Hogan Lovells

INDEPENDENT ANTI-SLAVERY COMMISSIONER

ATLEU
ANTI TRAFFICKING AND LABOUR EXPLOITATION UNIT

ParalympicsGB

OFFICIAL PARTNER

EEA National Victims of Modern Slavery: Claiming Welfare Benefits

Phillipa Roberts

Legal Director, Hope for Justice

Overview of presentation

- General tips on DWP advocacy
- Changes to welfare benefits for EEA nationals
- Overview of entitlements
- Common myths, challenges and commonly used counter arguments

General tips on DWP advocacy

- Advocating well means preparing well
- Don't believe everything you are told – research it
- Ask for decisions in writing (with a statement of reasons)
- Your resource is in your relationships – obtain help from specialist agencies
- Create dialogue with the DWP and Housing Benefit Departments
- Rely on broader principles – e.g. proportionality, rights of victims
- Signpost for immigration advice and welfare advice
- Public law (Judicial Review) can assist
- Utilise projects/social enterprises to increase employability and evidence "actively seeking work" and "genuine chance of being engaged in work."

Changes to Welfare Benefits for EEA Nationals

- 1st January 2014 EEA Nationals have to pass a more stringent **Habitual Residence Test (HRT)**
- 1st January 2014 EEA Nationals working less than a year who are involuntary unemployed and registered as seeking work will retain worker status for a maximum period of 6 months. If they worked over a year they can retain status longer if they pass the **"Genuine Prospect of Work Test" (GPOW).** Status can be retained longer if involuntary unemployment is due to being temporary unable to work as a result of illness or accident as no limit on time as long as the situation is not permanent.
- 1st March 2014 minimum earnings threshold (two tier test)
- 1st April 2014 EEA Job Seekers are NOT entitled to housing benefit (HB) unless they can show an alternative right e.g. retained worker, person with discretionary leave.
- November 2014 EEA job seekers entitled to Income Based JSA for a period of only 3 months before sitting a GPOW.
- As of 1st February 2015 the above rules are applied to stock cases.

Habitual Residence Test

- **"Actual Habitual Residence"**

  Having a settled intention to live in the UK and have developed central interests in the UK (job, friends, family etc.); and have been here for an appreciable period of time (government considers this is at least 3 months)

- **"Right to Reside"**

  - First 3 months all EEA nationals and their family members - no entitlement to most benefits except child benefit and child tax credit (see Article 6 Directive 2004/38/EC; section 13 Immigration Economic Area Regulations 2016 which consolidate the previous regulations)

  - Qualified person/not a person from abroad (jobseeker - note not entitled to HB), **worker, retained worker, self employed** (including if status is retained) or **self sufficient** (including students) (see Article 7 Directive 2004/38/EC; section 6 Immigration Economic Area Regulations 2016)

Right to Reside (continued)

- A **family member of a qualified person** (e.g. spouses, civil partners, children or grandchildren under 21, older children or grandchildren who are dependent, dependent relatives in the ascending line or "other family member") (see Article 2,3 Directive 2004/38/EC, sections 7-10 of Immigration Economic Area Regulations 2016 consolidating the previous regulations)
- **Derived right to reside** e.g. child of an EEA national worker or former worker, the child is living in the UK and is in education.(see section 16 Immigration Economic Area Regulations 2016 and relevant EU Case law)
- **Permanent Residence** e.g. legally resident for continuous period of 5 years this includes periods of job seeking; workers or self employed people (or family members) who have worked for more than 2 years and are now permanently incapacitated - this can be less than 2 years if incapacity was due to an accident at work or occupational disease (see Article 16 and 17 Directive 2004/38/EC, section 15 Immigration Economic Area Regulations 2016).

  Technically no need to apply to show permanent residence for welfare purposes as it is automatic once acquired. However worth applying due to Brexit.

Discretionary Leave to Remain (DLR) and Welfare Entitlement

If an EEA National has DLR they are not considered a "person from abroad" and should be entitled to welfare assistance as if they are a UK Citizen for the length of period of leave.

DWP Guidance on Habitual Residence states at DM 073189

"*The HO may refer to 1. limited leave given to refugees or 2. exceptional leave to remain or 3. leave to remain on an exceptional basis or 4. humanitarian protection or 5. discretionary leave. A claimant given one of the above is not a person from abroad (or a person not treated as in GB for SPC purposes)* ***for as long as the leave lasts, including periods when he/she has applied in time for an extension of leave.***" (NB see also Immigration Act 1971 section 3C re extensions)

See Regulation 10(2)(c) of the Housing Benefit Regulations 2006 (as amended) regarding application of DLR to housing benefit.

- Important to make DWP and Housing Benefit Office aware of DLR and also aware of any extensions prior to expiry, as its likely they will stop welfare assistance without confirmation of an extension.
- Note: GPOW should not apply to victims with DLR (see DWP Guidance DM 73080); make DWP aware of this prior to a GPOW to avoid a failed GPOW and welfare ceasing.

Can a person who is exploited be a worker, retained worker or self employed person thus exercising treaty rights? **YES**

- Freedom of movement constitutes one of the fundamental principles of the EU and thus the term 'worker' should not be interpreted according to domestic law (see *Lawrie-Blum v Land Baden Wurttemberg* [1986] ECR 2121 at para.16). The concept should also not be interpreted in a restrictive way (see *Levin v Staatsecretaris van Justitie* [1982] ECR 1035 at para 13).
- A person can be exercising treaty rights in accordance with Article 7 of Directive 2004/38/EC as long as the work satisfies the test in the CJEU case of *Jany v Staatssecretaris van Justitie* (Case C-268/99). This requires that the person show:

  (1) Work is **"real and genuine"** and not **"marginal and ancillary"**;

  (2) Performing these activities in return for **remuneration**;

  (3) Working "for and under the **direction of another**."

  NB: in the absence of subordination a person could be considered self-employed (see para 34 *Jany*)
- Even if a contract of work is **illegal**, this does not prevent the person being considered a worker. In the case of *JA v Secretary of State for Work and Pensions* [2012] UKUT 122 (AAC) (at para 19) an EEA national working for cash in hand despite working illegally was found to qualify as a worker.

Victims and HRT

- Activities not exceeding 5.5 hours per week could be enough to be considered as "genuine and effective work" see (C-14 *Genc v Land Berlin*). In the case of *Bristol City Council v FV (HB)* [2011] UKUT 494 (AAC) an income of £90.00 a week was sufficient to be self employed.

- In the case of *SSWP v RR* (2013) UKUT 021 AAC, the Upper Tribunal held that a person who had moved to the UK from another member state to accept an offer of employment actually made could be considered a "worker."

- Evidence actual residence and worker/retained worker status/permanent residency using wage slips, HMRC employment history, finding of fact (Employment Tribunal, civil or criminal court) - ensure victim continues to collect evidence of work or genuine prospect of work e.g. voluntary work, courses, job searches, interviews, job offers, P60's etc. RG/CG decisions can also evidence work; demonstrate that another department has accepted victim's narrative, including work done, as credible.

Genuine Prospect of Work Test

- GPOW is applied to job seekers at 91 days; and to retained workers who have worked for over a year and been unemployed for longer than 6 months.
- DWP consider that you should only have a right of residence as a job seeker or retained worker at GPOW if there is **"compelling evidence"** of a genuine chance of being engaged and that a claimant is continuing to seek employment.
- DWP Decision Makers Guidance at DM 073099 to 73100 describes this as (1) a genuine offer of a specific job due to start within 3 months from the relevant period; or (2) during the relevant period changes in circumstances give them genuine prospects of employment and as a result are awaiting the outcome of job interviews.

GPOW is more restrictive than EU Law allows

Arguments Specific to GPOW

- C-292/89 *Antonissen* related to UK law providing for expulsion of an EEA migrant job seeker after six months. The ECJ held at para 21 "*…if after expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has a genuine chances of being engaged, he cannot be required to leave the territory of the host Member State*." The case did not require "compelling evidence" which is a higher standard of proof.
- The standard in *Antonissen* was affirmed by the Upper Tribunal in the case of *Secretary of State for Work and Pensions v MB (JSA) and others (European Union law: free movement) [2016] UKUT 372 (AAC)* (5 August 2016) held that in assessing "compelling", the bar cannot be raised higher than in *Antonissen* (see para 57). "A "genuine chance of being engaged" is not something that can only be satisfied if one can point to a particular job (though of course the offer of a specific job will be very powerful evidence)" (see para 45)
- To give a victim maximum chances its important to provide as much supporting evidence as possible of a genuine chance of being engaged - e.g. evidence of seeking work, voluntary work, courses conducted, ESOL classes, previous work history.

Arguments Relevant to HRT and GPOW: **Proportionality**

- Principles of **proportionality, equal treatment** and **non-discrimination** are binding under EU Law - for instance Article 52 (1) of the Charter of Fundamental Rights of the European Union (TFEU) provides that limiting the exercise of rights and freedoms must only be where necessary.
- The Court of Justice of the European Union has stated on numerous occasions (including in C-456/02 *Trojani* and C-140/12 *Brey*) the importance of proportionality in applying Member States discretion, including Article 7 of Directive 2004/38/EC. In the case of *Brey* at para 64 CJEU held that in evaluating the extent to which granting social assistance would place an unreasonable burden on the social assistance system of the host Member State, it was necessary to carry out an overall assessment of the specific burden taking into account the persons personal circumstances.
- It is not unreasonable for a victim of slavery to seek social assistance particularly in light of wider EU rights.
- With support victims have a good chance of reintegrating into the labour market and not being a burden on the state.
- Victims are vulnerable and often without wider family support in the UK. Refusing welfare assistance would be disproportionate and should take into account the claimant's status as a victim of modern slavery, and the risk of being re-trafficked, in assessing whether social assistance should be provided.

Arguments Relevant to HRT and GPOW: **Victims' Rights**

- As a recognised victim there are obligations to ensure victims are protected and not placed at risk of re-trafficking or re-exploited (e.g. Article 12 ECAT and Article 11 Directive 2011/36/EU). In particular Article 11 (1) states victims should be provided with support "*before, during and for an appropriate period of time after the conclusion of proceedings*." Article 11(5) states support should include "*at least standards of living capable of ensuring victims subsistence through measures such as the provision of appropriate and safe accommodation and* ***material assistance***."

  In the case of *Galdikas & Ors, R (on the application of) v Secretary of State for the Home Department & Ors (Rev 1)* [2016] EWHC 942 (Admin) (26 April 2016) the judgment recognises a freestanding duty on the state to support victims pursuant to Article 11, independent of criminal proceedings, longer than a 45 day recovery and reflection period (see para. 43 and 44 and 116). Failure to provide welfare assistance could constitute a breach of ECAT and the Directive.
- Denial of welfare assistance would place the victim at risk of destitution and homelessness. This would place a victim at risk of re-trafficking either in the UK or country of origin. This could violate the victims rights under Article 4 of the European Convention on Human Rights (ECHR) (see *Ranstev v Cyprus and Russia* [2010] ECHR 22)

Arguments Relevant to Failure to Provide Interpretation

- The DWP Guidance on interpretation (as of April 2017) clarifies that, "under the Equality Act 2010":

  *"(2) It is **DWP policy to use an interpreter when we need to communicate with a claimant** or customer who: **cannot communicate adequately in English** (or, in Wales, Welsh); is an individual in a **vulnerable situation**; and cannot provide their own interpreter."*

- Para (4) of the Guidance recommends DWP frontline staff –

  "…arrange for an interpreter if it is clear that the person's command of English, or Welsh, is not good enough for you to deal with them properly and it is in the Department's interest to do so, for example as part of the process for accurately assessing JSA benefit entitlement or for explaining to a claimant their responsibilities under the Jobseeker's Allowance conditionality rules."

- Under para (6) of the Guidance, 'trafficking victims' are specifically identified as an example of vulnerable claimants who are not affected by the lack of automatic access to interpreting services.

Arguments Relevant to Failure to Provide Interpretation

- Section 29 Equality Act 2010: service providers and those exercising public functions must not discriminate on the grounds of race when providing services (for example interviewing benefits claimants) or exercising functions (for example making policy decisions). Race includes colour, nationality, ethnic or national origins, see section 9.
- Insofar as DWP staff/decision-makers exercise a policy on interpretation that has a worse impact on benefit claimants of particular nationalities – in limiting their ability to understand information given to them; or make appropriate representations as to their entitlements – the Department indirectly discriminates against such claimants. Indirect discrimination, without proportionate justification, is unlawful and in breach of the Equality Act 2010.
- Article 12(1) (c) of the Convention on Trafficking in Human Beings (ECAT) and Article 11(5) of Directive 2011/36/EU, victims are entitled to "translation and interpretation services where appropriate." Thus not to provide interpretation services could amount to a breach of the Trafficking Convention and Directive.

Useful Websites and Further Information

- http://www.airecentre.org/
- https://www.jcwi.org.uk/news-and-policy/a-brexit-guide-for-european-nationals
- http://www.cpag.org.uk/
- http://www.homeless.org.uk/our-work/resources/entitlements-of-eea-nationals
- https://www.rightsnet.org.uk/
- https://www.citizensadvice.org.uk/benefits/coming-from-abroad-and-claiming-benefits-the-habitual-residence-test/the-habitual-residence-test-an-introduction/the-habitual-residence-test-how-a-decision-is-made/
- https://www.gov.uk/government/publications/decision-makers-guide-vol-2-international-subjects-staff-guide (decision-makers guidance including updates on HRT)
- https://www.gov.uk/government/.../dwp-eia-interpreting-service-customers.pdf

Hogan Lovells

ATLEU

ANTI TRAFFICKING AND
LABOUR EXPLOITATION UNIT

www.hoganlovells.com