

# Changes to EU migrant citizens' social rights in the UK since 2010

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This brief considers changes which have been introduced through secondary legislation since the election of the UK Coalition government in May 2010. The changes can be understood in the context of political debates about the scale of intra-EU migration to the UK and the declared intention by the Conservative Government to reduce overall net immigration; linked concerns about the pressure on services resulting from inward migration; and the perceived practice of 'benefit tourism'.

## KEY FINDINGS

Most changes since 2010 concern amendments to status qualifications (such as the right to reside, habitual residence, worker or jobseekers) and restrictions in eligibility for benefits which are dependent upon the applicant meeting the new status criteria.

Following case law developments at the Court of Justice of the European Union, changes to UK regulations have extended the right to reside (and in some instances, access to social rights) to new groups, primarily non-EU nationals who are the primary carers of EU migrant citizens.

## Changes for workers

### The minimum earnings threshold

In March 2014 a Minimum Earnings Threshold (MET) was introduced to assess benefit eligibility. This was initially a means of assessing whether non-national EU applicants for Jobseekers Allowance (JSA), Housing benefit (HB) and Child Tax Credit (CTC) fulfilled the requirements as genuine workers. However, from October 2014 the MET was extended to apply to claims for Income Support (IS) and Employment and Support Allowance (ESA); and from November 2014 was also applied to state pension credit.

*The status of worker is fundamental to the EU's free movement framework. As the Commission has affirmed<sup>i</sup>, 'The term 'worker' has a meaning in EU law and cannot be subject to national definitions or be interpreted restrictively'. The MET appears to tinker with the definition of a worker and the criteria for qualifying as such, and may thus be open for legal challenge<sup>ii</sup>.*

### Box 1

#### The two-stage earnings test

The MET constitutes the first stage of a two-stage test to assess whether a benefits claimant meets the criteria for the status of worker/self-employed person, and is thus eligible for benefits on that basis.

1. Applications for the benefits listed opposite are assessed by calculating the applicant's average weekly income over the previous 3 months. If the average income equals or is greater than the 'primary threshold' (currently £155/wk), then the applicant is counted as having worker (or self-employed) status, and is eligible for those benefit(s).
2. Below-MET weekly earnings do not automatically mean exclusion from worker status. The application assessor must then (in the second part of the test) look more closely at the case to determine whether other aspects of the applicant's work indicate that s/he still meets the criterion of completing 'genuine and effective' economic activity.

### Retained worker status

Up until 1st January 2014, EU workers who became *involuntarily* unemployed could retain worker status and linked social rights for 12 months if they had been employed for more than a year and for 6 months if they had worked less than a year. Today, those who have worked for more than a year will retain 'worker' status for 6 months, following which they will only be able to rely on this status for an extended period if they can produce 'compelling evidence' of efforts to find work and a genuine chance of being offered employment. Those who were employed for less than a year will also retain worker status for six months, but without the possibility of extending it beyond that period.

### Changes for jobseekers

#### Jobseeker status

As of January 2014, changes have also been made to the definition of 'jobseeker' to clarify that a person may be a jobseeker both upon entering the UK, and where they have previously enjoyed a right to reside as a 'qualified person' in another capacity.

#### Box 2

##### DWP's definition of a 'genuine prospect of work'

'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.'  
Further guidance suggests that completion of a vocational training course or a job offer to start within three months will count as 'compelling evidence'.

Prior to this date, the Home Office only treated 'on-entry' jobseekers as such, meaning that a person who gave up working voluntarily was unable to rely on the status of jobseeker. A person can now only retain jobseeker status for more than 6 months if she can provide compelling evidence of seeking work and of having a genuine prospect of being employed.

In addition, since 1st July 2014, *newly arrived* EU jobseekers cannot claim child benefit or child tax credit since they are not considered to be habitually resident (and thus eligible) until they have lived in the UK for a minimum of three months.

#### Genuine prospect of work tests

The various amendments described above emphasise the need for those wishing to retain the status of worker (or self-employed person) beyond six months to show compelling evidence that they have a genuine prospect of being engaged by an employer. The amendments do however not give any indication of what constitutes compelling evidence or a genuine prospect.

The Department of Work and Pensions clarified the terms in what is now referred to as the 'genuine prospect of work' (GPoW) test (see Box 2).

#### Eligibility for jobseekers' allowance

In line with the changes to the status of jobseeker mentioned above, there is now an effective 3-month limit to the period of time in which jobseekers' allowance (JSA) can be claimed by EU migrant citizens whose only right to reside depends upon having jobseeker status.

For a newly arrived EU jobseeker, the first 3 months of residence in the UK is now categorised as their 3-month 'initial right to reside' period, whether or not the jobseeker is actively looking for work at this stage. EU regulations state that Member States may withhold 'social assistance' payments

during this initial period. Although the move to withdraw the right to JSA for new EU jobseekers was contentious, EU recent case-law appears to permit this.

The Court of Justice of the European Union (CJEU) previously took the position that a minimum subsistence payment for jobseekers could *not* be regarded as ‘social assistance’ since it is meant to facilitate access to employment in the labour market of a Member State - and consequently could not be denied to EU jobseekers. However, in two recent cases brought by German authorities (the ‘Dano’<sup>iii</sup> and ‘Alimanovic’<sup>iv</sup> cases) the CJEU has concluded that Arbeitslosengeld II (the German equivalent of JSA) should in fact be regarded as a social assistance payment on the grounds that its primary function is to cover subsistence costs. By extension, both unemployed EU citizens who have never worked (Dano) and those who have previously worked but no longer retain worker status (Alimanovic) can lawfully be excluded from JSA.

#### **Housing allocations and homeless assistance**

The Localism Act 2011 introduced an expectation of Local Authorities to include ‘a local residency test’ of at least two years in their allocations policies, meaning that most EU migrant citizens have to wait for the stipulated period before being able to apply for social housing. A number of local authorities have put in place considerably longer local residency tests of 5 years or more.

The Immigration Act 2014 made it a criminal offence to rent property to a person without the correct immigration status, and introduced a legal requirement for private landlords to check immigration documents to ensure that their prospective tenants are in the country legally. While this doesn’t apply directly to EU citizens, campaigners say there is evidence that

some private landlords are now refusing to rent to any immigrants to avoid the effort of making checks and the risk of being fined if they get it wrong.

Where the applicant for housing is a non-EU citizen primary carer of a dependent EU citizen child, the right to an allocation is extremely complex. The non-EU citizen carer of an EU citizen child in full-time education (referred to as an ‘Ibrahim/Teixeira’ carer) or a self-sufficient EU citizen child (a ‘Chen’ carer) may be eligible for social housing. In contrast, the non-EU citizen parent of a British child (a ‘Zambrano’ carer) is not eligible for social housing. See the Home Office guidance on Derivative Rights of Residence for clarification of the differences<sup>v</sup>.

#### **Housing benefit**

Prior to April 2014, EU migrant citizens in receipt of JSA were also entitled to claim Housing Benefit (HB)<sup>vi</sup>. Since April 2014, however, the link between JSA and HB has been removed for EU jobseekers. In addition, eligibility for housing benefit (HB) is one of the income-related benefits which is potentially affected by the MET test (see above); EU workers and self-employed EU people who fail the MET test may be found to be ineligible for HB.

Homeless charities have highlighted the impact this may have on homeless and economically inactive EU citizens in the UK, including those who may have been here for several years, since most hostels and night-shelters for the homeless require occupants to be eligible for HB as a form of payment for their bed space.

As a result, rough sleeping and homelessness are reportedly on the rise, as is the associated cost and impact on other services such as the NHS. No legal challenges to the HB restrictions have been made yet, the removal of legal aid for welfare benefits claims making it harder for those

most likely to be affected by the loss of HB to seek redress against the decision.

### Social Assistance, Social Security and Special Non-Contributory Benefits

Most welfare benefits can be divided into one of three categories: **social assistance**; **social security** and **special non-contributory benefits**. The difference between these is clarified in the judgement of Case C-1/72 Frilli [1972] ECR – 00457:

- **Assistance** 'seeks to relieve a state of need or poverty; it is the need which causes and justifies the right to assistance'.

- **Social security** 'does not seek to relieve poverty, but to indemnify the victim of certain social risks by providing him with a supplementary or substitute income; the intention is not to provide a particular income, but an equivalent or substitute'.

- **Special non-contributory benefits (SNCBs)** as per Article 70 of the EU Regulation 883/04 are 'hybrid' benefits (falling somewhere between social assistance and social security benefits) which are non-exportable. Member States have in the past tried to limit the exportability of certain benefits by re-classifying them as SNCBs, a process which has led to much litigation at the Court of Justice of the European Union.

▶▶ **Social assistance benefits in the UK** are funded through general taxes, and their allocation is often means-tested, e.g. housing benefit and income support.

▶▶ **Social security benefits in the UK**, e.g. pensions, maternity benefit, contributions-based Jobseekers Allowance and statutory sick pay, are funded through National Insurance contributions and taxes and are provided when the criteria are met, regardless of income.

**Under EU law, EU migrant citizens can be excluded from social assistance payments for the first three months of residence in another Member State.**

### Universal Credit

The regulations governing eligibility for Universal Credit, which were introduced in March 2015, state that an EU citizen who moves to the UK and whose only qualifying right to reside is that of jobseeker will not be eligible for a UC award as of 10 June 2015, and that the same rule applies to their family members.

The Government categorises Universal Credit as a 'social assistance' benefit, and as such EU jobseekers can be denied it (see box). This position seems to be in accordance with the recent 'Dano' and 'Alimanovic' cases adjudicated by CJEU described in the section on Jobseeker's Allowance (see above).

Critics highlight the likely impact of the exclusion of EU migrant citizens from UC on families who have been in the UK for up to five years but have fallen out of work, experienced family breakdown or homelessness.

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<sup>i</sup> European Commission (2010), *Reaffirming the free movement of workers: rights and major developments*. COM(2010)373 final. Brussels, European Commission.

<sup>ii</sup> Rutledge (2014), Could the earnings threshold for benefits be in breach of EU law? Interview available at: [http://www.gardencourtchambers.co.uk/wp-content/uploads/old\\_site/File/Desmond%20Rutledge%20LexisNexis%20interview.pdf](http://www.gardencourtchambers.co.uk/wp-content/uploads/old_site/File/Desmond%20Rutledge%20LexisNexis%20interview.pdf)

<sup>iii</sup> Judgment in Case C-333/13, Dano v Jobcenter Leipzig <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CJ0001&from=EN>

<sup>iv</sup> Judgment in Case C-67/14 Jobcenter Berlin Neukölln v Nazifa, Sonita, Valentina and Valentino Alimanovic

<sup>v</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/423573/Derivative\\_rights\\_of\\_residence\\_v2\\_0\\_ext.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423573/Derivative_rights_of_residence_v2_0_ext.pdf)

<sup>vi</sup> Regulation 10 (3B) (K) of the Housing Benefit Regulations