The Equal Opportunities Committee of the Scottish Parliament: call for evidence on race, ethnicity and employment.

This evidence draws on the findings of the Early Warning System (EWS). The EWS is a framework which has been developed by CPAG in Scotland to collect case studies and wider evidence about how welfare changes are impacting on children, young people and the families and communities that support them. Information is gathered from frontline workers across Scotland, including welfare rights workers, housing officers, health and social workers.

1. CPAG in Scotland welcomes this opportunity to provide evidence in response to the Scottish Government’s Equal Opportunities Committee’s inquiry into race, ethnicity and employment. We feel that we can provide evidence in relation to the question:

2. Recruitment, retention and promotion—what are the barriers that lead to unequal outcomes (including lower rates of employment and employment segregation)?

3. The following evidence draws on the work of the EWS and 2nd tier welfare rights advice service. It relates to the rights of European Economic Area (EEA) nationals exercising their rights of free movement under EU law to work in the UK.

4. To qualify for the majority of social security benefits and tax credits, an EEA national must have a right to reside in the UK, for example as a jobseeker or worker. A number of legislative changes in the last 2 years have reduced the circumstances in which an EEA national will obtain a right to reside and therefore have decreased the circumstances in which they will be entitled to benefits. This withdrawal of financial support is negatively impacting on EEA nationals’ abilities to enter the labour market and sustain employment as financial support available during periods of unemployment has been restricted and delays and error mean that some low paid EEA nationals are not receiving the financial support that should be available to supplement their income and assist with child care costs.

Changes to the rights of EEA jobseekers

5. As of 10 November 2014, an EEA jobseeker’s right to reside in the UK, and thereby their right to claim jobseeker’s allowance (JSA), child benefit (CB) and child tax credit (CTC) while doing so, is limited to 91 days having previously been unlimited and then reduced to 182 days. After 91 days they are required to provide
'compelling evidence' that they are seeking work and have a genuine chance of being engaged, to retain their right to reside as a jobseeker.

6. The DWP apply this compelling evidence requirement via the ‘genuine prospect of work test’ (GPOW) whereby they interpret ‘compelling evidence’ of seeking work and having a genuine chance of being engaged as being one of two things: having an offer of a job that will start in the next three months; having had a change of circumstances that mean that your chances of getting work in the next two months are increased.

7. In addition, from 1 April 2014 those whose only right to reside in the UK is as an EEA jobseeker have been entirely excluded from housing benefit (HB).

8. Similar changes have been made to the rights of EEA nationals who are involuntarily unemployed following a period of work in the UK: they now only retain their right to reside as a worker for 6 months before the same GPOW is applied. However, while someone has retained worker status they are entitled to housing benefit.

9. Together these changes seriously impede EEA nationals’ ability to enter and remain in the UK labour market as the financial support available whilst looking for work has been dramatically reduced:

**Young Portuguese woman, who is staying in a women's refuge has had her JSA and HB stopped after she failed the GPOW test. She is currently doing an English course and only left her previous job because her employer kept underpaying her. #3652**

**Romanian client who on the facts of his case should have either had a permanent right to reside, or a right to reside as a worker, had his claims for JSA and HB stopped as the DWP determined that he did not have a GPOW. #3810**

**The minimum earnings threshold**

10. Early in 2014 the DWP and HMRC introduced new guidance to their decision makers to help them determine when EEA nationals should be considered to have a right to reside as a worker or self-employed person under EU law. This guidance sets a test known as the ‘minimum earnings threshold’ (MET).

11. The EU Court of Justice has established that someone will only be considered to be a worker (or self-employed) for EU law purposes if they are undertaking ‘genuine and effective activity,’ as opposed to that which is ‘marginal and ancillary’. It has rejected any specific rulings on the minimum hours or length of contract or remuneration (although all will be factors in considering whether someone is undertaking genuine and effective activity).

12. Despite this, the MET works by automatically treating anyone as a worker (or self-employed person) who has had average gross earnings of at least the primary
earnings threshold (the point at which someone starts paying national insurance - £155pw for the current tax year) for the last 3 months. If someone does not meet this first test then a thorough examination into the person’s circumstances in light of relevant domestic and EU law should be undertaken to determine whether they are in fact engaged in genuine and effective activity. CPAG in Scotland’s concern is that the latter is not being carried out appropriately, if at all.

13. If someone is found to be, or to have been, a worker or self-employed, this gives them and their family members full access to the UK social security system on the same basis as British nationals (e.g. entitlement to in work benefits and out of work benefits if they stop working). Being found not to be a worker or self-employed can mean those in low paid, insecure or new employment may find maintaining a job unsustainable as they will not be entitled to the support through the benefit system that a British worker would receive to supplement low wages or assist with childcare costs.

Romanian lone parent who was a self-employed cleaner had her tax credit claim reviewed as HMRC suspected that her work was not genuine and effective. They requested so much information that the agency that offered her cleaning work stopped offering it to her as they did not want to deal with the excessive enquiries from HMRC. #1218

Spanish lone parent has been in the UK since Feb 14. She worked for 2 weeks, for 2 hours per day but had to give up as she was unable to take her daughter to school. If it is not accepted that the work was genuine and effective, she will not have retained worker status. At present she has claimed JSA but has been denied HB on the basis that her right to reside is as a jobseeker. She is currently staying in local authority temporary accommodation accruing rent arrears. #3315

Romanian Big Issue seller lives with his wife and 4 children, all of whom are at school. HMRC reviewed his claim and determined that he did not meet the minimum earnings threshold so he lost his right to reside as a self-employed person and his working tax credit (WTC) and CTC stopped despite him having a right to reside as the primary carer of children who began their education while he as self-employed. #M34

Misinformation and maladministration

14. Which entitlements and access to services EEA nationals have is determined by whether they have a right to reside in the UK under EU law. Someone may have more than one type of right to reside, i.e. both as a jobseeker and as the family member of an EEA worker, and the rights that any and all of those gives the individual should be considered by the relevant authorities.

15. Frequently EEA nationals are refused access to benefits on the basis that one type of right to reside does not entitle them without considering whether they have
any other type of right to reside which would suffice. The law around right to reside can be complex and it seems that decision makers do not have adequate resources to deal with this.

16. Being misadvised about one’s rights or being put into hardship as a result of misinformation and maladministration will seriously hinder EEA nationals’ ability to enter or remain in the UK labour market. It also has wider impacts on the general well-being of the EEA national and their family.

Polish client with a toddler separated from husband following domestic abuse, then lost her job and claimed JSA. HB incorrectly stopped on the basis that the client was a jobseeker however she retained worker status as she was involuntarily unemployed. #2027

Italian client should have a permanent right to reside as he has worked in the UK for more than 5 years and therefore the same entitlement to benefits as a British national. He is currently in receipt of JSA but his claim for HB stopped because the DWP could only confirm that he is a jobseeker. #3340

22 year old EU national was claiming JSA and HB until Jobcentre Plus advised her to claim income support (IS) because she was pregnant. Her claim for IS was refused and her HB stopped. If she makes a new claim for JSA she will not be entitled to HB as her only right to reside is as a jobseeker, so she will have to request a review of the decision terminating her JSA and hope that her HB claim is reinstated accordingly. #950

Polish client who has retained worker status is waiting for an appeal as his claim for employment and support allowance (ESA) was refused on the grounds that he does not have a right to reside. He has been without any benefits for 8 months apart from a short period where he claimed JSA. His adviser is concerned that the impact on his mental health will lead to him taking his own life or being permanently institutionalised. He has received some assistance from the Scottish Welfare Fund and the local food bank but has accrued £2000 rent and council tax arrears and is now likely to be evicted from his housing association tenancy. #3858

**Delays**

17. Decisions regarding EEA nationals’ benefit entitlement are often subject to excessive delays. The rules regarding entitlement are admittedly more complex than those effecting most British claimants but the length of delays in making decisions, often more than 26 weeks, are unjustified.

18. Information and evidence needed to establish entitlement is often available from other government departments or can be requested from elsewhere in the EU. EU law requires cross border cooperation by those institutions responsible for administering benefits in different EU member states. Modern communications technology means that there is no good reason for delays within the EU.
19. Delays in benefit entitlement can hinder or prevent EEA nationals taking up or staying in employment and amounts to unequal treatment. While waiting for a decision this may mean the claimant and family has no choice but to access the Scottish Welfare Fund (SWF) and/or food banks. EEA nationals have experience difficulties accessing SWF grants.

Client who can clearly evidence that she has a right to reside was told that it takes at least 16 weeks to process a child benefit application for all EU citizens. She was also refused her request for an interpreter as the person who took her call said her English was good enough. #4152

HMRC delays are usually at least 6 months. They are much worse than the DWP/local authorities. CB & CTC are completely inaccessible - MPs are the only route in. MPs and MSPs stopped contacting the HMRC compliance line because it just rang out. One HMRC employee said it was just as bad internally. [Quote from adviser at EWS seminar on benefits for EEA nationals]

German client asked for WTC form, but name does not match NINO and was told will take at least 14 weeks to investigate. In the meantime, no tax credits. #4508

Clients are being refused SWF grants or even chance to make applications because they are EEA nationals who have been found not to be habitually resident or have no right to reside. The local authority is saying they cannot award due to public fund/person subject to immigration control exclusions. Extracts from Scottish Government guidance have been submitted but to no avail. #3608

**Universal credit**

20. At present EEA nationals are precluded from claiming universal credit but still have the option of claiming the benefits it is replacing including jobseeker’s allowance or working tax credit. This means EEA nationals are unable to benefit from the more generous work allowances in universal credit that allow employees to keep more of their income before it is deducted from their benefit.

Polish person works at least 11 hours a week but this varies. Earning minimum wage she would be entitled to £6.60 a week but this would stop and start in line with the weeks that she works more hours. She would be at least £20 a week better off under universal credit.

21.

- Continued investment in advice and information will ensure that EEA nationals can access information about the benefits that are available to them in work and assist them to challenge decisions where benefits are refused or withdrawn incorrectly.
Further training and support for local authority staff administering housing benefit and the Scottish Welfare Fund would result in fewer EEA nationals having benefits refused or withdrawn incorrectly.

22. The EWS is continually gathering further information and evidence from advisers across Scotland and produces regular reports and newsletters summarising its finding which can be found at www.cpag.org.uk/scotland/early-warning-system. A report from the seminar held earlier this year on the changes to benefit for EU nationals rights will soon be available on the project’s webpage. It should be noted that there has been a significant rise in the last 6 months in the number of enquiries received by CPAG in Scotland’s 2nd tier advice service relating to the rights of EEA nationals.

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Para 073099 – 073100 DMG Vol 2 Chpt7 Part 3
Para 073031 – 073058 DMG Vol2 Chpt7 Part 3
Child benefit and child tax credit right to reside test: workers and self-employed people