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NOTE ON THE RIGHTS OF WORKERS FROM ACCESSION COUNTRIES IN THE EU FROM 1ST MAY^[1]

Introduction

The free movement of persons is one of the "fundamental freedoms" of the EC/EU. From 1 st May 2004, nationals of the 10 accession countries have had the right to travel freely and live anywhere in the enlarged EU. However, for up to 7 years the established 15 Member States ("MSs") may restrict the right to work of those from the 8 central and eastern European accession countries ("the A8").

Free movement rights may in principle be exercised by nationals of MSs and of other European Economic Area ("EEA") countries, accompanied by their dependants. These rights were originally intended to cover nationals of MSs moving for the purposes of work, self-employment or the provision of services, but their application has been extended by case law.

EC provisions concerning social security are intended to facilitate free movement of workers (and their dependents). "Worker" in EC law roughly means someone who is in the employment market (not self-employed or economically inactive) and includes job seekers.

EU free movement and UK law: current provisions

1. Immigration

Under the UK's Immigration (EEA) Regulations 2000, no entry clearance is required to enter the UK in the exercise of free movement rights, and no limit may be placed on length of stay.

Any EEA national may be removed (along with any family) on grounds of public policy, public security or public health.

Removal on public policy grounds has not been fully tested but the threshold is likely to be high. Refusal of entry for a EU citizen requires that the government be satisfied that the person poses a genuine and serious threat to one of the fundamental interests of society. This must be based exclusively on the personal conduct of the individual concerned. (Hansard 28 April 2004: Col 1104 W).

2. Social security

Freedom of movement depends, in practice, on reciprocity between MSs in the field of social security. Hence the Community provisions:

- Prohibit discrimination with regard to social security on the grounds of nationality;
- Allow people to rely on periods of employment, residence and contributions paid in one EU country towards entitlement benefit in others ("aggregation");
- Allow people to take certain benefits abroad with them to another EU state ("exportation").

The general rule is that people claim benefits from the state in which they last worked (the "single state principle").

Migrants to the UK from European Economic Area (EEA) countries who cannot take advantage of the EC law provisions may still be able to claim social security benefits. The Habitual Residence Test is applied to claimants of the principal means-tested benefits who have been resident in the UK for two years or less. It is a common law test - a question of fact on the balance of probabilities, to be determined by looking at all the circumstances in each case. The burden of proof lies on the Department of Work and Pensions (DWP) decision maker, that is to say that the presumption is in favour of the applicant.

Certain categories of person coming to the UK are exempt from the Test. One of these is people who are "workers" under EC law. To qualify for exemption, a claimant should satisfy the decision maker that his work is genuine and effective and is not on such a small scale as to be marginal and ancillary.

3. Housing

EEA nationals who are workers or have a right to reside in the UK fall into the main categories of applicants to whom a housing authority may allocate accommodation. Other EEA nationals must be "habitually resident" in the Common Travel Area ("the CTA", i.e. the British Isles) to be eligible, even if they are homeless. A local authority will however be under a duty to house an applicant deemed unintentionally homeless and in priority need.

Migration from the Accession Countries

Before 1 st May, the vast majority of people coming to the UK from the accession countries were "persons subject to immigration control" and as such were excluded from entitlement to most social security benefits, unless they were asylum seekers.

A European Commission study in 2000 found that 850,000 people from the accession countries were living in the 15 MSs, 300,000 of whom were workers. These were concentrated in Germany and Austria. Estimates of future migration from the new MSs to the old vary greatly.

Transitional Restrictions

1. General policy

Transitional restrictions on labour mobility were adopted in previous EU enlargements due to concerns about disruption to labour markets. When these restrictions were lifted migration flows to established MSs did not increase significantly, although the wage differentials were not as large as those with the A8 now are.

Similar transition periods have been negotiated with each of the A8. Their major features are:

- Established MSs may restrict A8 nationals from working in their territory for 2 years after accession;

- After 2 years, they may apply restrictions for a further 3 years;
- After this further 3 years, they may apply restrictions for a further 2 years in exceptional circumstances;
- Extension of restrictions beyond the first 2 years after accession is subject to permission from the European Commission.

2. Existing EU Member States' policies towards accession countries

Only the UK and Ireland have declined to impose restrictions on working for A8 nationals. The position in Sweden is currently unclear.

3. The UK's evolving position

The Government initially announced that there would be no restrictions except "in the event of an unexpected influx of workers".

In a statement of 23 rd February, the Home Secretary said that, in response to other MSs' measures, the UK would require nationals from the A8 to register where and for whom they were working, and that if they do not work, they will be unable to claim benefits.

The Government's measures

1. Workers' Registration Scheme

Unlike other MSs' schemes, the UK's is not based on work permit quotas or a prior offer of employment. Rather, registration under the scheme makes workers eligible for certain in-work benefits and social housing, whilst other benefits will become available when they have the right to reside - after a 12-month registration period has been completed.

For £50, a registrant receives a registration card (designed to be a precursor to a national ID card) and a certificate relating to their particular employer.

A registrant must be a "worker" under EC law, but need not be full-time. An employer commits an offence if he fails to register an A8 worker. No penalty is imposed on a worker who fails to register, although benefits will be unavailable to an unregistered worker, and removal from the UK is possible (in theory - but this is not specifically dealt with in the regulations).

A registration certificate expires on the date on which the worker ceases working for the employer, but is not necessary to notify the Home Office if the employment ends.

The requirement to register under the scheme ends when a worker has been legally working in the UK for 12 months without an interruption of over 30 days, whether some or all of that 12-month period is after 30 April 2004.

2. Restrictions on benefit entitlement

The Social Security (Habitual Residence) Amendment Regulations 2004 are concerned with entitlement to the main means-tested benefits.

The regulations require that a claimant is able to demonstrate a "right to reside" in the Common Travel Area (CTA). This is a new requirement, which applies irrespective of the Habitual Residence Test.

Under the Accession Regulations, an A8 worker who comes to the UK to work after 1 st May can only have a right to reside if they are working and registered under the Workers' Registration Scheme or have completed the initial 12-month period.

During the initial 12-month period, an A8 worker will be entitled to Child Benefit and in-work benefits such as tax credits. If they have a low income, they may also be entitled to Housing Benefit and Council Tax benefit.

The Regulations signified a change for economically inactive people. Previously, these could claim means-tested benefits provided they satisfied the Habitual Residence Test. The Regulations provide that they will now only have a right to reside (and with it, access to benefits) if they have sufficient resources to avoid being an unreasonable burden on the social assistance system. This will apply to people from existing European Economic Area (EEA) countries (and returning UK citizens) as well as those from the A8.

Non-means-tested benefits are unaffected by the draft Regulations. These include statutory sick pay, statutory maternity pay and maternity allowance, and Disability Living Allowance or Attendance Allowance. A8 nationals who are already in receipt of unemployment benefit in another Member State (MS) may ask to have it paid in the UK if they are looking for work here, whilst A8 nationals who are self-employed will be entitled to Incapacity Benefit provided they have paid the necessary NI contributions.

3. Housing

Under changes to be made by the Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004, in England, EEA nationals who are currently required to be habitually resident to receive housing or assistance will require a "right to reside" in the Common Travel Area in order to be treated as habitually resident. The aim of these amendments is to ensure "that people who come to the UK and who do not work or support themselves will not be able to access benefits or social housing".

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NOTES

- 1 **Summary of House of Commons Library Note: "*EU enlargement: working, claiming benefits and receiving housing assistance in the UK*" with updates where necessary**