

Benefits for EEA nationals March 2015

The Early Warning System (EWS) is a framework which has been developed by CPAG in Scotland to collect case studies and wider evidence about how welfare changes are impacting on children, young people and the families and communities that support them. We are currently collecting information and anonymous case studies from 86 frontline workers including welfare rights officers, housing advisers and support workers across Scotland. We are also processing evidence from our second tier advice line, training events and through ongoing qualitative research. Please visit [our website](http://www.cpag.org.uk/scotland/early-warning-system) for more information on the project. <http://www.cpag.org.uk/scotland/early-warning-system>

There have been a number of significant changes to the benefit entitlement of EU migrants in the last 2 years. The EWS has collected 160 case studies regarding benefits for people from abroad, the majority of which suggest these reforms are having a devastating effect, particularly on families who have undergone relationship breakdown or domestic abuse. This in turn is putting additional pressure on local authorities and third sector services.

Background

Entitlement to the main means-tested benefits (income support (IS), income related employment and support allowance (irESA), income based jobseekers allowance (ibJSA), pension credit (PC), housing benefit (HB), universal credit (UC), child benefit (CB) and child tax credit (CTC) is dependent on an EEA national having a right to reside under EU law. This could be as:

- a jobseeker
- a worker*
- someone who is self-employed**
- someone who is self sufficient
- a student who is self sufficient
- a family member of one of the above
- someone with a permanent right to reside

It is also possible to obtain a right to reside established by case law, for example, as the primary carer of a child who is in education, who is the child of an EEA worker. However, some types of right to reside give you little or no entitlement to the relevant benefits.

*Worker status can be retained if you are involuntarily unemployed and registered with the Jobcentre, you are temporarily unable to work due to accident or illness, or undertake vocational training.

**Self-employed status can be retained if you are temporarily unable to work due to accident or illness.

EEA nationals lose right to reside as jobseeker after 91 days

Jobseekers lose their right to reside after 91 unless they can provide 'compelling evidence' they are seeking and have a genuine prospect of getting work. DWP guidance provides as an example of compelling evidence having a job with a start date.¹ EEA nationals who have worked can retain their right to reside as a worker if they become involuntarily unemployed and register with the jobcentre. This is also now limited to 6 months if they have been working for less than a year, or longer if they worked for a year or more and can provide compelling evidence that they are seeking and have a genuine prospect of getting a job. If occurs right to reside is lost in these circumstances, the EEA national must have a period of absence from the UK before they can obtain jobseeker status again.

If a client does not have an alternative right to reside this means the complete loss of access to mean- tested benefits. However, in 5 of the 9 cases collected regarding the genuine prospect of work test (GPoW) the client did have an alternative right to reside and their benefit was stopped anyway.

- Slovakian client, with wife and 3 children, worked on and off and for fluctuating hours for an agency until Feb 14 when they stopped giving him any work. His claim for JSA was terminated under the GPoW test and subsequently so was his claim for HB. However, client or his wife may have an alternative right to reside as the main carer of a child in education. Client's wife can claim JSA but this will be limited to the 3 months and the HB claim will not be re-instated unless someone finds work.#2622
- Polish lone parent left her partner due to domestic abuse & claimed JSA. JSA has now stopped as she has not shown a GPoW. The client does not want to put her child in childcare and takes him round houses with her as she looks for work. Client has very little English. Client no longer has a right to reside for JSA, HB, CB or CTC.#2970
- Italian male, age 22, has been living in the UK for 18 years with his mother who has been self-employed for all of that time. He was in receipt of JSA but was called for a GPoW interview and told that his JSA will stop as he no longer has a right to reside as a worker. However, he has a permanent right to reside and continues to be entitled to JSA on that basis.

Exclusion of EEA jobseekers from housing benefit

From 1 April 2014 EEA nationals who's only right to reside is as jobseeker are excluded from housing benefit, even if they are entitled to ibJSA. This does not apply if you have previously been employed in the UK and have retained worker status.

- Pregnant Romanian client currently in a Women's Aid refuge has claimed JSA but is not entitled to HB as her only right to reside is as a jobseeker. #2596
- Spanish lone parent has been in the UK since Feb 14. She worked for 2 weeks, for 2 hours per day but had to give up as she was unable to take her daughter to school. If it is not accepted that the work was genuine and effective, she will not have retained worker status. At present she has claimed JSA but has been denied housing benefit on the basis that her

right to reside is as a jobseeker. She is currently staying in local authority temporary accommodation accruing rent arrears. #3315

- Italian national with 2 children in temporary accommodation has no access to HB as her only right to reside is as a jobseeker. The local authority is charging £484 per week rent. #1586

A third of the cases relating to the exclusion of jobseekers from HB concern clients who should have remained entitled to HB on the basis that they have an alternative right to reside:

- Polish client with a toddler separated from husband following domestic abuse, then lost her job and claimed JSA. HB incorrectly stopped on the basis that the client was a jobseeker however she retained worker status as she was involuntarily unemployed. #2027
- Italian client has a permanent right to reside as he has worked in the UK for more than 5 years. He is currently in receipt of JSA but his claim for HB stopped because the DWP could only confirm that he is a jobseeker. #3340

3 month “living in UK” test for jobseekers allowance, child benefit and child tax credit

From 1 January 2014, claimants must have been living in the UK or Common Travel Area (Ireland, Channel Islands & Isle of Man) for 3 months before they may be entitled to income based JSA. In addition to EEA nationals this also applies to British and non EEA nationals. From 1 July 2014 anyone who entered the UK after that date is subject to a similar living in the UK for 3 months requirement for child tax credit and child benefit. There are limited exceptions for both tests¹.

The vast majority of cases collected through the EWS in relation to the 3 month tests relate to returning UK nationals with few exceptions. However, the exceptions include an EEA national returning to the UK having served a prison sentence abroad and lone parents who have experienced relationship breakdown or domestic abuse:

- Polish man who had been living in the UK since 2007 was extradited to Poland to serve a 6 month prison sentence. He was refused JSA under the 3 month rule on his return. #1631
- Polish lone parent hoped to be supported by her boyfriend when she came to the UK but he rejected her. She was refused JSA under the 3 month test. #459
- Italian lone parent came to UK with her children fleeing domestic violence and will not be entitled to JSA until she has been in the UK for 3 months. #1763

Case studies suggest that DWP staff have been mistakenly applying the 3 month test for JSA to other benefits:

- A person returning to the UK was refused ESA on the basis that they had not been living in the UK for 3 months. When queried, the DWP said that ESA was going to be changed to be brought in line with the 3 month test for JSA. #1902
- A returning UK national who would appear to have remained habitually residence was advised they would not be entitled to IS until they had been back in UK for 3 months. #1374

Minimum earnings threshold

In order to have a right to reside as a worker or self-employed person, you must be doing work which is genuine and effective. In March 2014 HMRC issued guidance which introduced a minimum earnings threshold as a 2 stage test:

1. Have you had a gross average weekly income to the level where you become liable to pay National Insurance for the last 3 months? (In 2014/15 this was £153 a week, but it changes every April.)
2. If you do not meet this 'minimum earnings threshold', consideration must be given to the facts of your case to determine whether your work is genuine and effective.

- Romanian lone parent who was a self-employed cleaner had her tax credit claim reviewed as HMRC suspected that her work was not genuine and effective. They requested so much information that the agency that offered her cleaning work stopped offering it to her as they did not want to deal with the excessive enquiries from HMRC. #1218
- Romanian Big Issue seller lives with his wife and 4 children, all of whom are at school. HMRC reviewed his claim and determined that he did not meet the minimum earnings threshold so he lost his right to reside as a worker and his WTC and CTC stopped despite him having a right to reside as the primary carer of children who began their education while he as self-employed. #M34

Past presence tests for disability benefits

From April 2103, for new claims of attendance allowance, disability living allowance, carers allowance or personal independence payments you must have been present in the UK for 104 out of the last 156 weeks. The previous requirement was for 26 out of the previous 52 weeks.

- For babies under the 6 months old the presence test for DLA is 13 weeks
- For children between 6 and 36 months the presence test is 26 out of the previous 156 weeks.
- The past presence test does not apply if you are terminally ill.

EEA nationals can satisfy the past presence tests by relying on periods spent in other EEA countries, although this is often not recognised by the DWP resulting on benefits being withheld incorrectly. Cases collected through the EWS suggest that past presence tests may be more of an issue for people who have come from out with the EU, including returning UK nationals. Just over half of the cases collected regarding past presence tests relate to claims for DLA for children.

- Lone parent from Ireland with 4 children claimed DLA for her severely disabled son, but this was refused as he did not satisfy the past presence test. Time spent in Ireland should have been counted towards the time period required. #320
- 78 year old British citizen returned to Scotland having worked in America for 38 years. He will not be entitled to attendance allowance until he has been in the UK for 2 years. #2324

- British citizen returned to the UK with her daughter to care for her elderly parents. She will not be eligible for JSA for 3 months following her return or for carers allowance until 2 years after her return. #1324

Misinformation and maladministration

In addition to being affected by welfare reforms, it is apparent that EU nationals are greatly disadvantaged by confusion about entitlement and delays in processing their claims.

Misinformation

- Polish lone parent worked in the UK as an accountant for 13 years before going to America to live with her partner. She returned to the UK after 4 months due to domestic abuse. The DWP told her she has no right to reside for any benefits and the local authority are refusing to house her because of this. Client and daughter are currently sleeping in a friend's living room. Client is stressed and becoming quite ill. It is true that she could not claim JSA due to the 3 month rule, but client could apply for ESA and would be entitled to HB if local authority would accommodate her as she has a permanent right to reside. #2877

Lone parent incorrectly advised to claim income support

There has been a recurring issue of Jobcentre Plus advising lone parents to claim income support causing them to lose their right to reside as a jobseeker. It has been arising less frequently since the right to reside as a jobseeker has been limited to 91 days.

- 22 year old EU national was claiming JSA and HB until Jobcentre Plus advised her to claim IS because she is pregnant. Her claim for IS was refused and her HB stopped. If she makes a new claim for JSA she will not be entitled to HB as her only right to reside is as a jobseeker, so she will have to request a review of the decision terminating her JSA and hope that her HB claim is reinstated accordingly. #950

Benefit incorrectly refused

Just under a third of the cases collected by the EWS in relation to benefits for people who have come from abroad relate to people being incorrectly refused benefit.

- HMRC advised client that she would not be entitled to CB despite having permanent right to reside having been lawfully resident in UK for 5 years. #2154
- EU worker incorrectly advised would not be entitled to housing benefit as she "has no recourse to public funds" – a condition that may only apply to people who have come from out with the EU. #868
- Italian lone parent had to give up work and claimed JSA. She struggled with the claimant commitment and no one told her that she could restrict her availability as her child was at school, or about the domestic violence concession when her abusive ex-partner followed her from Italy. Jobcentre staff did advise her to claim ESA as she was too ill work. This was refused on the basis that she did not have a right to reside. After almost 2 months without money, ESA was paid and backdated on the basis that she had been working when her child was in education. #2816

Information about alternative right to reside not sought

- 17 year old Spanish male came to the UK with his parents 1 year ago. They were both working and he is at school. He left home due to domestic violence and has had no contact

with his parents since. His claim for IS was refused on the basis that he did not have any evidence that his parents were working. The DWP did not fulfil their duty collect information as established in case law.

Delays

- Polish couple with 1 child and another on the way and waiting for a decision on their housing benefit claim, but the local authority say they are waiting for a decision on residency. The client has a right to reside as a worker. The delay means they are currently 2 months in arrears with their rent. #1785

Difficulty establishing a right to reside

18 of the cases gathered highlight difficulties people have establishing a right to reside, leaving with limited or no access to benefits.

- EEA national Mum and severely disabled son have been in the UK for almost 5 years. For the past couple of years Mum has been in receipt of CA and IS as her son's carer. She had a right to reside as the carer of the child of an EEA worker in education. Son's course has broken down so he is no longer in education. As carer of a child in education is a derived right to reside it does not count towards achieving a permanent right to reside therefore neither mum or son have a right to reside at the moment. #2902
- Romanian dad has been imprisoned leaving mum with 3 children under the age of 5. Dad had been claiming JSA, HB, CTC and CB. Mum will now have to claim JSA but will have difficulty making the job seeking conditions with 3 small children, one of who is disabled, and she will not be entitled to HB as her only right to reside is as a jobseeker. At present Mum is relying on assistance from SWF, social work and food banks. #3158
- Polish kinship carer for 2 year old grandchild had her claims for IS & HB refused because she has been unable to establish a right to reside. She has claimed WTC as a self-employed kinship carer, but there is case law which states that fostering (and therefore kinship care) are not the type of activity envisaged by EU law and therefore do not generate a right to reside as a worker. Client's adviser has asked social work if they will pay client's rent.#3440
- Polish lone parent left her husband due to domestic violence and is now in a Women's Aid Hostel. She is reliant on the DWP establishing whether she can derive a right to reside from her husband, otherwise she will have limited access to JSA and no entitlement to HB. #2659

Other services

Scottish welfare fund

One adviser reported that clients were being refused Scottish welfare fund grants or even the chance to make applications because they are EEA nationals who have been found not to be habitually resident or have no right to reside. The local authority said they could not make awards due to public fund/people subject to immigration control exclusions. Extracts from the Scottish Government's guidance were been submitted to no avail, but the matter was resolved after CPAG provided the relevant information.¹

¹ [CPAG in Scotland's Advising BME Communities Project's e-bulletin Feb 2015](#)

Homelessness

6 of the cases collected suggest that local authority homeless departments are confusing entitlement to benefits with entitlement to homelessness assistance. The two do not necessarily mirror each other:

- 24year old Polish client who is working is currently in temporary accommodation, but the local authority has asked to him to leave saying that he has no right to reside for HB purposes, whereas it would appear that he has a right to reside as a worker.
- 45yo Romanian male is rough sleeping has been told that he cannot get into temporary accommodation unless HB can be paid. Shelter confirmed, access to homeless assistance still dependant on right to reside, not entitlement to HB.

What steps might be taken to mitigate the impacts of welfare reform

In the current political climate, it is unlikely that any of the welfare reforms affecting EU migrants will be reversed, however this does not absolve us from the responsibility of identifying and taking steps to mitigate the impacts.

For the DWP

Training and guidance for staff administering benefits for EU nationals would address the high level of misinformation and incorrectly refused claims, ensuring that EU nationals with a right to reside get the benefit that they are entitled to.

For housing benefit departments

Again there is an apparent need for training and guidance for staff. The housing benefit department must take responsibility for making its own decisions and not rely on the DWP's interpretation of a client's benefit entitlement.¹

Continued investment in good quality advice

Given the high level of error regarding benefit entitlement, it is vital that EU migrants have access to good quality information advice and support to challenge negative decisions.

Education

Key messages could be developed for EU migrants, for example:

- Register with the Jobcentre even if you will not be entitled to JSA as this may count towards your permanent right to reside, or protect your right to reside as a worker if you are unemployed for a short period.
- Seek advice before claiming another benefit if you are a jobseeker. This could be targeted at professionals, for example midwives and health visitors who may come into contact with lone parents who may be advised to claim income support.

Destitution domestic violence concession

At present, nationals from out with the EU may apply for a destitution domestic violence (DDV) concession if they have come to, or remained in, the UK as the: spouse; civil partner; unmarried or same sex partner of a British citizen, or person present and settled in the UK, and their relationship has broken down due to domestic violence.

The DDV concession grants leave with access to public funds for 3 months to allow an application for indefinite leave to remain on the basis of domestic violence to be submitted during this period.

Case law suggests that it may be possible for EU migrants who have been subject to domestic violence to apply for a DDV concession, however this should be made explicit to ensure there is not a lesser treatment of EU migrants in this situation.

Devolved powers

When disability benefits are devolved to Scotland this could present an opportunity to review the past presence tests.

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