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BRIEFING PAPER

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Measures to limit migrants' access to benefits

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Summary

Following an article by the Prime Minister's in the *Financial Times* on 27 November 2013 in which he said he shared concerns about the impact of lifting transitional restrictions on the rights of Romanian and Bulgarian nationals to work in the UK from 1 January 2014, the Government has introduced a raft of measures "to tighten up our EEA migration rules to ensure our welfare system is not taken advantage of." They include:

- From December 2013, a "stronger, more robust" Habitual Residence Test for those claiming means-tested benefits.
- From 1 January 2014, people coming to the UK must have been living in the UK for three months before they can claim income-based Jobseeker's Allowance.
- EEA jobseekers or former workers would have to show that they had a "genuine prospect of finding work" to continue to get JSA after six months (and if applicable, Housing Benefit, Child Benefit and Child Tax Credit). For those with a right to reside as a jobseeker the test is now applied after three months on JSA.
- From 1 March 2014, a new minimum earnings threshold to help determine whether an EEA national is or was in "genuine and effective" work, and so has a "right to reside" as a worker or self-employed person (and with it, entitlement to benefits).
- From 1 April 2014 new EEA jobseekers have been prevented from accessing Housing Benefits even if they are in receipt of JSA.
- From 1 July 2014, new jobseekers arriving in the UK would need to have lived here for three months in order to claim Child Benefit and Child Tax Credit.
- From 10 June 2015, EEA jobseekers have been prevented from claiming Universal Credit.

This note looks at the background to the changes, and at their likely impact.

In his keynote speech on immigration on 28 November 2014, the Prime Minister set out plans to secure agreement on changes to European law on free movement of persons in order to allow the UK to, among other things, deny EEA migrants in-work benefits for four years and prevent Child Benefit being paid for children living abroad. These, and other proposals set out by Labour and by the Liberal Democrats, are covered in a separate Library briefing, Further proposals to restrict migrants' access to benefits.

1. EEA nationals and benefits

People coming to the United Kingdom from EEA countries[1] do not have unrestricted access to UK social security benefits and tax credits. In May 2004, the legislation governing entitlement to certain 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).

The "right to reside" test applies to income-related benefits (Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance, Housing Benefit and Pension Credit), Child Benefit, Child Tax Credit and Universal Credit.

Broadly speaking, a person who moves from one EEA country to another has a right to reside in that country 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 newer accession states.

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 had a right to reside solely on the basis of the new three-month right of residence would not be able to claim benefits for that reason.[2]

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

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".[3] 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 may also have a right to reside as a **jobseeker**, if they can show that they are looking for work and have a "genuine chance of being engaged", and are **habitually resident**. Factors which may be taken into account when considering whether a person is habitually resident include how long they have been in the country, the person's reasons for coming here and their future intentions, what the person

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1 Switzerland is not a member of the EEA but as a result of an agreement that came into force on 1 June 2002, Swiss nationals enjoy broadly the same rights as EEA nationals with regard to freedom of movement

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

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

has done to establish themselves since arriving, their employment prospects, and where their "centre of interest" lies.[4]

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[5]

An economically inactive "**self-sufficient person**" may nevertheless be able to access means-tested benefits with being considered an "unreasonable burden" on the UK's social assistance system, in certain circumstances.[6] However, in the *Dano* case, the Court of Justice of the European Union confirmed that Member States can refuse to grant social benefits to economically inactive EEA nationals without sufficient resources to claim a right of residence who exercised their right to freedom of movement solely in order to claim social assistance.[7]

A person may also have a right to reside based on another person's right to reside. This is known as a "**derivative right to reside**." For example, a person who formerly a "worker" may have a right to reside as a **primary carer of a child in education**.[8]

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.[9]

Further information can be found in Library briefings 05972, EEA nationals: the 'right to reside' requirement for benefits, and 06847, People from abroad: what benefits can they claim?

1.1 Romanian and Bulgarian nationals

Until 31 December 2013, A2 nationals (Romanians and Bulgarians) were subject to transitional restrictions which limited their access to the UK labour market and benefits. A2 nationals could not come to the UK and claim benefits without having worked here first, i.e. they could not have a right to reside as a "jobseeker." They also bad to obtain a "worker authorisation document" before starting work as an employee in the UK. When working as an authorised worker, they could claim in-work benefits (e.g. tax credits, Housing Benefit) in the same way as other EEA nationals. However, they could only claim means-tested out-of-work benefits if they had completed 12 months' uninterrupted work.

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4 Library briefing 00416, The Habitual Residence Test, gives further background
5 Article 7(1)(b) *Rights of Residence Directive* 2004/38/EC
6 See Martin Williams, "Right to reside: Breytastic!", *Welfare Rights Bulletin*, October 2013, pp7-9
7 Case C-333/13; see also the Court's press release, "Economically inactive EU citizens who go to another Member State solely in order to obtain social assistance may be excluded from certain social benefits." The *Dano* case is discussed further in the Library briefing paper Further proposals to restrict migrants' access to benefits.
8 See CPAG Scotland factsheet, Right to reside – parent or carer of child in education
9 See the AIRE Centre factsheet, Permanent Residence for EEA Nationals and their family members in the UK, April 2013

Self-employed A2 nationals were not subject to worker authorisation and had a right to reside as a self-employed person for as long as they remained in work. However, they could not claim out of work benefits if they subsequently stopped working.

The transitional restrictions on A2 nationals were lifted from the end of December 2013, and A2 nationals are now treated in the same was as all other EEA nationals (**except Croatian nationals**, who continue to be subject to rules similar to those which previously applied to A2 nationals[10]).

Further information can be found in Library briefing 06847, People from abroad: what benefits can they claim?

[10] Croatia joined the European Union on 1 July 2013 and similar transitional restrictions to those imposed on people from the A2 countries were applied to Croatian nationals. For further information see Henri Krishna, "The accession of Croatia", *Welfare Rights Bulletin* 235, August 2013

2. Prime Minister's Financial Times article

In an article in the *Financial Times* on 27 November 2013, the Prime Minister noted that on 1 January 2014 the people of Romania and Bulgaria would have the same right to work in the UK as other EU citizens, and said that he shared the concerns of those who were "deeply concerned about the impact that could have on our country."[11] He announced a series of measures including, with regard to benefits-

- no EU migrant would be entitled to out-of-work benefits for the first three months
- no newly arrived EU jobseekers would be able to claim Housing Benefit
- from January 2014, no EU migrant would be able to claim Jobseeker's Allowance for more than six months unless they could prove that they had a genuine prospect of employment
- a new minimum earnings threshold would be introduced before benefits such as Income Support could be claimed

Some additional information about the timetable and legislative mechanisms for implementing some of the proposals was given by the Home Secretary in response to an urgent question later that day.[12] The changes were to come into effect "as soon as possible in the new year."[13]

The remainder of the note looks at these individual measures, and at further changes announced subsequently.

11 David Cameron, "Free movement within Europe needs to be less free", *Financial Times*, 27 November 2013
12 HC Deb 27 November 2013 cc267-279
13 Ibid. c267

3. A "stronger, more robust" Habitual Residence Test

The Habitual Residence Test was first introduced in 1994 in response to concerns about "benefits tourism". The test is applied to people (unless they in an exempt category) who have recently arrived in the country and who make a claim for certain benefits, or seek housing assistance from a local authority. It applies to returning UK nationals as well as to those coming to the UK for the first time. The benefits covered by the Habitual Residence Test include disability and carers' benefits (Attendance Allowance, Disability Living Allowance, Personal Independence Payment and Carer's Allowance) and means-tested benefits (income-based Jobseeker's Allowance, income-related Employment and Support Allowance, Income Support, Pension Credit, Housing Benefit and Universal Credit).

For means-tested benefits, a person must be habitually resident in fact **and** have a "right to reside" (see above) to pass the test. However, some EEA nationals are exempt from the Habitual Residence Test for means-tested benefits. This includes those with "worker" or "self-employed person" status, or who are no longer working but have retained their status; those with a permanent right of residence as a retired or incapacitated worker or self-employed person; or as a family member of one of these groups.

EEA nationals who have a right to reside as a "jobseeker" are not however exempt from the Habitual Residence Test. Therefore, an EEA national who arrives in the UK to look for work and who makes a claim for Jobseeker's Allowance but fails the Test will not receive benefit, even if they satisfy all the other conditions for JSA (e.g. they are available for and actively seeking work).

There is no statutory definition of "habitual residence" but factors which may be taken into account by DWP or a local authority when considering whether a person is habitually resident include how long they have been in the country, the person's reasons for coming here and their future intentions, what the person has done to establish themselves since arriving, their employment prospects, and where their "centre of interest" lies. The test is applied by interviewing the claimant. Library briefing 00416, The Habitual Residence Test, gives further information.

On 13 December 2013 the Government announced the roll out of a "new, stronger, more robust" test. A DWP press release explained:

> In order to pass the improved Habitual Residence Test, migrants will have to answer more individually-tailored questions, provide more detailed answers and submit more evidence before they will be allowed to make a claim. For the first time, migrants will be quizzed about what efforts they have made to find work before coming to the UK and whether their English language skills will be a barrier to them finding employment.
>
> [...]

> Migrants are only entitled to claim benefits if they can prove both that they are legally allowed to be here, and that they have sufficient ties to this country to show they are 'habitually resident'.
>
> The improved test will see the bank of available questions increase by more than 100, while the intelligent IT system will ensure that the number and type of questions asked are tailored to each individual claimant and their personal circumstances.
>
> Migrants wanting to claim benefits will have to provide more comprehensive evidence at the point of their claim. This might include what measures they have taken to establish themselves in the UK by looking at their housing and family situation or by looking at what ties they still have abroad. They will also have to provide more evidence that they are doing everything they can to find a job.[14]

The changes were achieved without any amendments to legislation.

"Habitual residence" has a meaning in both domestic and EU law. The "new" Habitual Residence Test does not tighten the existing criteria for establishing habitual residence, or add new conditions that people must satisfy in order to be considered habitually resident. Rather, it involves a more in-depth, stringent approach to establishing whether or not a person meets the **existing** criteria for habitual residence.

Some information on the new Habitual Residence Test was given in a response by DWP in January 2014 to a Freedom of Information request from a member of the public.[15] The test is applied using an "improved electronic tool to help [Jobcentre Plus staff] carry out interviews thoroughly and consistently." It is known as the "e-HRT" application. The application is, it is claimed, "intelligent by design" - an interactive format guides the user to appropriate questions, generates further questions where required, alerts the user if any required information has been left out, and includes drop-down menus to capture relevant information provided by the claimant during the interview. The full question set used in the application has also been released, although not all will be applicable in every interview.

There has been very little comment from organisations with an interest in welfare rights and immigration on the "more robust" Habitual Residence Test, or on the impact it is having.

A written answer on 25 March 2014 said that information was not held centrally on how many people had taken the new Habitual Residence Test since December 2013 and that information could be provided only at disproportionate cost.[16]

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14 DWP, Improved benefit test for migrants launched, 13 December 2013
15 HRT for migrants, DWP Ref: FoI 5814, 2 January 2014. Response to Ms Cristina Cruz. Available at the whatdotheyknow.com website
16 HC Deb 25 March 2014 c231w

4. No income-based JSA for those who have been in the UK for less than three months

4.1 Background

As explained in section 1 above , an EEA national who comes to the UK to look for work may have a "right to reside" as a jobseeker. This enabled them to claim income-based JSA and other linked benefits including Housing Benefit. Until 31 December 2013, this did not apply to A2 nationals (Bulgarians and Romanians), who could not come to the UK and claim benefits without having worked here first. However, with the ending of transitional restrictions A2 nationals will be treated in the same was as other EEA nationals (except Croatian nationals, for whom transitional restrictions remain in place).

A person who moves from one Member State to another to look for work has a right of residence in that country if they are continuing to seek employment and have a genuine chance of being engaged.[17] While jobseekers have a right of residence, in the UK however they do not automatically satisfy the habitual residence test.

Article 24(2) of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States provides that Member States are not obliged to confer entitlement to social assistance during the first three months of residence, or longer if the person is continuing to seek employment and has a genuine chance of being engaged. However, in case C-22/08, Vatsouras, the CJEU interpreted Article 45 TFEU[18] in such a way that a minimum subsistence allowance for jobseekers meant to facilitate access to employment in the labour market of a Member State cannot be regarded as "social assistance" within the meaning of Article 24(2) of Directive 2004/38/EC. Such a benefit should be granted to a person who has a genuine link with the employment market of the host Member State.[19]

Regulation 6(4) of the *Immigration (European Economic Area) Regulations 2006* (SI 2006/1003 as amended) defines a "jobseeker" as:

> ...a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

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17 The right of residence of workseekers arises directly from Article 45 of the European Union (EU) Treaty [Collins C-138/02 [2004] ECR 1-02703 (ECJ)]. It is only obliquely set out in EU Directive 2004/38 (Articles 14 and 24). Article 45 provides for free movement of workers. This means that a person looking for work can enter any member state and, while looking for work, has a right of residence in that state.

18 Treaty on the Functioning of the European Union

19 For further information see European Commission, Reaffirming the free movement of workers: rights and major developments, COM(2010)373 final, 13 July 2010; and Ferdinand Wollenschläger, "Jobseekers' Residence Rights and Access to Social Benefits: EU Law and its Implementation in the Member States, FMW - Online Journal on Free Movement of Workers within the European Union, No 7, January 2014

The regulations did not explicitly require an EEA jobseeker to demonstrate that they have a "genuine link with the labour market" in the UK.

If an EEA national met the criteria set out in regulation 6(4) – and passed the Habitual Residence Test – they could claim income-based JSA.

4.2 New regulations introducing the three month rule

The Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013 (SI 2013/3196) were laid before Parliament on 18 December 2013 and came into force on 1 January 2014.

The regulations introduced a new requirement that people coming to the UK have to satisfy in order to be deemed habitually resident for the purposes of a claim for income-based JSA. A person arriving in the UK will have to serve a three month period before they can be treated as habitually resident for income-based Jobseeker's Allowance purposes. It means that someone coming to the UK to look for work will not normally be able to make a claim for income-based JSA until they have been living in the UK for three months (although they can also satisfy the requirement if they have been living anywhere in the "Common Travel Area" for three months – this includes the Republic of Ireland, the Channel Islands and the Isle of Man, as well as the UK).

The new requirement only applies to claims for income-based JSA. It does not apply to other benefits covered by the Habitual Residence Test (see section 3 above). However, an EEA jobseeker who is not entitled to income-based JSA will not be able to claim Housing Benefit, as the former "passports" to the latter.[20]

The Impact Assessment accompanying the regulations stated that the new requirement would-

> ...help avoid additional costs by reducing claims to JSA by people who have not established a genuine link with the labour market. and will help to discourage migrants coming to the UK with the primary aim of claiming benefits.

However, the Impact Assessment acknowledged that the new rule **would also affect UK nationals who had been abroad** as well as EEA jobseekers coming to the UK for the first time.

As to how many people might be affected, the Impact Assessment stated (p5):

> Data based on non-UK EU nationals applying for a National Insurance Number (NINO) in 2012/13 suggests that 20,000 of these individuals received JSA within three months of applying for a NINO; however this figure does not include UK nationals who would be affected; nor does it make any allowance for future migration patterns.

[20] As a result of subsequent changes, EEA nationals who have a right to reside solely as a jobseeker are not entitled to Housing Benefit even if they are in receipt of JSA – see section 7 of this note.

> Exact estimates of the numbers of those likely to be affected by this policy at any one time are difficult as Jobseekers may not apply for a NINO until they apply for a benefit, so may have been in the UK for longer than three months by the time they apply
>
> It gives the number of individuals who have received JSA at any point within the 3 month period between NINo registration and start of JSA claim over the course of a year. More than a quarter of new JSA claims end within a month and over half within three months.
>
> Some, such as workers or the self-employed, will continue to be eligible for benefit after less than three months residence. Claims to contributory JSA will also continue as now.
>
> Assuming a hypothetical scenario where 1000 individuals were affected by the policy at a point in time and
>
> > each lost standard JSA (£71.70)
> >
> > 58% also lost passported HB of £91.81
>
> The saving to the exchequer would be around £6 million per year.

However, this does not take into account the possible impact beyond the benefits system (e.g. on demand for help from local authorities under social services legislation).

The Impact Assessment did not give the usual analysis of monetised costs/benefits "due to the lack of detailed data and the uncertainties regarding future migration patterns."

Further information on how the new rule is to be applied is given in a DWP memorandum to its "Decision Makers", JSA(IB) – three months habitual residence requirement, issued in December 2013.[21]

Concerns have been voiced about the impact of the three month rule on returning UK nationals. A further issue that has been flagged up is whether temporary absences from the UK, and what kind of absences, might "trigger" the three month rule.

Impact on returning UK nationals

In a letter to the Secretary of State for Work and Pensions dated 3 February 2014, the Chair of the independent Social Security Advisory Committee (SSAC), Paul Gray, expressed "serious concerns" about implementation of the changes to the Habitual Residence Test. These centred upon the impact on returning UK nationals:

> While acknowledging that currently a returning UK national generally needs to satisfy the habitual residence test in order to access entitlement to income-related benefits, the period needed to satisfy a decision-maker that they are habitually resident has commonly been considerably less than the three months introduced by these regulations for the purposes of income-related JSA. It is also possible that the new rules may mean that UK nationals who, in the past would have been expected to satisfy the habitual residence test immediately upon their return, will now be subject to the three months period of exclusion.
>
> This will, inevitably, impact UK nationals returning to the UK in a variety of circumstances – for example: following the end of a

[21] DWP Memo DMG 28/13

> marriage in difficult circumstances; to assist with caring responsibilities for a close family member (but where Carer's Allowance is already in payment to someone else or otherwise not appropriate); following short periods of employment outside of the UK; and where a young person has been travelling overseas during a gap year or volunteering. We understand that an absence of just three months would be sufficient to trigger this element of the regulations.
>
> It would be helpful to know what consideration the Government has given to the potential impact of this policy on UK nationals and whether any assistance will be made available to those without access to any alternative financial assistance.
>
> We welcome the fact that the Government has, since the beginning of this year, started to collect management information through the application of the Habitual Residence Test in relation to the nationality of those claiming income-based benefits. This will enable the Government to build a clearer picture about the potential numbers of UK nationals likely to be affected by this policy. It is regrettable that historical data is not broken down in this way, as this will make evaluation more difficult initially.[22]

In his response dated 14 February, the Secretary of State said:

> It has always been the case that UK nationals returning from abroad must satisfy the Habitual Residence Test and that this included the requirement to have been In the UK for an appreciable period of time. I therefore consider that the introduction of a fixed period of time which someone must have been living in the UK before being eligible to receive JSA (IB) provides much needed clarity. However, I recognise the Committee's concerns and have asked my officials to undertake further work to ensure we have taken full account of the impact of the three month requirement.

On 17 October 2014 the Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2014 were laid before Parliament.[23] The regulations exempt two categories of person from the three month residence requirement for income-based JSA:

- People who have paid UK National Insurance contributions whilst abroad at some point during this three month period (for example if they have been posted to work abroad by a UK-based employer); and
- Returning members of HM Forces and crown servants

The *Explanatory Memorandum* accompanying the regulations states that the changes were being made-

> …to safeguard people who recently contributed to the UK economy whilst being posted to work abroad, thus maintaining their connection to the UK. This policy continues to protect the benefit system by discouraging people who seek to migrate to the UK to claim Jobseekers Allowance immediately.[24]

The exemptions came into force on 9 November 2014.

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22 The impact on returning UK nationals has also been mentioned in media reports, for example "Britons travelling or studying abroad refused benefits on return," *Guardian*, 21 May 2014

23 SI 2014/2735

24 Para 7.3

Effect of temporary absences from the UK

The regulations provide that in order for someone to be "habitually resident" for income-based JSA purposes, they must (unless they are in one of the above exempt groups) have "**been living in** any of those places [in the Common Travel Area] for the past three months." The Common Travel Area comprises the UK, Channel Islands, Isle of Man and the Republic of Ireland.

The memo to DWP Decision Makers (DMs) on the changes gave the following guidance on the meaning of "living in", and on how to treat temporary absences from the Common Travel Area (CTA):

> **Meaning of "living in"**
>
> 5 This expression is not defined in the regulations and as such should be given its ordinary everyday meaning taking into account the context. The New Oxford English Dictionary says that to "live" somewhere means to "makes one's home in a particular place" The Shorter Oxford English Dictionary says that "living" means dwelling in a specified place. "Dwelling" is defined as the action of residing living or having one's home.
>
> **Temporary Absences**
>
> 6 If, during the three month period the claimant has spent some time outside the CTA, the DM will have to make a judgement as to whether that claimant ceased to be "living in" the CTA during that absence.
>
> 7 It is not possible in this Memo to deal with all the circumstances in which a temporary absence from the CTA will mean that a person has or has not ceased to be living in the CTA. DMs should take a common sense approach by applying the normal everyday meaning of "living in".
>
> **Example 1**
>
> Louis is a Belgian national. On 9.1.14 he came to the UK to look for work. Having been unable to find a job, he claimed JSA (IB). The date of claim was 14.4.14. It emerged from questions asked in relation to the claim that, since arriving, Louis had lived in a rented flat in the UK and that he had spent the period 2.3.14 to 15.3.14 in Belgium. His father had died and he had attended the funeral and had stayed in his mother's house. The DM decided that, as at 14.4.14, Louis had lived in the UK continuously for 3 months. The 2 week absence did not mean that Louis had ceased to live in the UK.
>
> **Example 2**
>
> Mia is a German national. She came to the UK alone on 2.1.14 in order to look for work. She rented a bedsit on a short-term one month tenancy and stayed in the UK until 1.2.14 when she returned to Germany. In Germany she stayed with her husband and children in the family home until 30.3.14. She did no work in Germany during that time. When she came back (again alone) to the UK on 30.3.14, she took up a 6 month tenancy on a flat. On 7.4.14 Mia claimed JSA(IB). On 8.4.14, the DM decided that Mia had a right to reside as a jobseeker but that she was not to be treated as habitually resident in the UK because she had not lived

> here for the three months prior to her claim. The DM therefore decided that Mia was not entitled to JSA(IB).[25]

No examples were given on how to treat UK nationals' "temporary absences". Ultimately however, it will be for the courts to decide whether the DWP applies the legislation correctly.

[25] DWP Memo 28/13, JSA(IB) - Three months residence requirement, December 2013

5. No income-based JSA for EEA migrants after six months unless they have a "genuine prospect of work"

5.1 Background

This was announced previously by the Prime Minister in his speech on immigration and welfare reform on 25 March 2013. A background note on the Prime Minister's speech of 25 March 2013 at the Number Ten website stated:

> **Cutting access to benefits for non-UK nationals after 6 months**
>
> The current Home Office Immigration (European Economic Area) Regulations state that someone who enters the UK in order to seek employment means they have a 'right to reside' as a job seeker. This means they can claim Job Seekers Allowance and other benefits.
>
> To ensure people cannot claim benefits indefinitely, in early 2014 we will create a statutory presumption that after 6 months an EEA national can no longer retain their status as a job seeker or retained worker and continue to claim benefits, unless they can demonstrate they have actively sought work throughout that period and have a genuine chance of finding work.

It is important to note that **anyone** claiming Jobseeker's Allowance must be both available for, and actively seeking, employment.[26] This applies from the outset of the claim and throughout. If someone ceases to meet these conditions, their benefit will stop.

European case law (Case C-292/89 Antonissen [1991] ECR I-745) provides that a Member State may require a jobseeker who has not found work after six months to provide evidence that they are continuing to seek employment and have a genuine chance of being engaged. As noted above, regulation 6(4) of the *Immigration (European Economic Area) Regulations 2006* (SI 2006/1003 as amended) already required that to have a right to reside as a jobseeker an EEA national had to be able to "provide evidence that he is seeking employment and has a genuine chance of being engaged."

5.2 Amending regulations

The *Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2013* (SI 2013/3032), which were made on 3 December and laid before Parliament on 5 December, included new provisions relating to the right to reside of jobseekers. The Explanatory Memorandum accompanying the regulations explained:

> 7.5 The amendments relating to jobseekers impose a requirement for any person seeking to reside in the UK while looking for work

[26] Section 1 *Jobseekers Act 1995*

> to provide, from the outset, evidence that they are seeking work and have a genuine chance of being engaged. Under Article 7 of the Directive, a person who had a right to reside as a worker may continue to be treated as a worker in the event that they are involuntarily unemployed ('a retained worker'). The amendments require those seeking to enjoy the status of a retained worker to provide, from the outset, evidence that they are seeking employment and have a genuine chance of being engaged. A new paragraph (7) of regulation 6 of the 2006 Regulations provides that a person may not enjoy the status of jobseeker or retained worker for longer than 6 months unless they provide 'compelling evidence' that they have a genuine chance of being engaged. In the case of a retained worker who had worked for less than 12 months before becoming involuntarily unemployed, there is an absolute limit of six months for the retention of worker status. These changes are better to reflect the requirements of Antonissen case C-292/89, which governs the protection from expulsion enjoyed by EU jobseekers who otherwise do not have a right to reside.

There were therefore three changes:

- In order to retain "worker" status, an EEA national who was formerly in work but was made redundant would have to provide, from the outset, evidence that they were "seeking employment and have a genuine chance of being engaged"
- A "retained worker" who worked in the UK for less than twelve months before being made unemployed could only keep their "worker" status for up to six months. This didn't necessarily mean that their benefits would stop however, as they could have a continuing right to reside on another basis, e.g. as a "jobseeker" (but see section 7 below on new restrictions on Housing Benefit for "jobseekers")
- A person with a right to reside as a "jobseeker" or a "retained worker" would lose that status after six months unless they could provide "compelling evidence" that they had a genuine chance of being engaged[27]

The Explanatory Memorandum did not give information on what would constitute "compelling evidence" of a genuine chance of being engaged. Some further information on the new test, and how it would be applied, was however given in the January 2014 edition of the DWP magazine *Touchbase*:

> ...from 1 January 2014, EEA job seekers who make a new claim for JSA will receive it for a maximum of six months. After six months, only those who have compelling evidence that they still have a genuine prospect of work (GPoW), will be able to continue claiming JSA.

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[27] Further amending regulations which came into force on 1 July clarified that the six month period provided to jobseekers in order to look for work could be spread over a number of different periods as a jobseeker, but not exceeded. The regulations also limit the extent to which a person can enjoy a fresh period of residence as a jobseeker. Where a person who formerly had jobseeker or retained worker status for six months has been absent from the UK for less than 12 months, they will have to provide, from the outset, "compelling evidence" that they have a genuine chance of being engaged, to enjoy a fresh period of residence as a jobseeker. See The Immigration (European Economic Area) (Amendment) Regulations 2014; SI 2014/1451

> Those EEA jobseekers affected by the change will be given a fact sheet at the outset of their claim to JSA, clearly setting out the terms of the GPoW assessment.
>
> The first GPoW assessments will take place from July 2014. Jobseekers will be given regular reminders of the new rules at interviews with Jobcentre Plus advisers.
>
> The assessments will check whether the claimant still has a genuine prospect of work, or if there is compelling evidence of exceptional circumstances for them to be granted a limited extension to JSA.
>
> Compelling evidence will vary from person to person, but a written job offer with a definite start date, for example, could be considered compelling evidence. Where there is no compelling evidence, JSA payment will stop.
>
> The measures only apply to new claims to JSA from 1 January 2014. Claims made prior to 1 January 2014 are not affected. However, existing claimants will be subject to the new measures if they make a new JSA claim in future.[28]

Further details of the "Genuine Prospect of Work Test" were given in a DWP memorandum for benefits Decision Makers, Habitual Residence and Right to Reside – JSA, issued in June 2014.[29]

The memorandum stated that a Decision Maker could extend entitlement to JSA beyond six months where the claimant had provided "compelling evidence" that a change of their circumstances had given them a "genuine chance of being engaged" in one of two ways:

- where the claimant had provided "reliable evidence that they have a genuine offer of a specific job" which would be "genuine and effective work", provided that job was due to start within three months; or
- where the claimant could provide proof that a change of circumstances during the six month period had given them genuine prospects of employment (which would be "genuine and effective" work), and as a result they were awaiting the outcome of job interviews. The JSA award could in these circumstances be extended by up to two months.[30]

In relation to the second bullet point the memorandum added:

> Examples of a change in circumstances could include evidence of recent completion of a vocational training course, or a recent change of location to improve labour market conditions, which may significantly improve the claimant's genuine prospect of employment. Using these examples, the date of change would be the date that any qualification was awarded from, or the date that the claimant moved into a different labour market area.

It further stated that the Decision Maker should accept that there was compelling evidence "if the evidence presented of their change in circumstances indicates that it is likely the claimant will receive a job offer imminently."[31] A number of examples are given in the

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28 "New rules have been introduced to restrict migrants' access to benefits", *Touchbase*, January 2014
29 Memo DMG 15/14
30 Ibid. para 14
31 Ibid. para 15

memorandum on how the "Genuine Prospect of Work (GPoW) Test" should be applied in different scenarios.

The GPoW test was initially applied to new JSA claims only, "for ease of operational implementation," but from 9 February 2015 GPoW assessments started for EEA nationals whose entitlement to income-based JSA started before 1 January 2014 ("stock cases").[32]

5.3 Further reduction in the time limit to three months

In an article in the *Daily Telegraph* on 29 July 2014, the Prime Minister said that the Government was taking action to address the "magnetic pull of Britain's benefits system." He added:

> …we are announcing today that we are cutting the time people can claim these benefits for. It used to be that European arrivals could claim Jobseeker's Allowance or child benefit for a maximum of six months before their benefits would be cut off, unless they had very clear job prospects. I can tell Telegraph readers today that we will be reducing that cut-off point to three months, saying very clearly: you cannot expect to come to Britain and get something for nothing.[33]

On 17 October The Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014[34] were laid before Parliament. The regulations provide that an EEA jobseeker who enters the UK has a right of residence for six months, but can only claim income-based JSA for the final three months of that period. A person already resident in the UK can also have a right to reside as a jobseeker for three months. In both scenarios, a further period of residence as a jobseeker is possible only if they can provide "compelling evidence" that they are continuing to seek employment and have a genuine change of being engaged – i.e. the satisfy the "Genuine Prospect of Work" test.

The changes do not affect the period for which a person can have a right to reside as a "retained worker" before the Genuine Prospect of Work test applies – this remains six months.

5.4 Comment and analysis

The Genuine Prospect of Work test only started to be applied in June 2014, but there is some anecdotal evidence from welfare rights sources[35] suggesting that it is starting to have a significant impact on EEA migrants. The extension of the test to "stock" EEA migrants – ie

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32 See DWP Memo DMG 2/15, Extending GPoW assessment to stock EEA nationals, February 2015

33 "David Cameron: We're building an immigration system that puts Britain first: We will close bogus 'colleges', cut benefits to jobless arrivals and stop advertising jobs abroad," *Daily Telegraph*, 29 July 2014. See also "Cameron outlines immigration curbs 'to put Britain first'", BBC News, 29 July 2014

34 SI 2014/2761

35 See for example www.rightsnet.org.uk

those in receipt of income-based JSA since before 1 January 2014 – will have increased the numbers to be tested.[36]

In April 2015 a paper drafted by Martin Williams of the Child Poverty action Group for a talk at an AIRE Centre, *KAPOW! to the GPOW*, was published on the CPAG website. The paper sets out arguments as to the lawfulness of the test. CPAG comments that "Welfare rights workers may find the arguments useful if they are preparing appeals against decisions that their clients are not entitled to JSA because they have not managed to provide compelling evidence." See Genuine Prospect of Work- is this test lawful? At the CPAG website.

[36] See Desmond Rutledge, Benefits to be withdrawn from EEA jobseekers previously unaffected by the January 2014 changes, Free Movement blog, 25 February 2015

6. Minimum earnings threshold to help determine whether work is "genuine and effective"

6.1 Background

In order for an EEA national to have a right to reside as a worker or self-employed person, the work they do has to be "genuine and effective work". Case law provides that this means work which is more than "marginal and ancillary." There is no minimum hours or earnings threshold as such; hours worked or earnings may be relevant, but other factors – such as the duration of the employment and regularity of the work – may also be taken into consideration. Guidance on what constitutes "genuine and effective work" is in paras 071180-071181 of the DWP Decision Maker's Guide, which is available online.[37] DWP Housing Benefit B Circular HB A3/2014 gives a more detailed summary of the case law.

Provided an EEA is in "genuine and effective work", they have worker status (or self-employed person status), and can therefore claim in-work benefits such as Housing Benefit, tax credits, and Child Benefit (if applicable). EEA nationals who were deemed to have been in genuine and effective work may also retain their stats when they are no longer working. For example, someone temporarily unable to work because of an illness or accident may have "retained worker" status, as may someone in involuntary unemployment who is registered as looking for work.[38]

6.2 Introduction of the new threshold

A DWP press release on 31 December 2013 said that, "over the next year", the Government planned to introduce "an earnings threshold to trigger a test which will check that someone isn't claiming to have, or have had, a job, or be self-employed to access benefits."[39]

On 21 February the Department for Work and Pensions announced that from 1 March 2014 EEA migrants who claim to have been in work or self-employed in order to access benefits would face a "more robust test":

> Being defined as a 'worker' under EU law allows people more generous access to in and out-of-work benefits such as Jobseeker's Allowance (JSA), Housing Benefit, Child Benefit and Child Tax Credit. Currently European Union case law means the definition of a 'worker' is very broad, meaning some people may benefit from this even if, in reality, they do very little work.

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37 The *Decision Maker's Guide* is the internal guidance used by DWP staff making decisions on individual benefit claims. It summarises the relevant statute and case law, but does not in itself have any force in law.

38 Note however the new time limit in part 5 for retaining worker status for those who were in work for less than twelve months.

39 DWP, Tough new migrant benefit rules come into force tomorrow, 31 December 2013

> So in order to help ensure benefits only go to those who are genuinely working a minimum earnings threshold will be introduced as part of the government's long-term plan to cap welfare and reduce immigration so our economy delivers for people who actively contribute and want to work hard and play by the rules.
>
> [...]
>
> To show they are undertaking genuine and effective work in the UK an EEA migrant will have to show that for the last 3 months they have been earning at the level at which employees start paying National Insurance. This is £150 a week – equivalent to working 24 hours a week at National Minimum Wage. An EEA migrant who has some earnings but doesn't satisfy the minimum earnings threshold, will be assessed against a broader range of criteria to decide whether they should still be considered as a worker, or self-employed.[40]

The level of the minimum earnings threshold will be the Class 1 National Insurance Contributions Primary Threshold (PT) - the point at which employees must pay Class 1 National Insurance Contributions. The PT is £153 a week (£7,956 a year) in 2014-15. This is the point at which employees must pay Class 1 National Insurance Contributions.

The DWP press release gives an example of how the new earnings threshold would be applied:

> Minimum earnings threshold – case study
>
> Mr A, an EEA national aged 24, claims income-based JSA on 12 March 2014 and is subject to the Habitual Residence Test. He provides evidence that he arrived in the UK on 1 February 2014 and has been working since 3 February as a horticultural labourer on a zero hours employment contract. His employment ended on 3 March. His pay slips show he earned:
>
> £56 in week commencing 3 February
>
> £0 in w/c 10 February
>
> £0 in w/c 17 February
>
> £25 in w/c 24 February
>
> As he has been employed for just over a month and his earnings have been below £149 a week, he does not satisfy the Minimum Earnings Threshold. He is therefore subject to a fuller assessment of whether his work was genuine and effective. A Decision Maker decides Mr A's work activities were marginal and ancillary and so he was not a worker who could retain that status.[41]

Further DWP guidance can be found in:

- DWP Memo DMG 1/14, JSA(IB) – Right to Reside – Establishing whether an EEA national is/was a "worker" or a "self-employed" person
- DWP Memo DMG 21/14, IS, ESA(IR) & SPC – Right to Reside - Establishing whether an EEA national is/was a "worker" or a "self-employed" person
- DWP HB Circular HB A3/2014, Minimum Earnings Threshold

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40 DWP, Minimum earnings threshold for EEA migrants introduced, 21 February 2014
41 Ibid.

6.3 Comment

The new minimum earnings threshold does not mean that those with earnings below it cannot have "worker" or "self-employed person" status. However, individuals not meeting the threshold will now face a more in-depth assessment of their circumstances in order to determine whether the work they do (or did) was "genuine and effective."

There has been little detailed comment so far on the new earnings threshold. In a blog of 18 March 2014 on the website www.freemovement.org.uk, Desmond Rutledge, a barrister at Garden Court Chambers, commented:

> The primary legal concern over the MET [Minimum Earnings Threshold] is that it purports to interpret the concept of a 'worker' by reference to the level of earnings needed to make Class 1 National Insurance Contributions. On its face, this appears to be a clear breach of the principle that it is impermissible to define the EU concept of work by reference to national laws (Brown).
>
> However, the DWP can argue that the MET does not seek to displace EU law; it merely helps the DWP focus on those cases where greater scrutiny is needed. Nevertheless, the use of the MET is vulnerable to legal challenge as the reference to a national threshold means it is inherently more likely that the DWP will employ a restrictive approach to the EU concept of a worker (Hoekstra). Moreover, the use of a threshold that is equivalent to 24 hours work makes it intrinsically more difficult for an EEA national in part-time work to satisfy the MET which means the effectiveness of the right to free movement is impaired (Levin).[42]

[42] Desmond Rutledge, Using the minimum earnings threshold to determine who is a 'worker', blog, 18 March 2014

7. No entitlement to Housing Benefit for EEA jobseekers

The Housing Benefit (Habitual Residence) Amendment Regulations 2014[43] amended the *Housing Benefit Regulations 2006* so that, from 1 April 2014, EEA nationals who have a right to reside solely as a "jobseeker" will no longer be able to claim Housing Benefit. The change does not affect existing EEA jobseekers in receipt of income-based JSA and Housing Benefit on 31 March 2014, who will continue to receive Housing Benefit until their JSA claim ceases or they make a new claim for Housing Benefit, whichever occurs first.

The new rules will not affect EEA nationals who are employees or who are self-employed, who can continue to claim Housing Benefit provided they have a right to reside as a "worker" or "self-employed person." This includes those who have retained their "worker" status even though they are no longer in work, e.g. those temporarily unable to work because of illness, or those who have been made unemployed and are looking for work.

The Government estimates that the new rules will yield savings of around £10 million a year. This is based on data on EEA migrants' registrations for National Insurance numbers (NINos) in 2011-12. Of the 300,000 EEA migrants who registered for a NINo in 2011-12, around 3,000 later made a claim for Housing Benefit as a jobseeker (rather than a retained worker). The DWP's Impact Assessment estimates that 92% of those potentially affected by the change will be in the private rented sector. More than three quarters are single people or childless couples. Around a third of those potentially affected live in London, 10% live in Scotland and 3% in Wales.[44]

The Impact Assessment states that the measure would "deter any EEA migrants who wished to move to the UK with the primary aim of claiming benefits."[45] However, it will also impact on some EEA migrants who have been in work in the UK, for example former workers or self-employed persons who have not retained that status when their work ended, or those losing "retained worker" status after six months' unemployment because they were in work for less than twelve months (see 5 above).

The Impact Assessment acknowledges that the measure could have an impact on "vulnerable groups", including those with families with children, but points out that other sources if support may be available:

> …the policy would increase the risk that EEA migrants could fall into difficult circumstances were they unable to find employment, particularly if they were vulnerable, such as families with children. Families would not be left without UK state support. They can claim JSA(IB) for a period and in certain circumstances they may

43 SI 2014/539
44 DWP, The removal of Housing Benefit from EEA jobseekers: Impact Assessment, 27 February 2014
45 Ibid. p3

> be able to apply for support from the Local Authority. Local Authority support is subject to statutory criteria e.g. under section 17 of the Children Act 1989 (for a child in need and their family) or section 21 of the National Assistance Act 1948 (provision of accommodation in certain circumstances). It is envisaged that any such costs to Local Authorities would be small and short-term.[46]

7.1 SSAC public consultation on amending regulations

On 7 April 2014 the Social Security Advisory Committee (SSAC) – an independent statutory body which scrutinises new social security legislation – announced that it was undertaking a public consultation on the Housing Benefit changes. SSAC was particularly interested in information on "the potential impacts on particular groups and geographical areas" and potential unintended consequences of the changes. The press release announcing the consultation stated:

> The Committee is particularly keen to hear from a broad range of organisations and individuals who have informed views and evidence relating to the following issues:
>
> - What impact will the legislation have on new EEA migrants to the UK, or for existing EEA migrants who lose their employment and who do not have the status of a retained worker? What impact will the removal of Housing Benefit have on the likelihood of EEA migrants coming to the UK as jobseekers?
>
> - Is there any evidence that EEA migrants experience particular difficulties in establishing whether or not they have retained worker status for benefit purposes? If so, what are the key issues and will the position change as a consequence of this legislation?
>
> - Local authorities are statutorily obliged to make help available under the Children Act 1989 and the National Assistance Act 1948. How do you think the new regulations will affect the extent to which local authorities are currently required to make such an intervention, and the associated costs of doing so?
>
> - The Impact Assessment notes that: 92% of those potentially affected by the policy are renting in the private rental sector; and that a third of those potentially affected live in London. What are the potential consequences (in terms of impacts, costs and behaviours) of this from the perspectives of the individuals, local authorities and private landlords?[47]

The deadline for responses was 30 May 2014, and the Committee submitted its report to the Secretary of State on 30 June. In a letter dated 6 July to the SSAC chair Paul Gray, Mr Duncan Smith said:

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46 Ibid. p5

47 SSAC, Formal consultation and a call for evidence: The Housing Benefit (Habitual Residence) Amendment Regulations 2014, 7 April 2014

> The Committee makes a number of detailed recommendations which I should like my officials to consider fully over the summer. Therefore I plan to return a full Departmental response in the early autumn. This will also allow the results from the Department's research with local authorities to be included in the response.[48]

The Committee's report, together with the Government's response, was published on 20 November 2014.[49]

The Committee noted that while the stated aim of the measure was to discourage EEA migrants from entering the UK unless they had confirmed employment or could otherwise support themselves financially from the outset, the Department had not provided information on the extent to which people were coming to the UK in order to claim benefits.[50]

In total, 25 organisations submitted written evidence to the Committee. Issues raised included:

- Respondents suggested that the Government may have underestimated the numbers likely to be affected by the removal of Housing Benefit.
- Many of the respondents questioned whether the policy would be an effective disincentive, since in their experience EEA migrants did not come to the UK in order to claim benefits, but wanted to find work and believed that they would find work quickly.
- Given the relatively buoyant state of the UK economy (compared with other EU countries), the number EEA migrants arriving in the UK was unlikely to fall over the next few months, although the benefits changes could mean that a greater proportion are single men working temporarily and sending their earnings home, rather than families intending to settle in the UK (because of the greater risk of destitution).
- The expectation that those failing to secure work will return to their home country may be unrealistic, for a number of reasons. Some migrants may have arrived in the UK at a very young age and have been here for several years; their remaining links with their home country may be tenuous and returning home could present significant difficulties. Lack of work, family and a support networks in their home country, coupled with difficulties in claiming benefits in return, mean that for some the choice is between being homeless in the UK and being homeless in their own country.
- The prospect of some existing EEA nationals having to leave their homes was likely to increase overcrowding in sub-standard accommodation, homelessness and rough sleeping. Higher rates of homelessness would have both human and financial costs, e.g. the impact on physical health of migrants and additional pressures on the NHS. Evidence suggested that interventions aimed at preventing migrants becoming homeless could yield significant savings for the public purse over the longer term.

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48 Correspondence: Access to Housing Benefit for EEA jobseekers: interim response to SSAC consultation, published 21 July 2014

49 The Housing Benefit (Habitual Residence) Amendment Regulations 2014 (S.I. 2014 No. 539): SSAC report and the Government's response, 20 November 2014

50 Ibid para 2.1 p10

- Some migrants had encountered difficulties proving "retained worker" status, in particular those who had been in transient work in certain industries, e.g. agriculture, catering and hospitality. Minimal earnings, zero hours contracts, poor record-keeping by employers and the fact that some were operating "around the margins of legality" meant that obtaining the required documentation was difficult. In other cases, young people estranged form their families had been unable to provide the information and evidence requested by authorities, e.g. utility bills.
- The law on determining who is and who is not a "retained worker" is complicated and benefits "Decision Makers" are frequently inexperienced in this area. It was common for negative decisions to be overturned on appeal, but many decisions were not challenged due to language barriers, difficulties accessing specialist advice services, or fear of antagonising the relevant authority and possible deportation.
- There was a lack of a consistent approach in relation to local authority duties under social services legislation, and respondents were concerned that some EEA migrants were not getting the help they should be receiving. Nevertheless, there was recognition that local authorities were being placed in a very difficult position. The Government's Impact Assessment stated that it envisaged any additional costs to local authorities to provide support to families under the *Children Act* and the *National Assistance Act* would be "small and short-term", but no further evidence or rationale was provided.
- Respondents drew attention to the plight of family members of EEA jobseekers having to leave the family home because of domestic violence. Organisations operating refuges for such victims said they would be unable to continue to provide support as they would not survive financially if residence were unable to access Housing Benefit.
- Issues had also arisen for young people estranged from their families. In some cases, young people who had arrived with their parents many years ago had been unable to claim Housing Benefit because their parents had never acquired permanent residence. In other cases, the parents had acquired permanent residence but the young person had been unable to obtain the necessary proof.
- All the comments received by the Committee in relation to homelessness were unanimous that in their view the removal of Housing Benefit would result in an increase in homelessness. St Mungo's Broadway noted that there had been an increase in the number of EEA rough sleepers, with figures for the first quarter of 2014 suggesting that 40% of rough sleepers in London were EEA nationals. Respondents noted that the removal of Housing Benefit was likely to undermine the Government's "no second night out" policy.
- There was concern that the legislation could have unwanted side effects, e.g. hostels may be reluctant to existing EEA migrant residents if it means they will become rough sleepers, even if there are others requiring a bed. Concerns were also voiced that asking residents to leave accommodation could risk valuable work undertaken with alcohol or substance abusers being undone. There were also concerns that some individuals might have little

> option but return to the trafficker who first brought them to the UK, risking further exploitation.

The Committee also considered the impact on private sector landlords. The Residential Landlords Association said that the measure would place the landlord "in the unenviable position of losing money through rent arrears, as well as having to take steps to evict the tenant." Given the length of time possession procedures can take arrears would grow, and there would be no realistic prospects of the landlord recovering the amounts owed.[51]

The Committee commented:

> 2.22 Whilst it cannot be predicted with certainty, it seems an almost unavoidable outcome that private landlords will become reluctant to let their properties to EEA migrants, even to those in typically secure forms of employment. The prospect of losing income if the tenant becomes unemployed is real. We have been advised that there is already some evidence of this happening.
>
> 2.23 Whilst some may be able to show that they have the status of a retained worker, the potential delay in establishing that status, and the limited period for which that status may benefit a migrant when it has been established, may both conspire to disincline a landlord from letting accommodation to a migrant in the first place.

The Committee made a series of recommendations:

- In light of concerns about the impact on homelessness and rough sleeping, the Government "as a matter of urgency by the end of autumn 2014, consider what action is needed in order mitigate these potential unintended and harmful effects and to publish its findings."
- The Government "puts robust arrangements in place to monitor and evaluate the impact of the policy, and to identify accurately the total overarching costs and/or savings to the Exchequer."
- Particular consideration should be given to the impact on local authorities. This should include "a more comprehensive analysis to identify the wider costs for local authorities and a plan setting out how the additional financial pressures are to be addressed."
- In relation to the Government's broader strategy for migrants, it urged the Government "to ensure that the relevant departments work together closely on this strategy - involving other delivery partners as appropriate - to ensure a consistent and fair approach which avoids unintended consequences."
- The Government "takes urgent steps to develop a clear strategy for communicating the changes in a cohesive and accessible way to those who are likely to be affected, including returning UK nationals."

In its response to the first recommendation, the Government said:

> 6. The Government wishes to deter EEA migrants from coming to the UK if they do not have a firm offer of or realistic chance of securing work. Those who come to the UK to look for work should ensure that they have sufficient resources to pay for their

[51] Ibid. para 2.21

> accommodation needs, as well as other support that they or their family may need while here.
>
> 7. The best option for those EEA migrants who are unable to find work, who lack savings or support networks and who are at real risk of ending up destitute is to return home. There is a London reconnections service, funded by the Greater London Authority, and run by the homelessness charity, Thames Reach, which helps vulnerable rough sleepers from the EU return home. Local authorities (LAs) themselves may help reconnect those who are destitute as an alternative to rough sleeping. Further, the Department for Communities and Local Government (DCLG) has funded a voluntary sector led "Before You Go" awareness campaign in home countries about the dangers of coming to the UK without appropriate support such as a job, accommodation or some money in case there are short-term difficulties. This is run by the homelessness charity, Passage.

With regard to monitoring and evaluation, the Government drew attention to its Impact Assessment and Equality Analysis of the Housing Benefit changes, and said it had "no current plans" to publish updates of either of these documents. However, it recognised the need to continue to monitor and evaluate the policy, and was committed to doing so as part of its regular review of policies on access to benefits by migrants. Monitoring on the scale envisaged in the recommendation "would be both costly and of uncertain value", but the Department wished to strengthen the evidence base and had therefore commissioned Ipsos Mori to conduct a survey "to get early perspectives on the first few months' implementation of the policy" as part of the regular LA Insight Survey. The fieldwork was carried out in June 2014 and the findings were published by DWP on 20 November.[52]

The Government's response to the SSAC report states:

> The survey shows that most LAs have been working to prepare their staff and systems, and many have been active in ensuring that affected claimants and their families have accurate information about the changes. LAs recognise that this policy and the associated processes are in the early stages of implementation and are keen to communicate fully and work closely with DWP as the policy progresses.[53]

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52 DWP, Findings from Wave 26 of the Local Authority Insight Survey: Removal of access to Housing Benefit for European Economic Area (EEA) jobseekers, 20 November 2014

53 The Housing Benefit (Habitual Residence) Amendment Regulations 2014 (S.I. 2014 No. 539): SSAC report and the Government's response, 20 November 2014, para 14, p8

8. Overall impact of the measures announced up to Budget 2014

Estimates of the overall savings expected to accrue from the measures detailed above were published alongside the Budget in March 2014. Budget 2014: policy costings set out the expected Exchequer impact of the various measures:

Exchequer impact (£m)

	2014-15	2015-16	2016-17	2017-18	2018-19
Exchequer impact	+60	+80	+115	+120	+125

No breakdown was given showing the estimated savings from the individual measures.

The estimates above also include an element to reflect expected savings from additional "compliance checks" on EEA migrants. The *Policy costings* document stated that the restrictions on migrant's access to benefits already announced would be:

> …augmented by additional HMRC compliance checks to improve detection of when EEA migrants cease to be entitled to these benefits. The checks will apply to all EEA migrant claims.[54]

[54] Ibid. p49

9. No Child Benefit or Child Tax Credit for jobseekers until the person has been in the UK three months

On 8 April 2014 the Government announced a further series of measures:

- From 9 April 2014, the routine use of interpretation services for most new JSA claimants would end;
- From 28 April 2014, JSA claimants whose spoken English was found to be a barrier to work would be expected to undertake training to improve their language skills; and
- From 1 July 2014, new jobseekers arriving in the UK would need to live in the country for three months in order to claim Child Benefit and Child Tax Credit.

A press release issued jointly by the Treasury, DWP and HMRC gave further information.

On 10 June 2014 the Child Benefit (General) and the Tax Credits (Residence) (Amendment) Regulations 2014 (SI 2014/1511) were laid before Parliament. The regulations – which were subject to the negative procedure and have not been debated – provide that a claimant must have been living in the United Kingdom for three months before they can be entitled to Child Benefit or Child Tax Credit. The new rule does **not** apply to certain groups including-

- "Workers" or "self-employed persons" under the Rights of Residence Directive 2004/38/EC, or persons with "retained" worker/self-employed person status (see p3 of this note);
- Croatian nationals subject to "Worker Authorisation";
- Persons who, though not EEA nationals, **would** be a "worker" or "self-employed person" within the meaning of directive 2004/38/EC were they an EEA national;
- Family members of persons coming under one of the above three bullet points;
- Person who are ordinarily resident in the UK and were getting Child Benefit/CTC before going abroad, who return within 52 weeks of the beginning of their period of temporary absence;
- Persons who were ordinarily resident in the UK for at least three months before going abroad, who return to the UK within 52 weeks;
- Persons who were paying Class 1 of Class 2 National Insurance contributions while working abroad, and paid these within three months of returning;
- Refugees;
- Persons granted discretionary leave to enter or remain in the UK, and are not prevented from claiming benefits;
- Persons granted leave to remain pending an application for indefinite leave to remain as a victim of domestic violence; and

- Persons granted humanitarian protection.[55]

The Explanatory Memorandum accompanying the regulations explained:

> 7.2 Following these amendments a person entering the United Kingdom, who is not working, or has no, or other, socio economic link to the United Kingdom will not be able to qualify for Child Benefit or Child Tax Credit as soon as they arrive in the United Kingdom. Instead, they will need to have lived in the United Kingdom for three months immediately before being entitled to such benefits.
>
> 7.3 This policy is being introduced, as part of a package of measures, to protect the benefit system and requires that a person claiming Child Benefit or Child Tax Credit has a reasonable connection with the United Kingdom before becoming entitled to such benefits. It is considered that living in the United Kingdom for a three month period establishes that required connection.

The Explanatory Memorandum also stated that the impact of the changes on business, charities and voluntary bodies, and on the public sector, would be nil. However, no Impact Assessment was produced for the regulations.[56]

The Social Security Advisory Committee discussed the regulations with HMRC officials at SSAC's meeting on 11 June 2014. Committee members noted that while the regulations were "more generous" than those imposing the three month rule for income-based JSA (see section 4 above), there would inevitably be some "hard cases" affected by the changes, such as people returning from voluntary work overseas, and those fleeing domestic violence. The accuracy of the claim in the Explanatory Memorandum that there would be no impact on local authorities was therefore questioned. In response, HMRC noted these points and said that they would be considered as part of the implementation and monitoring of the policy. Officials also indicated that there was no existing data to give an estimate of the how many returning UK nationals were likely to be affected by the measures, but that the impact of the changes on returning UK nationals, and of the policy more generally, would be monitored.

55 See also Child Benefit if you move to the UK at GOV.UK
56 Para 10

10. No Universal Credit for EEA jobseekers

Universal Credit is to replace a range of existing means-tested benefits and tax credits for people of working age. It can be claimed by individuals and families whether in or out of work.

The unique features of Universal Credit mean that it is not entirely clear how it should be classified under EU law – there is no real precedent. The Government has however said on a number of occasions that it considers Universal Credit to be a "social assistance" benefit. Om 25 November 2014, the Secretary of State for Work and Pensions, Iain Duncan Smith, said to the House:

> On migrants, we have already made it clear that universal credit is a different type of benefit, so people who come here and are out of work will not be able to claim it as a benefit.[57]

The Government considers that, for the purposes of EU law, Universal Credit is a "social assistance" benefit, and as such EEA jobseekers can be denied it.[58] However, the Court of Justice of the European Union has held that benefits "of a financial nature intended to facilitate access to employment in the labour market of a Member State" cannot be regarded as "social assistance" and should be granted to a person who has a "genuine link" with the employment market of the host Member State.[59]

In his speech on immigration on 28 November 2014, the Prime Minister said that "the legal status of Universal Credit meant that the UK could regain control over who should receive it." He continued:

> So as Universal Credit is introduced we will pass a new law that means EU jobseekers will not be able to claim it. And we will do this within existing EU law.[60]

10.1 Amending regulations

On 9 March 2015 the Universal Credit (EEA Jobseekers) Amendment Regulations 2015 (SI 2015/546) were laid before Parliament. The regulations provide that an EEA national whose only right to reside is as an EEA jobseeker, or a family member of such a person, cannot satisfy the Habitual Residence Test and will not be entitled to Universal Credit. The regulations, which were subject to the negative procedure, came into force on 10 June 2015.

The DWP's Explanatory Memorandum accompanying the regulations stated:

> 7.2 This policy is being introduced to protect the integrity of the benefit system and to ensure that any available benefit support is

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57 HC Deb 25 November 2014 c789

58 See section 6 of Library briefing SN06561, Child Benefit and Child Tax Credit for children resident in other EEA countries; and ""Tories plan to deny EU migrants out-of-work benefits under universal credit," *Guardian*, 6 November 2014

59 Cases C-22/08 - Vatsouras and Koupatantze; see also section 4.1 of this briefing

60 "David Cameron's EU speech: full text," BBC News, 28 November 2014

> increasingly focused only on mobile EEA nationals who contribute to the UK through work.

Further information can be found in DWP Memo ADM 14/15, Universal Credit – EEA jobseekers (April 2015).

10.2 Correspondence between SSAC and the Secretary of State

Correspondence between Paul Gray, Chair of the Social Security Advisory Committee (SSAC), and the Secretary of State for Work and Pensions regarding the amending regulations was published on GOV.UK on 9 March.

In his letter to the Secretary of State (dated 4 March) Mr Gray said that while the Committee had a number of concerns about the proposals, its previous report on Housing Benefit changes for migrants (see section 7.1 of this note) had dealt with similar and related issues. It considered it unlikely that there was significant amount of additional evidence to be gleaned from further public consultation at that stage, and had therefore taken the view that an "early exchange of correspondence" with the Secretary of State was more appropriate.

On the issue of classification of UC for EU law purposes, the SSAC letter states:

> The Committee notes that, in relation to these proposals, the view has been taken that Universal Credit can be classified as "social assistance" for the purposes of compliance with EU legislation. We assume the Department has satisfied itself on the robustness of that interpretation.

The letter outlines the Committee's concerns about the impact of the changes on EEA migrants who may have been in the UK for some time:

> The Explanatory Memorandum makes clear that the proposed further restriction of EEA nationals' access to benefits is to support Government policy that EEA migrants should not be able to access means-tested support before they have contributed to the UK through work. The proposed changes will, however, affect not only potential migrants considering whether to come to GB in search of work, but also EEA nationals and their dependants who have already settled and worked in the UK.
>
> The Committee acknowledges that some of this latter group who subsequently fall out of work may continue to have access to benefit because they have a qualifying right of residence. But the Committee is concerned that there will be a significant number of families that could suffer hardship. Indeed a number of respondents to our earlier consultation were clear that, in the case of family or relationship breakdown, some people would be wholly reliant upon friends, charities and local authorities for help. This would particularly be the case for a number of people who have been in the country and contributed for some time. For them, in practical terms, 'home' is here.

On the analysis of the likely impact of the measure, the Committee observes:

> The Equality Analysis provided to the Committee ahead of the meeting about these and other groups contained little by way of

> meaningful data. The Committee was also disappointed that the supporting papers did not explain what consideration has been given to the application of the 'Family Test' to this policy. However we were pleased to hear from officials at today's meeting that some additional relevant information and analysis, for example the estimated number of lone parents at risk of losing entitlement, has become available in the past few days. We were also advised that the Department was currently assessing the impact on families. We consider that it would support the process of Parliamentary scrutiny if this additional material could be made available to Parliament at the same time as the regulations are laid.
>
> The Committee also understands that measures are now being put in place to provide more comprehensive on-going data with regard to EEA migrants. This is a welcome step, but we think the Department should go further. For example, we recommend that more pro-active research should be undertaken and published, for example by undertaking surveys and consulting stakeholders. There is a considerable lead-in period before Universal Credit will be fully rolled-out in relation to EEA migrants, and this presents a timely and unusual opportunity for relevant information to be gathered in advance of implementation.

SSAC believes that DWP should, in the light of further analysis, consider-

> …whether there are any particular circumstances which would justify amending regulations to provide exemptions or easements in tightly defined circumstances. For example, it may prove to be appropriate that some groups, for example victims of domestic violence, could be given a right to reside for a limited period of time with benefit paid for a temporary bridging period.

The Committee also believes that appropriate funding be given to local authorities to provide a "final safety-net" for dependent children and vulnerable adults affected by the changes who are unable to return to their country of origin, and that local authorities, especially those containing "hotspots" where there are high numbers of immigrants, are consulted on the impact of the changes.

Finally, SSAC also highlights the importance of comprehensive guidance for DWP decision makers and those providing advice to EEA migrants to ensure "consistent and effective operation of the system."

The Secretary of State for Work and Pensions responded to the SSAC Chair on 9 March. On the issue of the classification of UC under EU law, he said that he, and relevant Cabinet colleagues, had "considered carefully the position of Universal Credit in the context of European law and our international obligations," adding that he was "satisfied that our classification of UC in this context is lawful and compliant with these obligations."

With regard to the Committee's concerns about potential hardship for families, the Secretary of State said that the Government's policy was to-

> …shape future EEA migration activity so that people do not migrate to the UK until they have a job (or if they still wish to come without a job they can fully support themselves until they find work).

He pointed out that there were a number of ways in which EEA nationals who had been working in the UK could still access benefits, for example by virtue of having paid sufficient National Insurance contributions to access contributory benefits, by retaining "worker" status on losing their job, having a derivative right to reside as a carer of a child in education, or by gaining permanent residence.

On the Committee's suggestion that emerging data and research be examined to consider whether exemptions were justified, the Secretary of State agreed that "emerging evidence should be used to inform practical application of the policy."

With regard to local authorities, the Secretary of State said that the Government would continue to monitor the impact of its policies on local authorities and the funding available to them to fulfil their statutory duties. He added however-

> You will be aware that, in historical terms, the numbers of accepted applications for homelessness assistance remains low [DCLG Housing Statistical Release, 11 December 2014] and that there has not been evidence of any significant increase as result of our previous reforms to migrants' access to benefits. The current evidence does not suggest that the changes to UC will notably alter this position.

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