

Politically acceptable poverty

October 2014

The EU rights project

The EU rights project is a legal action-based research project funded by the Economic and Social Research Council and the University of York, with support from Ripon Citizens Advice Bureau (CAB). The project takes on cases from all CABx in the North Yorkshire region, providing advice and advocacy to EU migrants at all stages of a benefit claim or appeal. It also records each action taken with or on behalf of clients and of each administrative encounter, to create a narrative of the obstacles EU migrants face when claiming welfare benefits.

In documenting the experience of using EU law in the UK, the project should shed some light on the distance between the theory of EU citizenship and equal treatment, and the lived reality for EU migrant claimants. This perspective is, on the whole, currently missing from EU academia, where the focus is much more on the caselaw of the Court of Justice of the European Union. But the effects of administrative and legal processes on EU migrant claims only come to light if we adopt a more socio-legal and empirical perspective, and if we integrate the study of EU law with domestic benefit rules. In short, action research allows us to test EU rights from within the UK welfare system.

This method is particularly timely, given the reduced access to justice in welfare law, for which legal aid has been all but scrapped. Many of the cases encountered would otherwise be invisible,

In the current popular discourse the media and the government have positioned migrants from the European Union (EU) as welfare threats and, despite the evidence that they are net contributors to the economy, as acceptable targets for welfare reform.¹ In addition to the stream of new rules reducing their entitlement, EU migrants also face a host of hidden administrative obstacles, impairing their access to welfare benefits to which they are entitled under EU law. Challenging these obstacles may not be politically popular but, given the vilification of a vulnerable demographic, the need to do so is pressing. Charlotte O'Brien describes the work of a new project that hopes to increase EU migrants' access to justice.

because of the limited specialist help available – a lack that is especially acute in the context of EU law, where clients are unlikely to know the relevant points of law, and face disadvantage in attempting to navigate their way through an appeals system in a non-native language.

So the project generates research findings on otherwise invisible subjects, offers help to those who would otherwise go without and, hopefully, has the potential to produce a genuine social good by shining a legal spotlight on the area. Moreover, a key output will be a toolkit to help advisers navigate the complex rules and deal with the administrative obstacles identified by our research.

The emerging problems

As we are only a year into a two-and-a-half-year project, it is too early to draw definitive conclusions. However, there are a number of themes emerging from the many obstacles encountered. So far, these include: delays; problems with communication; document black holes; misinformation and gatekeeping; and heavy evidential burdens.

Delay is a substantial problem. There can be a significant delay while a decision maker reaches an initial decision, often requesting further information several times, each request being some time apart. And there can be delays in HMRC submitting an appeal to a tribunal. Having submitted her/his own appeal within a tight deadline, a claimant might not hear anything about it for months. Delay is perhaps the most significant way in which EU welfare rights are stifled. It can be tantamount to refusal without a right to appeal, since the effect is no benefit and no decision to challenge – sometimes for such a length of time that a subsequent favourable decision comes too late to avoid or compensate for the serious hardship experienced in the interim.

Communication problems can contribute to delay, but also to flawed decision making. For example, a communication problem might be experienced when the DWP or HMRC contacts the authorities in another EU country to establish which is the ‘competent’ state responsible for paying benefit or to find out whether there is any ‘overlapping’ entitlement. There is a set procedure for contacting other states, through an electronic portal using a set form. But the clarity of the information and of the questions put on this form is crucial for receiving timely and accurate replies.

Other communication problems include the difficulties advisers and clients have when making contact with UK authorities. Several have reported problems with automated voice recognition helplines, with their words not being recognised, being sent round a loop, and being cut off. Moreover, the EU decision-making team may often not be contactable for the client. Clients have received correspondence with no telephone numbers, and the helpline has refused to put them through to the team.

Document black holes mean that correspondence and documents go missing, which can create serious problems and cause further delay. Especially worrying is the loss of ID documents, causing problems for clients who may need to travel to another state urgently to attend to a family illness or other emergency, or indeed may struggle to replace unique personal identifying documents. The departments responsible may then send repeat correspondence requesting that those very documents be sent again.

Misinformation and gatekeeping are related issues, since people may be inappropriately steered away from applying for benefits by frontline staff. HMRC advisers have given sig-

nificantly inaccurate advice about a client’s right to pursue an appeal while also submitting a new claim in tandem as a result of a change of circumstances. People may also receive poor advice from Jobcentre Plus about which benefits to claim. Staff may misinform themselves – ie, not gather the right information so that a benefit decision is made based on flawed information (an example might be not checking whether a claimant is married to a migrant worker).

The requirement to provide evidence can be onerous and arguably disproportionate in cases where sufficient evidence has already been provided to support a claim. For example, clients have found it difficult to substantiate benefit claims based on their having been continuously lawfully resident for five years when they have been in several jobs, even when they have kept all their paperwork. This burden can be exacerbated by administrative compartmentalisation, whereby Jobcentre Plus, the benefit decision maker and the EU decision-making team are three separate entities requiring their own databases to be updated. This can make for tortuous evidence-gathering processes, where clients take the required documents into a jobcentre and then do not hear for weeks whether they have been given to the benefit decision maker – and if they have not, they have to submit them again.

Other emerging areas of investigation include the administration of sanctions, and the triggering of compliance procedures. The UK government has suggested that all EU migrants must now be subject to compliance checks,² even though such checks were arguably only meant for cases where there is a cause to suspect that the claimant does not meet the entitlement conditions for the award. And, of course, the raft of new rules and regulations on benefits for EU migrants could set the scene for further administrative obstruction.

Tackling the new rules

The prime minister announced in November 2013 that there would be a crackdown on EU benefit claims. As a consequence, the project has taken a slightly unexpected turn, scrutinising each of the many rule changes for compliance with EU law and identifying likely problem areas, especially in the realm of administrative decision making. Briefly, the new rules introduced this year are as follows:

- a three-month residence rule for all new job-seeker’s allowance claims after January 2014, coupled with a ‘more robust’ habitual residence test;

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- the exclusion of EU jobseekers from housing benefit;
- a six-month limit for jobseeker's allowance receipt, coupled with a new test for showing there is 'compelling evidence of a genuine prospect of work';
- a new minimum earnings threshold and a new test of whether work is 'genuine and effective';
- the withdrawal of routine interpreting services in Jobcentre Plus;
- a three-month residence rule for child benefit and child tax credit.

Other changes are on the horizon, including the exclusion mooted by the Treasury of temporary 'non-resident' workers from the income tax personal allowance, which, if it goes ahead, is likely to result in 250,000 low-paid EU national workers effectively earning less than their UK counterparts for the same work.

Some of these changes raise potential EU law infringement issues, and one of the aspects of the project is to put together tribunal cases that require domestic UK law to be disapplied and EU law to be relied on instead. For example, the exclusion of work seekers from housing benefit might be unlawful, if housing benefit can be characterised as part of a package of benefits designed to facilitate access to the labour market. And given that the lone parent rate of jobseeker's allowance is £72.40 a week and the local housing allowance in, for instance, the Harrogate district for a lone parent with two different sex children, one over the age of 10, is £160 per week, jobseeker's allowance alone leaves a huge rent shortfall – and that is not accounting for paying for things other than rent, such as utilities and food. Job seeking is likely to become impossible for a great number of people.

At the very least, the changes demonstrate a very minimalist concept of European solidarity, since the families of work seekers are likely to face eviction and go hungry. Even where the changes seem to comply with EU law, they pose their own administrative hurdles, so the project will be testing how they are applied in practice. For example, the decision makers' guidance on what counts as 'compelling evidence' of a 'genuine prospect of work' for those who wish to receive jobseeker's allowance for longer than six months is extremely narrow – offering only two types of evidence. One of which is a written job offer, with a start date and

specified income, hours per week and duration, so that even a written job offer, but with a zero-hour contract, is not sufficient evidence of a 'genuine prospect of work',³ possibly resulting in a total loss of any benefit support in the interim before the job starts.

Studying the effects of the changes highlights the problem of assuming that there is a bright line between people who are EU 'workers' and those who are 'non-workers', and that rules directed at the economically inactive are irrelevant to workers. In reality, workers can be seriously affected by the measures imposed on the 'economically inactive' in many ways. Firstly, the bright line is deceptive: people may move in and out of work, or their partners and children may move in and out of families on relationship breakdown. Secondly, EU migrants, working or not, are potentially affected by the extra administrative hurdles, potential delays and evidential burdens following on from the new tests. And, of course, the greater the penalty for being economically inactive, the steeper the precipice faced, placing people at greater risk of exploitative employment. Taken together, the changes heighten existing welfare cliff-edges for EU migrants, and may result in increased destitution. The raft of measures, combined with a good deal of rhetoric about rogue benefit claims, feeds a cultural hostility to EU migrants, so that we feel little solidarity with those temporarily in need. ■

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For more information about the EU rights project, see eurightsproject.org.uk. I welcome any contributions from *Poverty* readers on past, current or future cases which demonstrate these obstacles, and especially on the consequent hardship experienced by clients (email: advice@riponcab.org.uk). It would be particularly helpful to hear of cases where the UK is contacting another member state. I would also like to hear of any such cases where interim payments have been made or requested, as the grounds for awarding interim payments seem to be drawn very narrowly.

1 European Commission, *A Fact Finding Analysis on the Impact on the Member States' Social Security Systems of the Entitlements of Non-active Intra-EU Migrants to Special Non-contributory Cash Benefits and Healthcare Granted on the Basis of Residence*, 2013
 2 HM Government, 'Budget 2014 policy costings', March 2014, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/295067/PU1638_policy_costings_bud_2014_with_correction_slip.pdf, accessed 12 August 2014
 3 DWP, 'Habitual Residence and Right to Reside – JSA', Memo DMG 15/14, June 2014

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