

# **A Question of Fairness? The Discrimination of European Accession Nationals under UK Social Assistance laws**

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## **Abstract:**

This paper deals with access by the Accession 8 nationals to benefits in the UK, based on the EU and national legislation. It tests the theory that the restrictions placed by the UK on the EU law that would have otherwise allowed them to claim social assistance

were discriminatory and it attempts to assess whether the recent changes in the government policy have found their way to the potential vulnerable recipients from the A8 states. It analyses the pre-2011 position of those nationals who were subject to controls imposed by the UK government for seven years during the transitional period and its consequences on EU nationals who exercised their right to reside as citizens of a new member state or their family members. The relevant national legislation did not allow them to enjoy the full extent of social assistance, even if faced with hardship. It focuses on the position of economically inactive members of families, who, being dependent on the workers were not able to achieve the status of a habitually resident person, seemingly because of being a national of the EU themselves. It then moves on to the post-2011 legal position of migrants and the current policies of authorities and the impact on individuals of the balance between 'benefit tourism' and genuine need.

## **Introduction**

The project was born out of the author's observations while working as a police interpreter. The hopelessness of both the victims of domestic violence and the various agencies who were unable to help was striking and saddening. Therefore, the aim of the research was to find out which legislation relates to this issue and how it is implemented by officials. In addition, the author tried to assess whether the recent change in law subsequent to the expiry of the derogation from the Accession Treaty in May 2011 has found its way to reality. Furthermore, one of the findings of the report was the potential of identical obstacles arising for the future new members of the European Union.

## **Process**

The initial step was establishing the main legislation governing the social security system. The relevant European law was highlighted first, starting with Regulation (EEC) No 1612/68<sup>1</sup> of the Council of 15 October 1968 on freedom of movement for workers within the Community, which promised no discrimination among the Member States as regards employment and all activities and its consequences limited only by public security, public policy or public health reasons. It was passed to enable Articles 48 and 49 of the Treaty establishing the European Economic Community to be adapted simultaneously and brought to life. Articles 1-6 are contained within Title I eligibility of employment. The UK national measures introduced by way of The Accession (Immigration and Worker Registration) Regulations 2004 (discussed below), derogated from Articles 1-6 of the 1612/68 Regulation. It could be argued that they somewhat contradicted Article 7 which expressly states that workers 'shall enjoy the same social and tax advantages as national workers,' and Article 9 which adds access to housing and housing lists and 'resultant benefits and priorities.' Further on, articles 10 and 11 provide for the same rights to be conferred onto a spouse and their descendants who are under the age of 21. As a result, the UK had to make provisions to enable access to benefits to nationals of other member states, however, the domestic law allows for strict restrictions for the purpose of protecting public finances.

Directive 2004/38, whose purpose was to unify and codify the existing legislation in relation to freedom to reside within the EU, amended Regulation (EEC) No 1612/68. The conditions imposed on the right to residence are a valid ID card or passport for the

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<sup>1</sup> OJ L257, 19/10/1968

initial period of three months and not becoming an 'unreasonable burden on the social assistance system of the host Member State.'<sup>2</sup>

In order to enjoy the right to residence in the period between three months and five years, all Union citizens should be workers/self-employed and be financially self-sufficient (to include the closest family members – the spouse/registered partner and dependent children) and possess a comprehensive health insurance. The status of a worker can be lost without affecting the right to residence in the cases of illness/accident, involuntary unemployment after having worked for 12 months and registration with the relevant unemployment office. This allows for the retention of the status of a worker for no less than six months. All conditions aside however, point 15 of the preamble states that 'with due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should be taken to ensure that in such circumstances family members already residing within the territory of the Host Member State retain their right of residence exclusively on a personal basis.'<sup>3</sup>

In 2004 the UK, as one of the few longer-established Member States, opened its borders and labour market to the A8 countries, albeit at the same time exercising its right to control immigration for up to seven years during the transition period which ended on the 31 April 2011. By signing the Accession Treaty at Athens on the 16<sup>th</sup> of April 2003, Polish nationals (as well as Czechs, Estonians, Hungarians, Latvians, Lithuanians, Slovaks and Slovenians) obtained the right to enter and work in the UK. In exercising their right to free movement they were obliged however to abide by a

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<sup>2</sup> Directive 2004/38/EC

<sup>3</sup> Ibid.

derogation from the EU law, which the UK brought into life in order to prevent ‘benefit tourism’ and to monitor the labour market for seven years<sup>4</sup>. The relevant Parliamentary discussion is summarised in the report.

This derogation was introduced in Annex XII: Temporary provisions, transitional measures for Poland of the Treaty of Accession 2003. The Accession (Immigration and Worker Registration) Regulations 2004<sup>5</sup> extended the older 2000 Regulations<sup>6</sup> to include the new members of the EU. These regulations effectively replaced Articles 1-6 of the 1612/60 Regulations for seven years. Regulation 4 denied the new accession nationals the right to reside in the UK unless they were a ‘qualified person’. The Social Security (Habitual Residence) Amendment Regulations 2004 in turn, state:

‘for the purposes of the definition of a person from abroad no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.’<sup>7</sup>

As benefit claims check for the residence status, this in effect meant that they were not eligible for any benefits for the first 12 months from the date of entry into the UK. In the case of workers, in order to retain the right of residence, they were required to register within one month of commencing work for an authorised employer (Part 3 of the 2004 Regulations sets out the scheme).

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<sup>4</sup> Derogation from Article 39 of the Treaty establishing the European Community and Articles 1 to 6 of Regulation (EEC) no. 1612/68.

<sup>5</sup> SI 2004/1219

<sup>6</sup> SI 2000/2326 Immigration (EEA) Regulations 2000

<sup>7</sup> SI 2004/1232

The Workers Registration Scheme prevented A8 nationals from obtaining benefits unless they could prove 12 months continuous work (by presenting decision makers with 12 monthly or 56 weekly pay slips) for an 'authorised employer'. The deadline for registration was one month from the start of employment and the fee started at £50 and was gradually increased to £90<sup>8</sup>. This seemed straightforward for those fortunate enough to maintain the same employment for 12 months. However, most migrant workers registered with agencies and worked on an 'ad hoc' basis, thus having to try and ensure registration with as many employment agencies/gang masters as possible in order to receive income. Home Office also required notification of any changes in employment and as many people were unaware of this requirement, they found themselves unable to claim any benefits if faced with unemployment or sickness. In addition, the relatively high fee was an obstacle for most new-comers, who often survived on the bare minimum until they were able to secure any employment.

The next relevant piece of legislation is The Immigration (EEA) Regulations 2006<sup>9</sup> that implemented directive 2004/38/EC into the UK law. It confirmed that EEA nationals were free to enter the UK if in possession of a valid national identity card or a passport and they had an initial right to reside for three months. Part I defines 'qualified person' as an EEA national and present in the UK as a jobseeker<sup>10</sup>, a worker, a self-employed person, a self-sufficient person or a student.

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<sup>8</sup> SI 2007/928

<sup>9</sup> SI 2006/1003

<sup>10</sup> who can prove that he is actively seeking employment and has a genuine chance of being engaged

The definition of a 'family member who has retained the right of residence' seems however to exclude EEA family members <sup>11</sup>. This invalidates the specific provision introduced to assist victims of domestic violence (regulation 10 (5)(d)(iv)), whose marriage (or relationship) terminated. In practice it means that even if the abused person has been married to and financially maintained by the abuser and independent of the state in accordance with the regulations, (s)he cannot rely on the social assistance in case of the termination of marriage. In the case of a wife who has never worked as she has been looking after children, the status of a qualified person would not be attached to her, nor, as an A8 national herself, would she be able to transfer it from her spouse. In the absence of a duly recorded employment history, she simply would not have earned the right to reside. Moreover, one could hardly be expected, when coming into another member state as a part of a married couple and thus as a dependent of a worker (fulfilling the self-sufficiency criterion), to foresee a dissolution of the relationship leading to no recourse to public funds.

After the initial seven years of migration control, the UK, as of the 1st of May 2011, cannot impose domestic restrictions on the A8 states members. The Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations revoke the 2004 Regulations. The effect of this revocation is that A8 nationals should have a right to reside without having to comply with the national transitional measures.

The other requirement they would have to satisfy is the habitual residence test. Both of those elements are necessary to be able to claim income-based benefits (Jobseekers'

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<sup>11</sup> SI 2006/1003, Regulation 10(6)(a).

Allowance, Income Support, State Pension Credit, Council Tax Benefit and Housing Benefit), in addition to standard ways of granting social assistance to UK nationals.<sup>12</sup>

Some case law relating to the above legislation was then discussed, as listed in Bibliography.

In order to obtain views on how EU and UK legislation impacts on individuals, the author interviewed a victim of domestic violence and a homeless male whom she had encountered through her work as an interpreter for Lincolnshire Police. Some information and evidence has also been provided by a Black and Ethnic Minority Mental Health Community Development Worker employed by Lincoln Community Development Project.

### **Summary**

The central problem for Accession 8 nationals emerges in the difference between the legal requirements on 'lawful presence' and the 'right to reside'. There is no statutory definition of the term 'right to reside', but for European Economic Area [EEA] nationals relying on the free movement rights, it is determined by EC law and the UK immigration law. Nationals of the Accession States have no difficulties in emigrating to the UK and they are welcomed at the borders on production of a valid travel document. They no longer require visas and are able to look for employment and work legally. However, not all the benefits of the 'welfare state' are available to them. Not only do they have to exercise their Treaty rights in the UK or be self-sufficient to be able to rely on the state's help if they find themselves in need, but they also have to comply with additional legislation, which the UK adopted in 2004. Those two conditions amount to the right to

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<sup>12</sup> <http://www.dwp.gov.uk/docs/dmgch0703.pdf>

reside, without which no person exists for the purpose of the benefits system (beyond the three months' initial period).

The situation is further complicated by the habitual residence requirement. Again, the period and specific conditions are not statutorily determined, but are centred around intentions, e.g. bringing possessions and family, arranging work and accommodation before emigrating or having a 'centre of interest' here.

The paper therefore, describes UK government policies aimed at protection of public funds and how their implementation affects individuals.

### **Conclusions**

The main issue seems to be proportionality of the system that leads to indirect discrimination on the grounds of nationality. When looked at from another perspective, the number of migrant workers who have been employed and paid taxes without claiming any benefits should outweigh the 'burden' that victims of domestic violence and homeless people present to the state. The last Accession Monitoring Report May 2004 – March 2009 finds that 'nationals from the A8 countries continue to come to the UK to work, contributing to the UK economy, while making few demands on our welfare system.'<sup>13</sup> They continue to find employment in the niches of the domestic labour market (the minimum wage menial jobs), as well as in public services. They generally work between 16 and 35 hours a week and 79 % are aged 18-34. The statistics paint a picture of healthy, young, hard-working people willing to enjoy their lives as lawful citizens of another member state. More importantly, one of the key findings reveals that although the number of A8 nationals applying for tax-funded income-related benefits

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<sup>13</sup>[http://webarchive.nationalarchives.gov.uk/20100422120657/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/accession\\_monitoring\\_report/report-19/may04-mar09?view=Binary](http://webarchive.nationalarchives.gov.uk/20100422120657/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/accession_monitoring_report/report-19/may04-mar09?view=Binary)

and housing support has been increasing, it has been significantly lower than the total number of claims nationwide. This is supported by a number of detailed tables in chapters 13-17 of the report.

However, organisations still publishing the outdated information<sup>14</sup> on A8 access to benefits include: <http://www.easteuropeanadvicecentre.org.uk/>, <http://www.migrantworker.co.uk/>, [www.lincolnshire.gov.uk](http://www.lincolnshire.gov.uk) (the Polish section). While the first two are voluntary organisations, albeit one of the first ones a migrant worker might turn to for advice, the latter is the reflection of the state of the knowledge of the local authority. North Kesteven District Council was still requesting certificates from the Home Office WRS in July 2011. The LCDP employee additionally reported lack of engagement of the South Holland CAB in defending the migrants' rights.

Organisations that are up-to-date, like [www.housing-rights.info](http://www.housing-rights.info) or [www.migrantsrights.org.uk](http://www.migrantsrights.org.uk) provide a better source of information and explain how the rights of the A8 nationals are now the same as other EEA nationals. They include the right to Job Seeker's Allowance for up to six months from arrival into the UK (or beyond that period in some circumstances) and housing and homelessness assistance for those who retain their worker status (for example as students), as well as their families. A report published jointly by the Migrants' Rights Network and the AIRE Centre (Advice on Individual Rights in Europe) doubts the legality of the system until the 01.05.2011 and mentions that the European Commission has sent the UK government a 'reasoned opinion' about it.<sup>15</sup> Some A8 nationals may continue to experience the same problems if they are unable to show that they are jobseekers, never registered as workers (and hence are unable to retain their worker status) or are not able to show that they have been resident in the UK for five years.

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<sup>14</sup> All accessed on the 29 August 2011

<sup>15</sup> <http://www.migrantsrights.org.uk/files/publications/FAQ-rights-benefits-A8-May-2011.pdf>

As one of the possible solutions to the problem, the Women's Aid website suggests making an exemption to the 'no recourse to public funds rule' and issuing guidance to all local authorities regarding the use of their powers to support those 'survivors'. Their campaign statement issued in conjunction with around 40 other organisations mentions the breach of Articles 2,3 and 8 of the European Convention on Human Rights and criticizes the government for their 'inadequate and inhumane response'. Their proposal initially was to offer 20 days funding for accommodation and basic needs costs for women who manage to obtain leave to remain in the UK. The website also contains a link to the Sojourner Project, offering help for victims of domestic violence with no access to public funds until April 2012 (located and thus accessible only to London). There is also a brief confirmation of an agreement between the Home Office and DWP to provide a 'permanent solution' by the same date.

Although until the 01.05.2011 the courts and tribunals had upheld the legality and proportionality of the derogating measures, organisations like The AIRE Centre continue to provide advice for legal representatives and voluntary organisations free of charge and until the local authorities catch up with the new legislation, and legal action against those negligent in acknowledging the changes in law might result in compliance. Until then, however, migrants will be left suspended in the confusion and hostility created by those who should be there to help them.

### **Acknowledgements**

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