

Factsheet on the Expulsion of Homeless EEA Nationals

August 2010

Background

This factsheet is intended for voluntary-sector agencies, local authorities and others working with EEA nationals¹ facing homelessness. The AIRE Centre (Advice on Individual Rights in Europe), the Immigration Law Practitioners Association (ILPA) and Migrants Rights Network (MRN) have prepared this factsheet in response to a recent pilot scheme the UK Border Agency (UKBA) have launched attempting to remove homeless EEA nationals on the basis that they are not exercising residence rights in the UK.²

The aim is to help you understand the rights of those homeless EEA nationals facing expulsion but who do not wish to leave the UK. UKBA can, apart from this scheme, remove someone only on the basis that she is a threat to public policy, public security or public health. In this case certain procedural safeguards and strict legal tests apply, developed in case law. The current scheme, however, constitutes a different basis for expulsion, untested in the courts. AIRE Centre, ILPA and MRN believe that this scheme of coercive expulsion is unlawful.

Domestic legislation imposes a “right-to-reside” test that EEA nationals must meet in order to access certain benefits, including income-base Jobseeker’s Allowance, income-based Employment and Support Allowance, Income Support, Pension Credit, Housing Benefit and Council Tax Benefit, as well housing and homelessness assistance. Economically inactive EEA nationals are often unable to demonstrate to the authorities that they have a “right to reside”, and this has resulted in protracted legal disputes, with those applying for benefits unable to access them while the disputes go on.

This is particularly the case for A8 and A2 nationals, many of whom, as a matter of domestic law, cannot exercise a right to reside as jobseekers and therefore cannot access Jobseeker’s Allowance. In many cases, it appears that the authorities apply the test incorrectly.³

At a time when the number of those sleeping rough for other reasons has dwindled, many of these EEA nationals unlawfully (or arguably unlawfully) refused benefits are described as “entrenched” rough sleepers, lumbered with responsibility for their predicament when often unlawful State action has played a predominant role. Given the complex legal regime that applies (overlapping and conflicting domestic and EU rules), many advice agencies do not know that they can challenge refusal of benefits and would have difficulty doing so even if they did. Given that these homeless EEA nationals are foreigners, the logic seems to be that the best solution is to expel them. In our view, that is unlawful.

¹ For the purposes of this factsheet, ‘EEA nationals’ means citizens of EU countries (other than the UK), as well as citizens of Iceland, Lichtenstein, Norway and Switzerland.

² As of 17 June 2010, 116 individuals have been served with ‘minded to remove’ letters, 40 have been served with immigration decision notices, and 13 have been removed under this scheme. It appears that the pilot scheme focuses on specific area, including Peterborough and Westminster (London).

³ ILPA and the AIRE Centre have complained to the European Commission that the right-to-reside test should not apply to most of these benefits (including Jobseeker’s Allowance, Employment and Support Allowance, Income Support and Pension Credit) at all; the Commission agree with us and there is ongoing litigation before the Supreme Court about this.

Legal Framework for the Rights of EEA Nationals to Reside in the UK

EEA nationals enjoy a right to reside in the UK for up to three months as long as they do not become an unreasonable burden on the social assistance system. They can stay longer if they are:

- jobseekers;
- workers (which includes certain people who have stopped working, including those who are temporarily unable to work due to illness or accident);
- the self-employed (which, like workers, includes some who have stopped their activity);
- students;
- self-sufficient people;
- permanent residents (usually acquired after five years' residence in the UK, or in some exceptional cases earlier);
- family members of other EEA nationals in the above categories.

Domestic legislation at present restricts the right of A8 nationals to reside as jobseekers and workers: a recently arrived A8 national who works must register with the Workers Registration Scheme and cannot retain worker status or exercise rights as a jobseeker until completing twelve months' registered work. (This does not mean an A8 national cannot seek work; just that she is not exercising rights as a jobseeker, which has the practical effect of making her ineligible for income-based Jobseeker's Allowance.) Some A8 nationals are exempt from registration.

A2 nationals must have authorisation to work in the UK. They cannot retain worker status or reside as jobseekers unless they complete twelve months' authorised work. Some A2 nationals are exempt from worker authorisation.

A8 and A2 nationals can exercise residence rights as self-employed persons, self-sufficient, persons or students without any restrictions.

Historically, these categories have only been relevant in the UK for benefits purposes. Only those with a right to reside can access certain benefits under domestic legislation; a person who has been residing on the basis of being self-sufficient who applied for Income Support, for example, would be told that she no longer has a right to reside as she is no longer self-sufficient. Now UKBA are trying to expel certain homeless EEA nationals on the basis that they do not have a right to reside.

Legal Arguments Against Expulsion

UKBA have indicated that they will not expel an EEA national on the basis that she is not exercising residence rights during the first three months she is in the UK. For other homeless EEA nationals facing expulsion, it is important to verify that they are not exercising some form of residence rights; for example, they may be workers (even if they are on leave from their jobs) or jobseekers, or may be family members of another EEA national exercising residence rights. EU legislation (Article 14(4)(b) of Directive 2004/38/EC) prohibits the expulsion of any EEA national who is seeking work and has genuine chances of becoming engaged in employment. This probably applies to A8 nationals as well, even if they cannot technically exercise residence rights as jobseekers yet. Any EEA national who has been in the UK for more than five years arguably has acquired permanent residence automatically and cannot therefore be removed. UKBA might not be aware of these circumstances.

Those most at risk of expulsion in this category are economically inactive, destitute EEA nationals who have resided in the UK for more than three months but less than five years, are

not engaged in or seeking work, cannot otherwise be classified as workers or self-employed, and do not have any EEA family members who fall into one of the residence categories.

Even for those in that group, however, it is arguable that expulsion is unlawful. These individuals may be said to be exercising residence rights as self-sufficient individuals. To be self-sufficient, one must have:

- sufficient resources to avoid becoming a burden on the social assistance system; and
- comprehensive sickness insurance cover.

Since domestic legislation (the ‘right to reside test’) blocks this group’s access to social assistance benefits, the first criterion might not apply, since they cannot become a burden on the system. (There is ongoing litigation about the lawfulness of applying the right-to-reside test to certain benefits, including income-based Jobseeker’s Allowance and Employment and Support Allowance; if EEA nationals in this situation could access those benefits, perhaps many of them would no longer be homeless and the issue of expulsion would not arise for them at all.) As a matter of EU social security law, any EEA national resident in the UK should be eligible for NHS treatment just as British Citizens are, and so has comprehensive sickness insurance cover. This is not to suggest that homeless EEA nationals, because they are technically “self-sufficient”, are in an acceptable situation; but coercive expulsion does not appear to be a lawful way of dealing with this serious problem.

It is also important to note that any attempt to expel an EEA national on this basis must obey certain procedural safeguards, including notification of the decision and its basis, a right of appeal, the possibility of suspending removal during the appeal. If it is possible lawfully to remove an EEA national on this basis (which we believe is not), it is not lawful to impose an exclusion order on the individual removed, meaning EEA nationals who have been removed like this can return right away to the UK.

Questions?

If you are working with an EEA national in this situation and would like legal advice, contact the AIRE Centre: info@airecentre.org. The AIRE Centre is a charity providing free legal advice on European law issues and provides free advice to those supporting vulnerable EEA nationals.