationals wishing to work in the UK must, except where they are exempt from the requirement, obtain a 'worker authorisation document' before they commence employment in the UK. To have a right to reside as a worker, an A2 national who is subject to worker authorisation must have a worker authorisation document and be working in accordance with the relevant conditions. An A2 national who has worked legally in the UK without interruption for a period of 12 months is exempt from worker authorisation and has the same rights and access to benefits and tax credits as other EEA nationals. For practical purposes therefore, the rules closely mirror those which previously applied to A8 nationals.

2 EEA nationals with a 'right to reside' for benefits purposes

The right to reside in the UK for EEA nationals is governed by the *Immigration (European Economic Area) Regulations 2006*[7], which transposed Directive 2004/38/EC on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States. Under the 2006 regulations, EEA nationals who are exercising their treaty rights are 'qualified persons' if they fall within one of five categories:

- Jobseekers

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6 The 'A8' comprises the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia

7 SI 2006/1003

- Workers
- Self-employed persons
- Self-sufficient persons
- Students

A 'qualified person' has a right to reside in the UK. The regulations also provide that a person can acquire the right to reside permanently in the UK after a certain period.

A family member of a qualified person, or of a person who has a permanent right of residence, also has a right to reside. For these purposes, 'family' has a broader meaning than normally applies under UK social security legislation.

More detailed information is given below. This is not however intended to be a detailed statement of the law in this area, which can be very complex. Whether or not a person has a right to reside can depend on a number of factors including their nationality, immigration status, when they first came to the UK, and their individual or family circumstances. Furthermore, the case law on the 'right to reside' is however constantly evolving to clarify situations where someone from an EEA country may be able to claim benefits in the UK. Anyone seeking advice on how the provisions apply to particular individuals should seek professional advice.

Section 4 of this note lists sources of further information on the right to reside requirement.

1.1 Jobseekers

EEA nationals have a right to reside as a jobseeker if they are looking for work and have a genuine chance of being engaged. Family members of jobseekers also have a right to reside. To have a right to reside as a jobseeker a person needs to be registered with Jobcentre Plus and signing on as available for and seeking work. A person with a right to reside as a jobseeker may claim income-based JSA (which can give entitlement to Housing Benefit and Council Tax Benefit), Child Benefit and Child Tax Credit. Jobseekers may <u>not</u> however claim Income Support, income-related Employment and Support Allowance, or Pension Credit; nor can those with a right to reside as a jobseeker get housing or homelessness assistance from a local authority.

It is important to note that, unlike workers, self-employed persons and persons with a permanent right of residence, those with a right to reside as a jobseeker are <u>not</u> exempt from the main Habitual Residence Test and will also need to satisfy this requirement in order to claim income-based JSA (and with it HB and CTB).[8]

A8 nationals who were required to register their work under the Worker Registration Scheme could not have a right reside as a jobseeker, but with the end of the WRS this restriction no longer applies. A2 nationals subject to worker authorisation cannot have a right to reside as a jobseeker.

1.2 Workers

'Workers' – and their family members – have a right to reside and are exempt from the main Habitual Residence Test. A worker has a right to reside for as long as they are in 'genuine

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8 See the separate Library standard note, *The Habitual Residence Test*

and effective work'. This means work which is not on such a small scale as to be 'marginal and ancillary'.[9]

A person remains a 'worker' for as long as they as they are under a contract of employment, even if they are currently on leave. So, for example, a woman who established worker status does not cease to be a worker if they are not working because of pregnancy or childbirth, if they are on maternity leave (whether paid or unpaid). This applies to all EEA nationals, including those from A2 countries.

A worker can also retain worker status when they stop working if:

- they are temporarily unable to work due to illness or accident **or**
- they are in duly recorded involuntary unemployment after having been employed in the UK, as long as they have registered as a jobseeker with the relevant employment office **and**
    - they were employed for a year or more before becoming unemployed
    - they have been unemployed for no more than six months **or**
    - they can provide evidence that they are seeking employment in the UK and have a genuine chance of being engaged **or**
- they are involuntarily unemployed and have started vocational training **or**
- they have voluntarily stopped working and have started vocational training which is related to their last employment[10]

In addition, a person has a right to reside as a primary carer of a child receiving education, if one of the parents of the child was a worker.[11] 'Education' for these purposes does not include nursery education. A right to reside as a primary carer end normally ends when the child reaches 18[12], but can continue beyond that age if the young person requires the presence and care of that parent in order to be able to complete their education.

Before 1 May 2011, A8 nationals subject to worker registration could not retain worker status on stopping work if they had not completed 12 months' continuous registered work. However, this restriction no longer applies.

A2 nationals still subject to worker authorisation cannot retain worker status if they stop working.

1.3 Self-employed persons

Self-employed people, and their family members, have a right to reside and are exempt from the main Habitual Residence Test. There are no additional rules which self-employed A8 or A2 nationals need to satisfy; they have the same rights of residence as self-employed people from all other EEA states.

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9 CH/3314/2005, CIS/3315/2005 paras 21-30; Case C-357/89 *Raulin* (1992) ECR 1027

10 Regulation 6 *The Immigration (European Economic Area) Regulations 2006*; SI 2006/1003

11 See DWP Memo DMG 30/10 revised, *Right to reside – parent and primary carer of child in education*, December 2010

12 But for a dissenting view of what the appropriate age threshold should be, see CPAG, *Benefits for migrants handbook*, 5th edition, 2011, pp243-244

As with workers, a person needs to be doing 'genuine and effective work', but a person can be accepted as self-employed straight away if they are in the process of establishing themselves in self employment.

Those temporarily unable to work because of illness or an accident retain their self-employed status and, as is the case with worker, self-employed people do not lose their status during maternity leave. The Courts have held that a former self-employed person who is now registered with Jobcentre Plus and looking for work cannot retain their self-employed status, but welfare rights advisers believe that this could be the subject of further challenges.[13] In the meantime, EEA nationals who were formerly self-employed may have a right to reside as a jobseeker (see 2.1 above), but this will not be possible for A2 nationals who have not completed 12 months' authorised work.

1.4 Students and 'self-sufficient' people

EEA nationals who are students have a right to reside if they:

- are enrolled in an accredited college;
- have comprehensive sickness insurance cover in the UK; and
- can provide an assurance that they (and their family) have sufficient resources not to become a burden on the UK social assistance system during their period of residence

People who do not have a right to reside under any other category can also have a right to reside as a 'self-sufficient person' if they can satisfy the last two bullet points.

Directive 2004/38/EC prevents Member States from setting a fixed amount to be regarded as 'sufficient resources' for these purposes, stipulating that the personal situation of the person should be taken into account. The UK authorities may take the view that a person has sufficient resources if they have an income in excess of their 'applicable amount' for means-tested benefits including the Housing and Council Tax Benefit they would qualify for, but welfare rights groups have questioned if this is consistent with European case law.[14]

1.5 Permanent residents

EEA nationals and their family members who have acquired the right to reside permanently in the UK satisfy the right to reside requirement. EEA nationals can acquire permanent residence if they have 'resided legally' in the UK for a period of five years. It is possible to apply to the UK Border Agency for confirmation of permanent residence status. The UKBA website gives information on how to apply for a registration certificate (for proof of right of residence) or permanent residence confirmation, and has links to the application forms, guidance notes and UKBA caseworkers' instructions.

A person can lose their permanent right of residence of they are absent from the UK for two consecutive years.

Some EEA nationals can acquire permanent residence before five years have elapsed. This includes:

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[13] See for example Martin Williams, 'Right to reside and self-employment: a review', *Welfare Rights Bulletin* 2220, February 2011, pp8-10

[14] CPAG, *Benefits and migration handbook*, 5th edition, 2011, pp235-236

- Workers and self-employed persons who reach state pension age or take early retirement, if they worked in the UK for at least 12 months, and resided in the UK continuously for more than three years, before stopping;

- Workers and self-employed persons who stopped working in the UK because of permanent incapacity, if they had resided in the UK for at least two years or, if regardless of their length of residence if the incapacity was the result of an accident at work or occupational disease; and

- Family members who were residing with a worker or self-employed person immediately before they died, if the worker or self-employed person had resided in the UK for two years immediately before they died, or regardless of their length of residence if the death was caused by an accident at work or occupational disease.

1.6 Family members

A person who is a 'family member' of an EEA national with a right to reside also has a right to reside. This applies whether or not they themselves are EEA nationals.

Family members include spouses and civil partners; and children (or grandchildren or great-grandchildren) under 21, or older if dependent. It also includes dependent relatives in the ascendant, i.e. parents, grandparents and great-grandparents.

Rights may also be given to 'extended family members'. This may include partners with whom the EEA national has a 'durable relationship'; other relatives who are dependants or members of the person's household; and relatives requiring personal care from the EEA national on serious health grounds. An 'extended family member' must have been recognised as such by the UK Border Agency and have been issued with the necessary documentation.

A family member does not necessarily lose their right to reside on that basis when they cease to belong to one of the categories outlined above. For example, a former spouse or civil partner can retain their right to reside if, before the termination, the marriage or civil partnership had lasted for at least three years with both partners residing in the UK for at least one year; or he or she has custody of their child(ren) or a right of access to the child(ren) in the UK only; or if a continued right of residence is warranted by particularly difficult circumstances (e.g. he or she was a victim of domestic violence during the marriage or civil partnership).

3 Ending of the Worker Registration Scheme

On 10 March 2011 the Home Office issued a Written Ministerial Statement announcing that the Home Secretary had laid before Parliament regulations to revoke provisions relating to the Worker Registration Scheme for A8 nationals:

Worker Registration Scheme

> The Minister for Immigration (Damian Green): My right hon. Friend the Home Secretary is today laying before Parliament regulations which will have the effect of closing, on 30 April 2011, the worker registration scheme for workers from those member states from eastern Europe that joined the EU on 1 May 2004. This means that after 30 April 2011 nationals of those countries will no longer be subject to a requirement to register

> their employment as a condition of working legally in the United Kingdom and will be able to work and reside in the United Kingdom on the same basis as nationals from other EU member states.
>
> The worker registration scheme is being closed because the terms of the treaty of accession mean that the United Kingdom cannot apply restrictions on access to the labour market to nationals of those member states for more than seven years from the date of accession. Those other EU member states-that is, Germany and Austria-that have maintained such restrictions to date will also be required to lift them.
>
> The Government intend to apply transitional controls on labour market access, in accordance with the relevant accession treaty, to nationals of any country joining the EU in the future. This is part of the Government's commitment to reducing net migration to the tens of thousands, alongside the steps that the Government are taking to reduce immigration from outside the EU, including new limits on numbers of workers admitted under tiers 1 and 2 of the points-based system and reforms to other routes of entry including students, families and marriage. Economic migration routes will remain closed to lower-skilled migrants from outside the EU while UK and EU labour continues to be available to meet labour needs at this level.
>
> The UK Border Agency will be publishing guidance on its website for workers from the relevant accession member states and for employers, clarifying their responsibilities in relation to compliance with the worker registration scheme until its closure on 30 April.[15]

The relevant regulations are *The Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011*[16]*.* An accompanying *Explanatory Memorandum* was also published.

The ending of the Worker Registration Scheme received extensive coverage in the press, with some reports suggesting that more than 100,000 Easter European migrants would be able to claim benefits as a result of the changes.[17]

In its 26th report published on 22 March, the House of Lords Merits of Statutory Instruments Committee drew special attention to the regulations ending the WRS on the grounds that they gave rise to 'issues of public policy likely to be of interest to the House.'[18] While noting that DWP's assurance that rules were in place to prevent abuses and that it had an expert team of staff to scrutinise claims from A8 nationals, the Committee said it was 'less than satisfactory' that the Department was still working to estimate the full potential costs of the end of the WRS, given that it had had seven years to plan for the change. The Committee observed:

> 4. The termination of the WRS has received significant media coverage, some of which has alluded to the fact that this will give migrants from the eight countries greater access to the UK benefits system. In response to questions from the Committee, the Department for Work and Pensions ("DWP") has provided further information on this issue via the UKBA (see Appendix 1). The DWP say that from 1 May 2011, nationals from the eight countries will have the same access to the UK benefit system as nationals of other, longer established EEA nationals. This includes eligibility for

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15 HC Deb 10 March 2011 c78-79WMS

16 SI 2011/544

17 See for example 'Migrants free to claim full benefits', *The Times*, 3 March 2011; 'MIGRANTS FLOOD BACK TO BRITAIN: 100,000 more can claim our benefits from next week; New benefit rules will mean migrants never want to leave', *Daily Express*, 25 April 2011

18 HL 122 2010-11

> income-based Jobseeker's Allowance if an EEA national has 'worker status' and stops working.
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> 5. However, the DWP say there are rules in place to prevent abuse; and migrants, including EEA nationals, can generally only access income-related benefits if they have a right to reside here and are habitually resident. The DWP add that in order to maintain a tight control of claims from nationals of the eight countries, there is an expert team in Jobcentre Plus in Wick, Scotland which scrutinises the quality and consistency of decision making. The DWP also note that the Government will be keeping the rules around the payment of benefits to people from abroad under review.
>
> 6. The Committee would have expected to see more evidence that departments had collectively assessed the full impacts of the change across Government. Given the interest in the impact on the benefits system, it is disappointing that the EM did not include any information on the possible consequences for the system from the termination of the WRS. The DWP said in their response to the Committee that in the year to December 2010, 11,909 claims for income-based Job Seeker's Allowance from nationals of the eight countries were refused, which may have succeeded with the ending of the WRS and the transitional arrangements under the Accession Treaty. However, the DWP has not provided any estimates of the resulting costs, saying that work on the potential costs following the end to the WRS is continuing. This is particularly disappointing as the UK has had seven years to prepare for the end of the national measures restricting the labour market, and the House may consider that it is entitled to be better sighted in this regard.

The Department's Memorandum for the Committee sets out in greater detail the implications of the changes and the procedures in place to deal with them.

On 26 April 2011 the House of Lords debated a motion tabled by Lord Hunt of King's Heath-

> ...To resolve that this House regrets the lack of detailed information contained in the explanatory memorandum on the Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011.

Lord Hunt noted the issues highlighted by the Merits Committee, adding:

> This debate is an opportunity, first, to encourage the noble Baroness's department to be more forthcoming in its impact assessments in future. Secondly, I hope that the noble Baroness will update us and the House on whether the DWP has made any further progress in its work in analysing the potential costs following the end of the worker registration scheme.[19]

Baroness Hamwee asked about estimates of the numbers affected:

> The noble Lord referred to the 11,000-it may be almost 12,000-claims rejected in the past calendar year which apparently would have succeeded with the ending of the transitional arrangements. How confident are the Government that those figures are close to being accurate? How will they seek to verify them? Newspaper articles use the figure of more than 100,000 migrants. If I were to ask the Minister whether she knows where the newspapers got the figure of 100,000 from, that would probably be an unfair question, because we all know that newspapers are not necessarily the most accurate reporters.[20]

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[19] HL Deb 26 April 2011 c82
[20] HL Deb 26 April 2011 c83

For the Government, the Home Office Minister Baroness Neville-Jones said that the Government had not set out to 'deny Parliament legitimate information' but had been cautious because of the high degree of uncertainty about both the future pattern of migration and about the consequences of the changes for the benefits budget. She continued:

> However, there are some points that can usefully be made. First, there is the position of A8 nationals who are already here. One effect of the worker registration scheme has been that those entering the UK labour market have generally been prevented from having immediate access to out-of-work benefits if they are seeking work or become unemployed. It is also reasonable to assume that a substantial proportion of those who have arrived since 2004 were already no longer subject to the restrictions because once they have worked here legally for more than 12 months they are no longer subject to the WRS.
>
> The number of A8 workers who have registered under the WRS since May 2004 is approximately 1.1 million. The WRS does not record how many of those who have registered have subsequently left the UK, but statistics from the Labour Force Survey suggest that the number of A8 nationals in employment in the UK in the three months to the end of 2010 was 615,000. It can be assumed that a fraction of that number, but we do not know how many, are A8 workers who have already worked legally and continuously in the UK for more than 12 months and so are not subject to the WRS and therefore the termination makes no difference to their status.
>
> What is more difficult to predict is the extent to which we may experience more or less migration from A8 countries after 30 April 2011. While the Labour Force Survey provides us with some information on the stock of A8 migrants to the UK, it does not tell us about flows over time. The general trend indicated by the International Passenger Survey estimate of long-term migration from A8 countries, which was published by the Office for National Statistics last year, is that immigration levels steadily fell during 2008 and 2009 and then levelled off while numbers of A8 nationals emigrating from the UK rose sharply in 2008 before exits fell off. The result is that net migration from A8 countries appears to have been positive, but not particularly strongly, over the past year.
>
> What is likely to be the position in the future? The position after 30 April may reinforce the trend, but we simply do not know. There are a number of reasons for that. We do not know about perceptions abroad of job prospects in the UK, and we do know that, as has been demonstrated by authorities such as the World Bank, on the whole migrants come here for employment, not for benefits. We do not know about job prospects in the UK or, more importantly, the effect of other countries now having to lift their very restrictive provisions relating to A8 migrants. As we know, they all have to lift them, and some of the countries that had the greatest restrictions are geographically pretty close to A8 countries. I would particularly name Germany. Germany will no longer be able to maintain its restrictions on labour market access, and A8 migrants who might otherwise come to the UK may now chose to go there. That is a material consideration. The changed position may also influence the emigration decisions of those already here. The relative availability of work could be a factor, as could relative exchange rates. If you think through the implications of those things, employment in the German market probably looks quite attractive.
>
> There will be some who have no intention of seeking work, and they may indeed, and this is one of the worries, try to exploit the changed position in terms of access to benefits. It is not on the whole the analysis of why people come here, but it is a danger. That is why we have rules in place to prevent the abuse of the benefits system and to prevent benefits tourism.

We are committed to maintaining the security and integrity of the benefits system to ensure that tax payers' money is spent appropriately. Claimants can access income-related benefits only if they have a right to reside here and are habitually resident.

How far the lifting of the worker registration scheme will affect the benefits system is a complex question. I want to spell out why it is. This is unashamedly complex so I beg your Lordships' indulgence in listening carefully. It is difficult to arrive at a reliable estimate. We are unwilling to mislead by supplying estimates that are falsified by outcomes. In order to produce a reliable forecast for the cost to the benefit system after 1 May 2011, the Government would need to have forecasts of migration on which they can rely. I have just pointed out why there are some real difficulties with that.

As to actual costs-this is where it gets complex-the DWP does not generally record the nationality of those to whom benefits are paid. Indeed, there is a data protection limitation on so doing, which arose when HMRC was recording nationality and a number of welfare groups protested about the irrelevance of that criterion for access to benefits. HMRC and DWP accepted that position and nationality is no longer recorded. However, we are not entirely without information about nationality because the way that claims are assessed means that note is taken at the point of application-for clerical purposes only, not for administration and therefore not subsequently recorded-in order to get the claims into the right channel. That channel goes to the office in Wick, which deals with the claims from A8 and A2 countries. It is also partly for the purposes of ensuring that these claims are proper ones. As a result of the numbers being collected in that way, it is possible to have some information regarding nationality.

Figures have also been published by the Home Office in its quarterly Control of Immigration statistics. My noble friend asked whether we could rely on the figure of 11,000 plus. That is a factual figure. It is not an estimate. Let me say straight away that the figure of 100,000 is one we do not recognise and do not know where it has come from. It seems to have been conjured out of the air. We do not believe that it represents anything like the likely outcome, but we have been very cautious about making statements which are going to be falsified about what the future trend is likely to be.

From the number of claims disallowed in the past year, it might be argued that it is possible to produce an estimate of the cost to the benefit system of closing the WRS. If you take that estimate, the additional cost would have been about £30 million, which represents about 0.1 per cent of total expenditure on the benefits concerned. The reason that we are very reluctant to use that figure is that it is a figure that relates to the past. It is a retrospective figure. For the reasons I have tried to set out, relating to our ignorance about the likely flow of migrants and our inability to know exactly how many of those would be claimants, we are very reluctant to base any projection on those figures. It is for those reasons-and not for any unwillingness to inform either House of the likely outcome-that the DWP was so cautious and why the Home Office thought that it was right to be cautious.

My final point is that EEA nationals who are neither in work nor seeking work are generally not entitled to income-related benefits. They have to be self-sufficient while they remain in the UK, and they must have sufficient resources to support themselves and their family members to avoid being a burden on the state. That is another reason why, on the whole, we do not believe that the impact will be all that great. In short, the picture is complex, which means that any assessment of the impact of A8 migration after 30 April is likely to be speculative and could well be unhelpful.[21]

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[21] HC Deb 26 April 2011 cc84-86

4 The right to reside test: compatibility with EU law

4.1 The Patmalniece case

There is a substantial body of case law on the right to reside requirement, but the most significant to date is perhaps the Supreme Court's judgment in March 2011 in the *Patmalniece* case.[22] This involved a Latvian national – Galina Patmalniece – now aged 72 and in receipt of a Latvian retirement pension. She first came to the UK in June 2000 (i.e. nearly four years before Latvia joined the EU), and made an unsuccessful claim for asylum but was not subsequently removed. In 2005 Mrs Patmalniece – who had never worked since coming to the UK – made a claim for Pension Credit but was refused on the grounds that she did not have a right to reside in the UK. She appealed the decision, arguing that the right to reside requirement was directly discriminatory on the grounds of nationality, contrary to Article 3 of EC Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community. Article 3(1) provided that:

> Subject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.

EC Regulation 1408/71 has since been replaced by EC Regulation 883/2004, and the corresponding provision is now in Article 4 of that Regulation.

The case ultimately reached the Supreme Court, which delivered its judgment on 16 March 2011. The Court rejected unanimously the argument that the right to reside test for Pension Credit constituted direct discrimination on the basis of nationality, but accepted that it *indirectly* discriminated against EU nationals. By a majority of four to one (Lord Walker dissenting), the Supreme Court held however that the discrimination was justified as a proportionate response to the legitimate aim of protecting the public purse, and that this justification was independent of the claimant's nationality.

The full judgment can be found at the Supreme Court website, along with a shorter press summary. A commentary on the case has also been produced by the AIRE (Advice on Individual Rights in Europe) Centre.

The finding of indirect as opposed to direct discrimination is important since, under EU law, the latter cannot be justified in any circumstances. Direct discrimination occurs where someone is treated differently because of their nationality, whereas indirect discrimination occurs where apparently neutral criteria put non-nationals at a particular disadvantage compared with nationals of the Member State in question. The Court held that the right to reside requirement for Pension Credit constituted indirect discrimination because it was only part of the wider Habitual Residence Test, which UK nationals may or may not satisfy.[23] While all UK (and Irish) nationals would automatically satisfy the right to reside requirement for Pension Credit, they might not satisfy the other requirements of the Habitual Residence Test and could therefore still be denied benefit.

The right to reside requirement is part of the wider Habitual Residence Test for Pension Credit and other means-tested benefits. However, for Child Benefit and Child Tax Credit, the Habitual Residence Test does not apply; instead, a person who does not have a right to reside is treated as not being in Great Britain and is ineligible for benefit on those grounds. It

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22 *Patmalniece (FC) (Appellant) v Secretary of State for Work and Pensions (Respondent)* [2011] UKSC 11

23 See Library standard note SN00416, *The Habitual Residence Test*

has been argued that, in light of the Supreme Court's reasoning in *Patmalniece*, the right to reside test cannot apply to Child Benefit or Child Tax Credit. Since all UK (and Irish) nationals automatically satisfy the right to reside requirement and can receive Child Benefit and Child Tax credit without having to satisfy any additional requirements, it is argued that the right to reside test in this context constitutes direct discrimination on grounds of nationality, and is therefore unlawful.[24]

In considering whether the indirect discrimination was justified, the Supreme Court looked at whether the right to reside requirement met the twin tests of being based on objective considerations independent of nationality, and proportionate to a legitimate aim. The Court held – by a majority of four to one – that both tests were satisfied. In his judgment, Lord Hope, referring to statements by the Government when the right to reside requirement was originally proposed, and at the wording of the regulations themselves and their effect, said:

> They show that the Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit, or social tourism by persons who are not economically or socially integrated with this country. This is not because of their nationality or because of where they have come from. It is because of the principle that only those who are economical or socially integrated with the host Member State should have access to its social assistance system. The principle, which I take from the decision in *Trojani*, is that it is open to Member States to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality.[25]

A recent commentary on *Patmalniece* comments that "in no previous right to reside case has the DWP ever suggested that anything other than a positive right to reside as of the date of claim would suffice" and that the judgment could be taken to mean that people who are "socially and economically integrated" might be able to claim social assistance benefits without having to demonstrate a "right to reside" at the time of the claim. However, the article adds that until further clarification is provided by the courts, the full implications of the Supreme Court's reasoning remain unclear.[26]

4.2 European Commission infringement proceedings

In 2010 the European Commission announced its intention to initiate infringement proceedings against the United Kingdom concerning the right to reside test. A "Letter of Formal Notice" – the first step in possible infringement proceedings – was sent to the UK Government. The letter itself was not put in the public domain, but the basis of the Commission's case was set out in a response of 2 September 2010 by the Commission to a petition received by the European Parliament Committee on Petitions from a Polish national regarding the refusal of his claim for Jobseeker's Allowance. The Commission's response said that a Letter of Formal Notice would be sent to the UK authorities "soon":

> In 2004, the UK introduced an eligibility condition for the entitlement to certain social benefits that a claimant has to be habitually residing in the UK. This requires as a precondition to first have a right to reside in the UK (Right to Reside Test). The conditions for the residence right in the UK legislation are transposed from Directive

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[24] For further details see Graham Tegg, 'Right to reside: the aftermath of Patmalniece', *Welfare Rights Bulletin 223*, August 2011

[25] Paragraph 52

[26] Graham Tegg, 'Right to reside: the aftermath of Patmalniece', *Welfare Rights Bulletin 223*, August 2011

2004/38. The underlying purpose of the introduction of the RRT was to protect the UK's social system from exploitation by those who do not wish to come to work but to live off benefits.

The practical result of the RRT is that when a person applies for one of the benefits concerned, it is examined by the UK authorities for the purpose of determining the right to these benefits whether he or she has a right to reside in the UK. While the UK nationals always meet this requirement, the nationals of other EU countries are tested as to whether they satisfy conditions for the residence right derived from Directive 2004/38.

The social benefits in question come within the scope of Regulation 1408/71 which guarantees in Article 3 equal treatment between own nationals and persons from other EU countries and prevents both direct and indirect discrimination. As regards the hierarchy of norms (Regulation 1408/71 and Directive 2004/38), in view of its direct legal effect the Regulation takes precedence and Member States cannot use their national implementation of the Directive to impair Union rights which are directly applicable by virtue of the Regulation. In particular, where citizens are entitled to social security/healthcare on the basis of residence under Regulation 1408/71, residence should be assessed within the meaning of this Regulation. Such rights cannot be restricted on the basis of the more restrictive residence conditions emanating from the Directive.

By applying the Right to Reside Test, the UK legislation makes the access to certain social security benefits more difficult for other EU nationals than it is for the UK nationals who pass this test automatically. Other EU nationals are thereby being discriminated and treated unequally as regards their access to the social security benefits.

Conclusion

The Commission has recently opened an infringement procedure against the UK concerning the application of the Right to Reside Test. The letter of formal notice will be sent to the UK authorities soon.[27]

A Member State must respond to a Letter of Formal Notice within two months. If the Commission is not satisfied with the reply, this first letter may be followed by a final written warning ("Reasoned Opinion") clearly explaining the infringement, and calling on the Member State to comply within a specified period, usually two months. A failure to act on the final written warning can result in a summons to the Court of Justice. If the Court rules against the Member State, it must then take the necessary measures to comply with the judgment. If, despite the ruling, a Member State still fails to act, a further round of the infringement process begins under Article 260 TFEU, this time with only one written warning. This second round can ultimately result in financial penalties for the Member State concerned.[28]

On 29 September 2011 the Commission announced that it had sent the UK a “Reasoned Opinion” relating to the right to reside test. The UK had two months to inform the Commission how it intended to bring UK law into line with EU law. The following Commission press notice gives details:

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[27] European Parliament Committee on Petitions, *NOTICE TO MEMBERS: Subject: Petition 1119/2009 by Piotr Kalisz (Polish) on the British authorities' refusal of his application for unemployment benefit ('Jobseeker's allowance')*, CM\829426EN.doc, PE448.691, 2 September 2010

[28] This information provided by Vaughne Miller, Library International Affairs and Defence Section. See also the note on *Infringements of EU law* at the Commission's website.

Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits

Brussels, 29 September 2011 - EU nationals who habitually reside in the UK are subject to the so-called 'right to reside' test to qualify for certain social security benefits. As this test indirectly discriminates non-UK nationals coming from other EU Member States it contravenes EU law. This is why the European Commission has requested the United Kingdom to stop its application. The request takes the form of a "reasoned opinion" under EU infringement procedure. The UK has two months to inform the Commission of measures it has taken to bring its legislation into line with EU law. Otherwise, the Commission may decide to refer the UK to the EU's Court of Justice.

EU rules on the social security coordination (EC Regulation EC 883/2004) allow the UK to grant social benefits only to those persons who habitually reside in the UK, however Article 4 of this Regulation prohibits indirect discrimination through the requirement for non-UK citizens to pass an additional right to reside test. Any discrimination in providing social security benefits (including non-contributory cash benefits) also constitutes an obstacle to free movement guaranteed by Article 21 of the Treaty.

Under UK law, certain social security benefits - namely Child Benefit, Child Tax Credit, State Pension Credit, Income-based Allowance for Jobseekers, Income-based Employment and Support Allowance - are only granted to persons with a "right to reside" in the UK. While UK nationals have the right to reside solely based on their UK citizenship, other EU nationals have to fulfil additional conditions in order to pass a so-called 'right to reside' test. This means the UK indirectly discriminates against nationals from another Member State.

For example, a non-UK citizen from another Member State came to the UK from Italy (where she had lived since 1989) to work for an Italian company. She worked in the UK from April 2007 until April 2009 when she was made redundant. All throughout her employment in the UK, she paid taxes and national insurance contributions, yet her claim for income-based jobseekers' allowance was refused on the grounds that she did not have a right to reside in the UK. If the UK had applied EU social security coordination rules, those citizens confirmed as habitually resident in the UK would enjoy the same protection as habitual residents in other EU Member States.

The concept of habitual residence has been defined at EU level as the place where the habitual centre of interests of the person is located. The Commission considers that the criteria for assessing habitual residence are strict and thus ensure that only those persons who have actually moved their centre of interest to a Member State are considered habitually resident there. This is a powerful tool for the Member States to make sure that these social security benefits are only granted to those genuinely residing habitually within their territory.

Background

EU social security coordination rules (EC Regulation EC 883/2004) concern social security benefits and not social assistance benefits. Under these rules, EU citizens have the same rights and obligations as nationals of the country where they are covered.

The EU directive on the free movement of EU citizens (Directive 2004/38/EC) allows for restrictions of access to social assistance only, but it cannot restrict the access to social security benefits (including special non-contributory cash benefits). In the

> absence of any such explicit derogation, the principle of equal treatment ensures that EU citizens may not be treated differently from the nationals of a Member State.[29]

The UK Government responded robustly to the Commission's move. Writing in *The Telegraph* on 30 September, the Secretary of State for Work and Pensions, Iain Duncan Smith, said that the Commission's decision had the potential to "completely undermine" the UK's welfare reform programme. He went on:

> The UK has no problem playing its part in supporting the free movement of labour in the EU. However, what the EU is now trying to do is get us to provide benefits for those who come to this country with no intention to work and no other means of supporting themselves, with the sole purpose of accessing a more generous benefit system.
>
> These new proposals pose a fundamental challenge to the UK's social contract. They could mean the British taxpayer paying out over £2billion extra a year in benefits to people who have no connection to our country and who have never paid in a penny in tax. This threatens to break the vital link which should exist between taxpayers and their own Government. The EU settlement is supposed to protect the right of member states to make their own social security arrangements. But we are now seeing a rising tide of judgements from the European institutions using other legal avenues to erode these rights, and we should be gravely concerned. As if this week's decision was not bad enough, we are also fighting increasing demands for the UK to pay benefits to those who have long since moved abroad, and who may never have made more than a token contribution to UK society.
>
> This could not have come at a worse time. Just as we are taking tough decisions to get our public finances back in order from the mess we inherited from Labour we are being hit with unjustified burdens which could cost British taxpayers tens of billions of pounds. But I sense this is part of a wider movement, coming in the same week as the proposals for a financial transactions tax across Europe which threatens to punish UK banks by decreasing their competitiveness abroad. This is not a case of the UK being Europe's enfant terrible. There is growing concern being heard from a number of member states that the European Commission has overstepped the mark, basing decisions more on ideology than on the fundamental rules governing the European settlement.
>
> France, Germany and Denmark have all spoken out against the commission's insistence on issuing this week's provocative decision on benefit payments. This decision confirms the worry that the EU is pulling more areas of national competence into its fold. Yet these are decisions taken outside of national democratic processes by unelected and unaccountable institutions.
>
> This kind of land grab from the EU has the potential to cause mayhem to nation states, and we will fight it.[30]

Suggestions that changing the rules could cost the UK taxpayer up to £2.5 billion a year have however been questioned. A post by Patrick Worrall at the "FactCheck with Cathy Newman" blog hosted by the Channel 4 News website on 30 September considered the available evidence in the extent of "benefit tourism", in light of the Commission's announcement of infringement proceedings and subsequent comment in the press and elsewhere. It concluded that there was little convincing evidence that "benefit tourism" had been a problem in the UK, that UK benefits were not particularly generous in comparison with other leading

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29 European Commission press release IP/11/1118, 29 September 2011

30 'Commentary: Brussels poses serious threat to our welfare reforms', *The Telegraph*, 30 September 2011

EU Member States, and that UK benefit rules for economically inactive people were already restrictive and likely to become more so as a result of the Government's welfare reforms. Even if the UK were compelled to amend its legislation on the right to reside, given this backdrop an upsurge in "benefit tourism" was thought unlikely:

> So if benefit "tourism" is still out even if the European Commission gets its way, long-term sponging won't [be] an option thanks to the government's own crackdown, and there are other more attractive destinations closer to home, it's difficult to see why floods of work-shy immigrants will be queuing up to make Britain their home.
>
> FactCheck asked the government for estimates of how big the problem of benefit tourism actually is, and whether it had got better or worse since the introduction of "right to reside" in 2004.
>
> A DWP spokesman said the department had "no information available".
>
> We also asked where the headline figures of a potential annual cost to the taxpayer of up to £2.5bn came from, and we were told: "The £2.5bn is taken from our internal estimates – showing the worst case scenario. Essentially we have looked at a range of scenarios with the possible fiscal impact ranging from £650m to £2.5bn per annum."
>
> It later transpired that the figures were based on estimated changes in the economically inactive population, with analysts looking at possible increases of five, ten and 20 per cent to get that worst-case scenario figure.
>
> As far as FactCheck understands – and we weren't allowed to look at the methodology in detail – this appears to mean that it would cost the country £2.5bn if the ranks of the economically inactive (9.38 million according to the latest Office of National Statistics figures) swelled by 20 per cent.
>
> That would mean a sudden influx of 1.87 million benefit migrants – more than three times the entire Polish-born population of the UK – would have to take place for the Government's direst predictions to come true.[31]

The post concluded that the figure of £2.5 billion had "a dubious evidence base".

At Work and Pensions Questions on 28 November the Minister for Employment, Chris Grayling, said that the Government were "formally rejecting in the strongest possible manner the Commission's reasoned opinion":

> **Mr Hollobone:** Will the Minister confirm that this matter is a red line for Her Majesty's Government which the European Commission shall not be allowed to cross? Will he undertake to lead a coalition of EU countries against these Commission proposals to interfere in the domestic business of quite a few member states in an area where the Commission should not be going?
>
> **Chris Grayling:** I very much agree with my hon. Friend. We have had a number of robust discussions with the European Commission about this matter, and I can confirm to the House that we are formally rejecting in the strongest possible manner the Commission's reasoned opinion against the right to reside condition of the habitual residency test. I am in regular discussions with my counterparts in other European countries, many of whom share the same concern. I regard this as a battle that I do not intend us to lose.

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[31] FactCheck: 'Benefit tourism' scare sent packing: Friday 30 September 2011: http://blogs.channel4.com/factcheck/factcheck-benefit-tourism-scare-sent-packing/8050

Mr Peter Bone (Wellingborough) (Con): With all due respect, that sounded like ministerial waffle and a refusal to answer the question asked by my hon. Friend the Member for Kettering (Mr Hollobone). Surely the answer should just have been yes.

Chris Grayling: Indeed, I think the answer very clearly is yes.[32]

5 Further information

Determining whether or not a particular person has a 'right to reside' can be far from straightforward. Anyone refused benefits or tax credits on the grounds because they are deemed not to have a right to reside should seek professional advice. This is not something the Library can provide. This note should not be relied upon as legal advice or a substitute for legal advice. A CAB, Law Centre or local welfare rights organisation may be the best first port of call when seeking advice.

The annual Child Poverty Action Group *Welfare benefits and tax credits handbook* contains a section which gives detailed information on the right to reside requirement (pp1424-1453 of the 2011-2012 edition).

CPAG also publishes the *Benefits for migrant's handbook*, which contains a chapter on the right to reside test. The most recent edition was published in January 2011.

The guidance for DWP staff on the application of both the Habitual Residence Test and the right to reside test is in Volume 2, Chapter 7, Part 3 of the *Decision Maker's Guide* (DMG), which is available at the Department's website here:

http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide/

The DMG does not in itself have any force in law, but it summarises the relevant case law.

The AIRE (Advice on Individual Rights in Europe) Centre has produced a briefing, *FAQs about the rights of EEA nationals to access benefits and the rights and the changes for A8 nationals from 1 May 2011*. This sets out the changes which occurred from 1 May, and their implications.

The DWP has also produced Memo DMG 13/11, *A8 nationals – ending of restrictions on right to reside*.

The website of the No Recourse to Public Funds (NRPF) Network includes guidance on possible alternative sources of support for people refused benefits on right to reside grounds.

[32] HC Deb 28 November 2011 c667