

Means-tested benefits for European Economic Area Nationals

WARNING: This is a complicated area of the benefit system and the rules frequently change. This guide is correct as of April 2017 - Always check before you give advice.

This pack is also available in Welsh / Mae'r pecyn hwn ar gael yn y Gymraeg hefyd

-  Please ensure that you check the date of this factsheet because this is an ever-changing area of law and there may have been recent changes that are not included.
-  Please be aware that this factsheet deals only with the rights of European Economic Area Nationals (EEA's) to claim benefits in the UK.
-  If your client is a national from outside the Common Travel Area (CTA) or the European Economic Area (EEA) their rights to claim benefits in the UK will be determined by their immigration status and any conditions placed on this status.
-  **NEVER** give benefit advice to someone if you are not absolutely certain of their immigration status AND conditions - if your client claims benefits they are not entitled to, it may affect their right to remain in the UK and if you provide immigration advice without being registered or exempt with the Office of Immigration Services Commissioner, you will be committing a criminal offence.
-  It is important to distinguish a right to reside for benefit purposes from somebody's right to be in the UK. EEA Nationals have a right to enter a member state; if they are told they do not have a right to reside for benefit purposes, this does not mean that they will be told to leave the UK.

This factsheet applies to the following DWP administered means-tested benefits: **Income-based Jobseekers Allowance (JSA), income-related Employment and Support Allowance (ESA), Income Support (IS), Pension Credit (PC), Universal Credit (UC) and Housing Benefit (HB)** (although administered by the local authority, the same rules apply). For benefits administered by Her Majesty's Revenue and Customs (HMRC) and non means-tested benefits please seek further advice.

In addition to meeting the residence conditions, EEA Nationals must also meet the usual qualifying conditions to receive the above benefits.

**City and County of Swansea
Dinas a Sir Abertawe**



Who is an European Economic Area (EEA) National?

This is not actually a straightforward question. We first need to establish who counts as an EEA national for benefit purposes. EEA nationals are then divided into groups.

- **British Citizen:** although the UK is part of the EU, for benefit purposes British Citizens are not EEA Nationals.

- The **main EEA states** where additional restrictions do not apply are:

Austria	Germany	Netherlands
Belgium	Greece	Norway
Bulgaria	Italy	Portugal
Cyprus	Iceland	Republic of Ireland
Denmark	Liechtenstein	Spain
Finland	Luxembourg	Sweden
France	Malta	Switzerland

- The **A8 states** joined the EU on 01/05/2004 and had additional employment and residence rights imposed until 01/05/2011:

Czech Republic	Hungary	Lithuania
Estonia	Latvia	Poland
Slovenia	Slovak Republic	

- The **A2 states** joined the EU on 01/01/2007 and had additional employment and residence rights imposed until 01/01/2014:

Romania
Bulgaria

- **Croatia** joined the EU on 01/07/13 and has restrictions on employment and residence rights until 30/06/18 (contact the Advice Line for further information)

Habitual Residence Test (HRT)

The HRT is broadly made up of two parts. The first part looks at whether someone is '**habitually resident in fact**' (confusingly, this first part uses the same name as the overall test). The second part of the HRT looks at whether someone has the '**right to reside**'.

ALL means-tested benefits administered by the DWP require a claimant to be habitually resident in the Common Travel Area (CTA – see below).

ALL means-tested benefits covered in this leaflet have a right to reside requirement (though the requirements may differ between benefits).

There is an additional test within the HRT for EEA Nationals who want to claim income-based JSA. Claimants have to have been living in the **Common Travel Area (CTA)** for the last three months. The CTA consists of the United Kingdom, Ireland, The Channel Islands and the Isle of Man.

Also, with the exception of HB, claimants are required to be **'present'** in the UK in order to claim means-tested benefits. These rules affect both British citizens and EEA Nationals.

Note the following:

The HRT applies to the benefit claimant only, but:

- For joint-claim JSA, if one of the claimants satisfies the HRT and the other does not, JSA can be claimed by the person who passes the test and should be paid at the couple rate.
- For UC claims where one member of a couple fails the HRT, the other member must claim as a single person and the award will be based on the maximum amount for a single person. However, the partners capital and income will be taken into account.

EEA Nationals who are exempt from the Habitual Residence Test (HRT)

Some EEA Nationals can be exempt from the HRT and don't have to demonstrate a right to reside. However, it is best to think of the HRT as a backwards test because, in practice, the DWP does this; it will first consider a right to reside and if this requirement is satisfied, it will move on to considering whether someone is habitually resident in fact. For income-based JSA, the DWP will look at the right to reside, then whether the claimant has been in the CTA for three months, and then at habitual residence in fact. So in reality, claimants will always need to show a right to reside to prove that they should be considered exempt from the HRT.

The following groups of EEA Nationals are exempt from the HRT. In effect, this means that they have a right to reside because they fall into one of these groups. The DWP refers to someone from one of the groups as a **'qualified person'**:

- EEA worker
- EEA 'retained' worker status
- EEA self-employed person
- EEA 'retained' self-employed status
- Family member of an EEA worker / self-employed person (or retained status) - does not apply to extended family members
- EEA National with a permanent right of residence acquired in less than 5 years

You are exempt from the HRT for Housing Benefit if you are also receiving other means-tested benefits, **except** income-based JSA (see below).

You are exempt from the HRT for income-related ESA if your claim was migrated from Income Support **and** you have been receiving means-tested benefits continuously since 30/04/2004.

If you are not exempt, you will need to show that you are '**Habitually Resident in Fact**' and have a '**Right to Reside**' in order to pass the Habitual Residence Test (HRT) and be entitled to claim means-tested benefits.

All EEA nationals have a right to reside for the first three months they live in the UK because they have a right to enter any EEA member state - this is called the initial right to reside. In the UK, however, this initial right is subject to you not becoming 'an unreasonable burden on the social assistance system', so the initial right to reside cannot give you entitlement to means-tested benefits.

Habitually Resident in Fact

To be habitually resident in fact, you must reside in the CTA, your home must be here, you must have a 'settled intention', and have been here for an 'appreciable period'. To show a settled intention, certain factors are important; having somewhere to live, for example, showing that you have a school for your children, or you are registered with a GP. The DWP and the Local Authority (LA) may consider a wide range of factors, but they have to consider whether your 'centre of interest' is here. An appreciable period is not defined, but usually between one and three months will be accepted (or possibly less if you have previously lived in the UK and you are returning - seek advice). Whether or not you have a settled intention will depend on a combination of all these factors.

Who has the Right to Reside?

Remember that you have an initial right to reside (see above). You will not be able to claim benefits. The following groups of people can have a right to reside for benefit purposes:

1. EEA Worker

You have the right to reside and are exempt from the habitual residence test if you are an EEA National and count as a 'worker'.

A 'worker' is someone who is in an '**employment relationship**' which means: you provide services in return for remuneration, under the direction of another person. This work must count as being '**genuine and effective**' as opposed to being '**marginal and ancillary**'. What these definitions mean has been established by caselaw (see below). If you are told that your work is not genuine and effective, seek advice.

A voluntary worker who receives expenses will not be a worker as they do not receive remuneration for their services. However, if you receive payment in this kind, this can count as remuneration.

Working for an agency does not stop you being a worker. Working cash in hand or illegally does not prevent you from being a worker; it is the economic relationship with an employer that is important (but it might be harder to provide the proof that you are a worker - having no payslips, for example).

You remain a worker whilst on sick leave, annual leave, maternity leave, etcetera, as the employment relationship has not ended. If your job is still there to go back to and the contract has not ended, then you remain a worker.

EEA Self-employed Person

It can be harder to prove that you are self-employed as you do not have an employment contract or wage slips. You may count as self-employed while you are setting up your business, but this will need to be more than an intention to start (you will need to show that you are taking steps to set up a business). Registering with HMRC as self-employed will help, and other relevant steps could include advertising, research, obtaining equipment, setting up accounts or a website, for example. It is not necessary to have made a profit in order to be self-employed, although this will help.

Examples:

- Caselaw has held that selling the Big Issue can amount to being self-employed subject to the same considerations for an employee that the work must be '**genuine and effective**' as opposed to being '**marginal and ancillary**'. This means the hours, frequency, level of profits will all be taken into account, so an occasional couple of hours selling a few magazines is unlikely to count, but regular hours substantiated by records of the number of magazines brought and sold could count, in the case the claimant was spending between 16 and 24 hours a week working. All aspects of whether the self-employment is genuine and effective as explained below need to be considered.
- Being a foster carer has been held not to count as self-employment because it is not an economic activity. Whilst you may not need to claim any means-tested benefits while you are receiving money from an LA, please bear in mind that you are not establishing a right to reside; this may affect your right to claim benefits if your work with an LA ends.

Genuine and Effective Work or Self-Employment

Decision Makers (DM) should use a two-tier approach to decide whether work is 'genuine and effective':

Tier 1 - Minimum Earnings Threshold

An EEA national whose average gross earnings (as either an employee or a self-employed person) for the previous 3 months has been more than the National Insurance (NI) threshold will automatically be accepted as a worker or self-employed person. In 2016/17, the point at which NI payments start is £155.00 per week.

Tier 2 - Minimum Earnings Threshold not met

The DWP guidance clearly states that where the minimum earnings threshold is not met, the case should be examined as a whole; you should not automatically be told that you are not a worker or self-employed if you do not meet this threshold. To establish whether the work is genuine and effective, a number of factors should be considered:

Number of hours: There is no minimum number of hours that have to be worked (though the more hours worked, the better the chance of the work being accepted as sufficient).

Earnings: Just because the work is low paid or at a level that requires a top-up of means-tested benefits, this does not necessarily prevent you from being a worker.

Duration: The longer employment is due to last, the more likely it is to be accepted as genuine and effective, but again this is just one factor.

Irregular or erratic: Being on a zero-hours contract does not prevent you from being a worker; the DM must look at the work you actually do.

Employment rights: Having a contract, being entitled to sick and/ or holiday pay, being in a trade union that is recognised by your employer, are all factors. However, not having these right does not prevent you from being a worker, as the concept of a 'worker' is an economic, not a legal concept. Do not confuse the concept of illegal work (cash-in-hand) with the need for A8, A2 and Croatian nationals to be 'legally working' which is a specific requirement to do with the right to reside tests.

Marginal and ancillary

This can mean work done as part of another relationship which is not economic; for example, a lodger mending a tap they broke for the landlord as part of the landlord/tenant relationship.

2. Retaining Worker Status

If you are actually no longer a worker, you can '**retain worker status**' from your previous employment in the circumstances below. You can retain your worker status as self-employed **only** if you are temporarily unable to work due to illness or accident.

Involuntarily unemployed and registered as a jobseeker:

Being involuntarily unemployed is not as straightforward as the contract ending or being made redundant. You can be involuntarily unemployed even if you voluntarily left your job; for example, your shifts are changed and no longer fit around your available childcare, so you have to leave and look for another job that fits the hours the nursery is open. As long as you remain in the labour market and are looking for and available for a new job, whether you are involuntarily unemployed will depend on the individual circumstances.

The easiest way to prove that you are registered as a jobseeker is by claiming JSA (in Swansea, UC is not currently open to EEA nationals). You can retain your worker status through this route for an indefinite period if you have already been employed for more than a year. If you have worked for less than a year, you can retain this status for six months. However, JSA is limited to 6 months before you have to show genuine prospects of work (GPoW).

Vocational training:

You can retain worker status if you have started vocational training related to your previous employment or started vocational training having become involuntarily unemployed.

Temporarily unable to work due to illness or accident:

You can retain worker and self-employed status if you are temporarily unable to work due to an illness or accident. The test looks at whether you can no longer do your previous work or the sort of work you were previously looking for. Your inability to work must be temporary; this means not being permanently incapacitated (the condition could be permanent, but not the inability to work).

Unable to work due to late stages of pregnancy or childbirth:

If you are on maternity leave from your job and still under your employment contract, this does not apply as you are still employed and have worker status.

If you have stopped work or have stopped seeking work due to the physical constraints of late pregnancy or the aftermath of childbirth, as long as you intend to start work again within a reasonable period, you can retain worker status. Caselaw has said that this reasonable period could be up to 52 weeks as this is the length of time allowed for statutory maternity leave.

If you were self-employed and intend to resume self-employment, you remain self-employed during your maternity period.

Mind the gap:

All the categories of retaining worker status are related to the concept of workers' rights and remaining in the labour market. If you have been a worker and lose retained worker status because you no longer meet the conditions, you then have to become a worker again before you can retain worker status again.

If there has been a gap between being a worker and making a claim for benefit on the grounds of retaining worker status, the gap does not necessarily mean that worker status is lost. If you can explain why there has been a gap - that is, why there has been a delay between ceasing to be a worker and making a claim - then it may be accepted that you have retained worker status. For example, your employment contract came to an end and you lived on your last wages for the next two or three weeks whilst looking for another job before claiming JSA. This means that you had not left the labour market before claiming JSA because you are involuntarily unemployed and registered as a jobseeker. If you had spent your last wages on spending two months sightseeing around the country before registering as a jobseeker and looking for a job again, then it is likely that the DWP will decide that you left the labour market and, therefore, cannot retain worker status.

You can move between different categories of retaining worker status, as long as you do not lose worker status. For example, if you become sick and temporarily incapacitated whilst you are also retaining worker status as involuntarily unemployed and registered as a jobseeker, you are moving between categories. Again, any gaps will depend on the circumstances.

3. Jobseekers

The right to reside as an EEA jobseeker has been increasingly restricted over the last few years.

You have the right to reside in the UK as a jobseeker if:

- You can provide evidence you are looking for work and have 'a genuine chance of being engaged'
- You entered the UK to look for work or are in the UK looking for work immediately after having the right to reside as a worker, self-employed worker, self-sufficient person/student **and**
- You have not already had the right to reside as a jobseeker for 91 days or, after 91 days, you pass the 'genuine prospect of work' test

Since 31/12/2013, if you have already had 91 days as a jobseeker, or you have had 6 months of retaining worker status as involuntarily unemployed and registered as a jobseeker, extra restrictions apply before you can have another period with the right to reside as a jobseeker:

- You must have had an absence from the UK **and**
- You have to provide compelling evidence that you have a genuine prospect of work from the start of the new period of jobseeking (that is, you don't have another 91 days before this requirement applies).

If you have had another type of right to reside between these periods as a jobseeker, or you have left the UK for a year, these extra restrictions will not apply.

The 91 day jobseeking period can be in one complete period, or a number of shorter periods. So if, for example, you have had 30 days as a jobseeker, then leave the UK for two months, then you can have another 61 days right to reside as a jobseeker.

Having the right to reside as a jobseeker gives you very limited rights to claim means-tested benefits. Basically, if your only right to reside is as a jobseeker, you can only claim income-based JSA, Child Benefit (CB) and Child Tax Credit (CTC) (Remember that you also have to meet the other conditions of entitlement as well as having a right to reside). This type of right to reside does not allow you to claim IS, income-related ESA, PC, HB or UC. Anyone who has been in receipt of both income-based JSA and HB continuously since 31/03/14 is not excluded from HB until a break in the claim, but, in reality, the rule will apply to very few people.

In addition to only being able to claim income-based JSA as a jobseeker for 91 days (before the GPoW test applies), you must have also been living in the Common Travel Area for 3 months before you can claim and must be 'habitually resident in fact' (see above). So basically, if you are from the EEA and you have no right to reside other than as a jobseeker, you cannot claim any means-tested benefits for the first 3 months. You can then claim JSA for 3 months after which you have to meet the GPoW requirement.

The 'Genuine Prospect of Work' test

The 'Genuine Prospect of Work' (GPoW) test applies to jobseekers after 91 days. If you are retaining worker status (as involuntarily unemployed and registered as a jobseeker) the test will apply after 6 months. The regulations state that after these periods you only have the right to reside as a jobseeker/unemployed retaining worker status if you can **'provide compelling evidence that [you are] continuing to seek employment and have a genuine chance of being engaged'**.

You will be called in for an interview and asked to provide evidence that you meet the GPoW test. DWP guidance states that evidence amounts to something like a job offer or a letter from a prospective employer. In fact, caselaw has decided that claimants only have to show 'real prospects of success in obtaining work'. It is possible that the DWP is going beyond what is required in law when deciding what counts as evidence in showing a genuine prospect of work, so you should always seek advice if the GPoW test is failed. If your only right to reside is as a jobseeker and you fail the test, you also lose the right to reside for all other means-tested benefits, including CB and CTC. Any family members relying on you for their right to reside also lose their status and their means-tested benefits. Seek advice as soon as possible.

You should also note that the DWP are calling in claimants for GPoW interviews who have another right to reside. It is important to provide any evidence at the GPoW interview that you have an alternative right to reside, in order to continue being paid (for example, you could be the family member of a worker).

4. Self-sufficient People

You have the right to reside as EEA national if you and any family members without an independent right to reside have:

- Sufficient resources not to be a burden on the UK social assistance system **and**
- Have comprehensive sickness insurance cover in the UK.

Whether you have sufficient resources will depend on your circumstances. The Decision Maker will check whether your income is more than you would be entitled to on a benefit and, if it is less, will look at all of the circumstances. 'Resources' do not include resources from working in the UK. Claiming means-tested benefits does not necessarily make you an '*unreasonable burden*' and the decision maker should take into account all your circumstances and the likely length of your claim.

Having comprehensive sickness insurance cover means private insurance, but can also include cases where the EU co-ordination rules apply and another EEA state will reimburse any NHS costs - get advice.

5. Self-sufficient Students

The same rules for being self-sufficient apply to students but in addition you have to be enrolled on a course in a Government accredited college and provide assurance that you have sufficient resources. In addition, your family members are limited to spouse/civil partner and either's dependent child.

Basically, for self-sufficient people and students the rules mean you should usually have enough resources that you do not qualify for means-tested benefits, but time being self-sufficient counts towards the 5 years needed for permanent residence (see below).

6. Family Members

If you are the family member of a qualified person, you can take your right to reside from them. These are the qualified persons:

- EEA worker
- EEA self-employed person
- EEA retained worker status
- EEA retained self-employed status
- EEA self-sufficient person or student
- EEA jobseeker

- EEA national with a permanent right to reside
- EEA national with an initial 3 months right to reside

You have the same right to reside as your family member and the same access to means-tested benefits. If they lose their right to reside, so do you, and if they have a right to reside which is excluded from certain benefits, the same exclusions apply to you. Therefore, if your family member only has an initial three months right to reside and is excluded from means-tested benefits, so are you. If your family member is an EEA jobseeker, you are also excluded from claiming Income Support, income-related ESA, HB, PC and UC. But if your family member is exempt from the HRT and not excluded from any means-tested benefits, so are you.

Definition of a family member:

You count as a family member of an EEA national if you are a:

- Spouse/civil partner (applies even if you are separated but not yet legally divorced)
- Direct descendant of EEA national or their spouse/civil partner, and under 21
- Direct descendant of EEA national or their spouse/civil partner, and dependent on them
- Direct ascendant of EEA national or their spouse/civil partner, and dependent on them
 - 'Descendant': child, grandchild, great grandchild, etc
 - 'Ascendant': parent, grandparent, great grandparent

If you are under 21, there is no need to show any dependence on your family member or even have any contact with them (although you will need to show they have a right to reside). However, you should get advice on what residence rights you will have when you are 21.

Other 'extended' family members may be able to obtain residence rights from an EEA national, but this is limited and documentation is required, so further advice is likely to be needed.

Dependent:

- Your family member is dependent on you if you provide them with 'material support' that contributes to the 'basic necessities of life'. This will include things like providing financial support, paying bills, buying food, providing accommodation, providing care due to sickness or disability - all are material support. It is irrelevant whether there are other sources of support and dependency shouldn't be affected by a benefit claim. For example, a Decision Maker should not make a circular decision that an award of benefit would mean you cease being dependent and therefore, you don't have a right to reside. You can be dependent whilst receiving a benefit and all the circumstances should be considered.

7. **Permanent Right to Reside**

When you have resided legally in the UK for a continuous period of 5 years, you gain a permanent right to reside. 'Residing legally' means you had the right to reside as a qualified person. Having a permanent right to reside means that you will satisfy the right to reside requirements for all benefits that have such a test attached to them.

Continuous residence is not affected by temporary absences from the UK. A temporary absence is defined as a period not exceeding 6 months per year, or as a period of up to a year for reasons such as pregnancy, child birth, serious illness, study/vocational training or overseas posting. Seek advice if you have a temporary absence for another reason. The rules around temporary absences have been decided in caselaw but the DWP relies on older caselaw which says that if you have a temporary absence, that time will not count towards 5 years of continuous residence. This is arguably unlawful and you should seek advice if you are told you don't have a permanent right of residence. Similarly, if you are in the UK but you have gaps where you are not 'residing legally' (see above, qualified person), seek advice; these gaps may not affect your continuous residence.

Once you have a permanent right to reside, you only lose it by being absent from the UK for more than two consecutive years.

Permanent right to reside in less than 5 years

You could require a permanent right of residence in less than 5 years in certain limited circumstances. These circumstances depend on someone having been a worker (and their family members) who is now retired, permanently incapacitated, or being married to a UK national. If you are an EEA national who was a worker, seek advice.

8. **Derivative Right to Reside**

It is important to remember that any periods where your only right to reside is a derivative right to reside do not count towards your five years continuous residence. So if you can establish an alternative right to reside as a qualified person, you should always do so.

Derivative rights can be established in the following circumstances:

- You are the child of an EEA national who was a worker in the UK, while you were living in the UK, and you are currently in education.
- You are the primary carer of the child in the above point, and that child would be unable to continue in education if you were required to leave the UK
- You are the primary carer of a self-sufficient child who is an EEA national
- You are the dependent child of a primary carer in the points above
- You are the primary carer of a British citizen who would be unable to reside in the UK

This is a complex area and you should always seek advice about whether you may have a right of residence.

What information you need to establish whether you have a right to reside

Please see the attached checklist of the information that is needed to establish whether somebody has a right to reside. You should always seek further advice; this is a complex area of law and, in addition, the rules and caselaw frequently change for EEA nationals.