

Frequently Asked Questions: Working with Homeless EEA Nationals

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What is the issue?

At a time when the number of homeless has dwindled, it has been reported that recently many EEA nationals have found themselves sleeping rough on the streets. These EEA nationals usually have trouble accessing jobseeker's allowance or housing benefits, which only exacerbates the situation (see below section on benefits entitlement). Given that these homeless EEA nationals are foreigners, the current official logic seems to be that the best solution is to expel them.

Recently the UK Border Agency has launched a pilot scheme attempting to remove homeless EEA nationals, who do not wish to leave, on the basis that they are not exercising residence rights in the UK. The UK Border Agency is aiming for a combined strategy for dealing with homelessness, underpinned by the prospect of immigration enforcement for those who do not comply. However, the basis for expulsion on which the new scheme relies is yet to be tested in the courts. AIRE Centre, ILPA and MRN believe that this scheme of coercive expulsion is unlawful and needs to be challenged.

Who is an EEA national? Who are A8 and A2 Nationals?

An EEA national is a citizen of any European Union country other than the United Kingdom, as well as Iceland, Lichtenstein, Norway and Switzerland. A8 nationals are citizens of the eight central and east European countries that joined the EU in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia). A2 nationals are citizens of Bulgaria and Romania, which joined the EU in 2007.

Has the UK Border Agency powers to remove homeless EEA nationals from the UK?

Normally the authorities can only remove EEA nationals who pose a threat to public security, public policy or public health; there is a lot of case law and practice on what that means, and it is very rare that the authorities will be allowed to expel an EEA national on one of those grounds. However, the UK Border Agency is piloting a scheme in an attempt to remove people by simply showing that they do not have rights of residence in the UK.

Is this legal?

Domestic legislation permits the UK Border Agency to remove from the UK any EEA national who is not exercising residence rights. That means any EEA national who is not a worker, self-employed, self-sufficient, a student, permanently resident or a family member of another person in one of those categories. We consider that any EEA national, even homeless and economically inactive, can at least be described as "self-sufficient", because of how that term is defined in EU law. It means having sufficient resources to avoid becoming a burden on the social assistance system and having comprehensive sickness insurance cover. The first criterion does not matter, because most homeless EEA nationals are, by operation of domestic law, prevented from even accessing the social assistance system, and so cannot become a burden on it. (Contribution-based benefits and Disability Living Allowance are not social assistance benefits, so there is no concern about a person becoming a burden by receiving those. See below.) All EEA nationals are generally entitled to NHS care, so there is, in our view, no concern about comprehensive sickness insurance cover. We do not think that the UK Border Agency can plausibly argue that an EEA national who is not receiving social assistance benefits and who is receiving NHS care does not meet the EU-law definition of "self-sufficient".

That does not mean that homelessness is not a problem or that people should be left in that situation. What it does mean is that forcing homeless EEA nationals to leave the UK when they do not want to is not a permissible solution.

The authorities must also show that any removal is proportionate. UKBA are not allowed to issue exclusion orders against EEA nationals removed in this way, meaning EEA nationals who have been removed like this can return right away to the UK. Many of those affected will have ties here as strong as or stronger than their ties with their country of origin. For these reasons, we think these removals will often (perhaps always) be disproportionate.

What happens when the UK Border Agency tries to remove a homeless EEA national on the basis that (s)he is not exercising residence rights?

If the UK Border Agency tries to remove someone, they must provide that person with notice and reasons for the removal, as well as an opportunity to appeal and the opportunity to ask for suspensive effect of the appeal (that is, the opportunity to ask that not to be removed while the appeal is pending).

How many people have been removed so far?

As of 17 June 2010, the UK Border Agency has served 116 individuals with 'minded to remove' letters and 40 with immigration decision notices in the context of the pilot scheme. They have removed 13 individuals under the scheme.

What should I do if someone I am working with is threatened with removal on the basis that (s)he is not exercising residence rights?

Check to see if the person has residence rights of which the UK Border Agency may be unaware. For example, if an EEA national has resided in the UK for over five years, they are probably permanently resident here. They may have EEA national family members exercising residence rights here, giving them rights to be here. In any event, we consider that such removals can always be challenged; if the person you are working with wants to challenge it, we should be interested in hearing from you. Just contact AIRE Centre (Advice on Individual Rights in Europe) info@airecentre.org.

Are EEA nationals entitled to benefits?

Under domestic legislation, EEA nationals must pass the so-called '*right-to-reside*' test to access welfare benefits. Economically active EEA nationals (i.e. working or self-employed), family members of economically active EEA nationals, and those who have acquired permanent residence (usually happens after five years of residing in the UK) should always pass the right-to-reside test. EEA nationals who are seeking work and signing on at Jobcentre Plus can access, at a minimum, Jobseeker's Allowance, Housing Benefit and Council Tax Benefit, but currently different rules apply to A8 and A2 nationals (see below). EEA nationals can retain worker or self-employed status in some circumstances, for example, if they are temporarily unable to work due to illness or accident.

Some benefits do not have a right-to-reside test attached to them. These include contribution-based benefits (such as contribution-based Jobseeker's Allowance and contribution-based Employment and Support Allowance) as well as Disability Living Allowance (which applies a presence test and an ordinary residence test which we think many EEA nationals will meet regardless of whether they pass the right-to-reside test).

Are things different for A8 and A2 Nationals?

A8 nationals who have not completed twelve months' registered work (or are not otherwise exempt) are required to register their work with the Worker Registration Scheme (WRS). They have not committed an offence if they have worked without registering, but their work is not considered when it comes to determining whether they pass the right-to-reside test. Until they have completed twelve months of registered work, they cannot retain their status as

workers, for example if they are temporarily ill, as other EEA nationals can. Registered A8 workers (and those A8 nationals who are working and are no longer required to register) can access all of the in-work benefits that a British Citizen could access (e.g. Housing Benefit and Council Tax Benefit). Perhaps most importantly, unless they are exempt from or have completed twelve months' work under the Workers Registration Scheme, out-of-work A8 nationals cannot access income-based Jobseeker's Allowance, Housing Benefit and Council Tax Benefit just by signing on as workers.

A2 nationals cannot work without authorisation, unless they have already worked with permission for twelve months or are otherwise exempt, making it even harder for them to access benefits by showing they are economically active. A2 workers who have worker authorisation or are exempt from it are able to access in-work benefits.

However, A8 and A2 nationals can always access benefits by becoming self-employed; they have the same rights as self-employed persons as non-accession EEA nationals.

Note that the right-to-reside test does not apply to contribution-based benefits, such as contribution-based Jobseeker's Allowance or contribution-based Employment and Support Allowance. An individual who has made sufficient National Insurance contributions is always entitled to these benefits on the same terms as British Citizens. Moreover, if an EU migrant has paid National Insurance contributions in the UK and previously paid social security contributions in another EU Member State, the social security contributions in the other Member State must be considered as if they were National Insurance contributions in the UK for the purpose of calculating entitlement to contribution-based benefits.

Are these restrictions legal?

We consider that much, if not all of this, is not lawful. The AIRE Centre and ILPA have complained to the European Commission about these restrictions on benefits and the European Commission has indicated that it agrees with us that much of what the UK is doing (e.g. applying the right-to-reside test to Jobseeker's Allowance, Income Support, Employment and Support Allowance and Pension Credit, or refusing to recognise that a registered A8 worker who stops working temporarily during his first twelve months of registered work can retain his worker status) is unlawful. The Commission has written to the UK Government, but so far to no avail. There is a case on some of these issues pending before the Supreme Court of the United Kingdom. In the meantime, many EEA nationals are, in our view, unlawfully refused benefits, adding to the problems homeless EEA nationals face.

Is there anything I can do to help someone get benefits?

You can help EEA nationals make applications based on the principles set out above. The more cases that come through the system, the faster these questions are likely to be resolved. If you want help finding a representative to bring these cases, or want help making benefits applications yourself, contact the AIRE Centre (info@airecentre.org).