

Benefits and People from Abroad

Information Guide 16: For Residents and Advisers

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1. Introduction

This information guide is designed to provide an overview to the rights to benefits and tax credits of people coming to the United Kingdom from abroad whether they are European nationals (including British nationals returning from a spell abroad) or people from further afield. The rules which govern entitlements are fairly complex so please seek further advice and information as necessary.

The entitlements to benefits and tax credits that are covered within this Information guide are:

- Income-based JSA (IBJSA)
- Income-related ESA (IRESA)
- Income Support (IS)
- Pension Credit (PC)
- Child Tax Credit (CTC)
- Working Tax Credit (WTC)
- Child Benefit (CB)
- Housing Benefit (HB)
- Council Tax Reduction (CTR)
- Disability Living Allowance (DLA)

- Personal Independence Payment (PIP)
- Attendance Allowance (AA)
- Carer's Allowance (CA)
- Universal Credit (UC)

2. The Starting Point

The starting point is to understand that the right to claim benefits and/or tax credits is subject to a number of conditions outside of what may be considered to be the normal qualifying rules. These extra conditions do not present as barriers for the vast majority of claimants. This is because they surround issues of nationality/immigration status and residence and most claimants are British citizens and have never been abroad. However, for those coming from abroad (from an EEA country or further afield) these extra conditions can serve to limit or deny any financial assistance even though all the other qualifying conditions of entitlement may be satisfied. The intention is to address 'benefit tourism' and limit access to benefits by those who have no connection with the UK.

Ultimately when seeking to assess an entitlement to benefits and/or tax credits it is important to identify whether the person concerned is an **EEA National** or a **National of a Non-EEA Country** or a **Person Seeking Asylum**. Broadly speaking, these are the three groups of people from abroad.

3. Must be Present...

For all benefits and tax credits a person must normally be present (physically present) in the UK when claiming, although there are rules which allow people to be treated as present during a temporary period of absence. Do seek further information and advice as necessary.

In addition to being 'present' a person must also be/have:

- **WTC:** ordinarily resident - set up home here with a settled intention to live here for the time being
- **CB / CTC:** ordinarily resident and right to reside - set up home here with a settled intention to live here for the time being and have a right to reside in the UK - some people are exempt from the RTR test
- **IBJSA / IRESA / IS / PC / HB / CTR / DLA / PIP / AA / CA and UC:** habitual residence - resident here with settled intention to live here for time being and have lived here for an appreciable period of time - some people are exempt from this test
- **IBJSA / IRESA / IS / PC / HB / CTR / CB / CTC and UC:** a right to reside - a right to reside in the UK - some people are exempt from this test

Therefore, in order to work out whether a person coming to the UK from abroad has any right to an individual benefit and/or tax credit, not only must you look at whether they are able to meet the normal qualifying rules for that benefit and/or tax credit, you must also consider other factors.

You must establish their nationality and immigration status, whether they are actually living in the UK (as opposed to simply visiting the UK), whether they are 'habitual residence' (or are exempt from this test) and/or whether they have a 'right to reside' (or may be exempt from this test). When considering immigration status, it is important to understand that there are broadly three groups of migrant people. The group a person belongs to will dictate what (if any) benefits and tax credits they may claim. In cases involving EEA nationals, everything will turn on whether they are working, self-employed or simply looking for work.

4. EEA Nationals and Others

EEA Nationals:

The **European Union (EU)** consists of the United Kingdom (England, Scotland, Wales and Northern Ireland), Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden. It also comprises:

- **Since 1st May 2004 - A8:** Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia
- **Since 1st January 2007 - A2:** Bulgaria and Rumania
- **Since 1st July 2013 - A1:** Croatia

The **European Economic Area (EEA)** includes the above countries plus Norway, Iceland and Liechtenstein.

The European Union grants a right to EEA nationals (and Swiss nationals) to enjoy freedom to travel, live and work within any of the countries which are part of the EEA.

However, these rights are not absolute. Whilst EEA nationals have the right to reside in another EU/EEA country for three months beyond that a person must have a 'right to reside' to remain.

An EEA national may have a 'right to reside' in the UK in a number of different circumstances including where they are:

- a worker
- a self-employed person
- a jobseeker
- a student who can financially support themselves and they have comprehensive sickness insurance
- a person who is able to financially support themselves and any family members (i.e. they are 'self-sufficient') and they have comprehensive sickness insurance.

A person may also have a 'right to reside' if they are a 'family member' (e.g. a spouse, civil partner or dependent child) of a person who meets one of the aforementioned conditions.

Note: New rules were introduced from **1st February 2017** which underlined the position that EU citizens who are living in the UK but who do not have a 'right to reside' are in a precarious (and unlawful) position and could be removed.

Any right to mainstream benefits and tax credits is ultimately dependent on an EEA national having a 'right to reside'. See Part 5: EEA Nationals - Right to Benefit.

Non-EEA Nationals:

A non-EEA national will be a national of a non-EEA country. Any non-EEA national will normally have time limited leave to remain in the UK e.g. whilst on holiday, during a period of employment or during a period of study. A non-EEA national is classed as a 'person subject to immigration control' (PSIC) and their stay is normally subject to the condition that whilst here they shall have 'no recourse to public funds' (i.e. mainstream benefits and tax credits). However, non-EEA nationals may be granted permission (known as 'leave') to remain in the UK.

In some cases, this permission is made without any restriction on the rights to claim mainstream benefits and tax credits. In other cases, the leave to remain is conditional on the person having 'no recourse to public funds' - they may not receive mainstream benefits and tax credits. See Part 9: Non-EEA Nationals - Right to Benefit.

Asylum Seekers:

An asylum seeker is a person who does not have any legal right to reside (leave to remain) in the UK but has applied for refugee status i.e. the right to remain in the UK be it on a permanent or temporary basis. Asylum seekers are not entitled to mainstream benefits and tax credits. They may be entitled to Asylum Support through which accommodation may be provided and/or money for basic living expenses. The expectation is that if the application for asylum fails the person will return to their country of origin. See Part 11: Asylum Seekers.

5. EEA Nationals - Right to Benefit

The right to benefits and tax credits of people coming to the UK from the EEA is dependent on whether they have a 'right to reside' (which for most benefits forms part of an overall 'habitual residence test' - see Part 6) in the UK.

In order to have a 'right to reside' in the UK a person must either:

- be a British Citizen;
- have a 'right to reside' under European Community law;
- have the right of abode in the UK; or
- have leave to remain under UK immigration rules

Under European Community law an EEA national - now including those from A8 and A2 countries (but not those from Croatia - see below) has the right to reside in another EEA country providing they are:

- a worker (or 'family member' of a worker) engaged in 'genuine and effective work'; or
- self-employed (or 'family member' of a self-employed person); or
- a work seeker (or 'family member' of a work seeker) providing they have a 'genuine chance of becoming engaged' in work; or
- a student (or 'family member' of a student) provided they can support themselves; or
- a person that is able to support themselves and any family members (i.e. they are 'self-sufficient') and has comprehensive sickness cover in the country in which they are living

A 'worker' may retain worker status should they stop working in certain situations e.g. temporary illness or unemployment, provided they are looking for work.

Permanent residence: An EEA national (including their family members) may acquire the right to reside permanently in the UK where they have 'resided legally' in the UK for at least 5 years. This permanent 'right to reside' may be lost if the person has been absent from the UK for two consecutive years or longer. Permanent residence may be acquired within less than five years where one of the situations below apply.

The EEA national:

1. was a worker or self-employed person and has reached 'state pension age' or taken early retirement providing they worked in the UK for at least 12 months and resided in the UK continuously for more than three years before stopping work/self-employment; or
2. was a worker or self-employed person and stopped working in the UK due to permanent incapacity providing they had lived in the UK for at least two years; or
3. was a worker or self-employed person and stopped working in the UK due to permanent incapacity caused by an accident at work or by reason of contracting an occupational disease; or

The person:

4. is a 'family member' of (and living with) an EEA national who was a worker or self-employed person before that person died providing the deceased had resided in the UK for at least two years
5. is a 'family member' of (and living with) an EEA national who was a worker or self-employed person before that person died and the deceased died by reason of an accident at work or by reason of contracting an occupational disease

Family Member:

A person who is a 'family member' of an EEA national with a 'right to reside' also has a 'right to reside'. This applies equally whether or not they are themselves an EEA national. A 'family member' includes:

- a spouse
- a civil partner
- a child aged under 21
- a child aged 21 or over where the EEA national is providing them with 'material support' relating to the person's basic necessities of life
- a grandchild/great-grandchild (if aged 21 or over then only where the EEA national is providing them with 'material support' relating to the person's basic necessities of life)
- a parent, grand parent or great-grand parent where the EEA national is providing them with 'material support' relating to the person's basic necessities of life

A 'family member' may also include an 'extended family member' such as a partner whom the EEA national has had a 'durable relationship' with. It may also extend to other relatives who are dependants or relatives who require help with their personal care on serious health grounds. To count as an 'extended family member' the person must be recognised as such by the UK Border Agency and have been issued with the relevant documentation.

A 'family member' does not necessarily lose the right to reside when the link with the EEA national ceases. For example, a former spouse or civil partner can retain their right to reside if, before a separation, the marriage or civil partnership had lasted for at least three years with both members of the couple having lived together in the UK for at least one year. Equally a right to reside would continue if, following separation the party has custody of any children in the UK or access rights (but only in the UK). Further, the right to reside may also be retained where the right of residence is warranted by particularly difficult circumstances (e.g. in the case of domestic violence during a marriage or civil partnership).

Labour Market Restrictions: Worker Registration / Worker Authorisation

One of the principles of the European Union is that EU/EEA economic migrants have the right of freedom of movement between member states. When the European Union was enlarged, existing members were allowed to regulate access by A8 nationals and A2 nationals to their labour markets by restricting employment and job seeking. Similar restrictions were put in place when Croatia joined the EEA.

A8 Nationals - 1st May 2011: For those from A8 countries (so called 'accession countries') between 1st May 2004 and 1st May 2011, they needed to meet the additional transitional requirement that they had to have legally worked without interruption under the 'Worker Registration Scheme' for 12 months before they could access out-of-work benefits. However, this transitional arrangement was removed on 1st May 2011. A8 nationals may now work and access benefits on the same basis as other EEA nationals.

A2 Nationals - 1st January 2014: For those from A2 countries (so called 'A2 countries') between 1st January 2007 and 1st January 2014, they needed to meet the additional transitional requirement that they had to have legally worked without interruption under the 'Worker Authorisation Requirement' for at least 12 months before they could access out-of-work benefits.

However, this transitional arrangement was removed from 1st January 2014. A2 nationals may now access benefits on the same basis as other EEA nationals.

Croatian Nationals - 1st July 2013: Croatia joined the European Union on 1st July 2013. Between 1st July 2013 and 30th June 2018, all Croatian nationals will be subject to a 'worker authorisation' requirement in order to have a 'right to reside' and claim mainstream benefits and tax credits in the UK, unless they may be exempt. Croatian nationals who are **exempt** from the 'worker authorisation' scheme include those who:

1. are self-employed
2. on 30th June 2013 had leave to enter or remain in the UK without any employment restrictions
3. have, since 30th June 2013, legally worked in the UK for at least 12 months (without a break of more than 30 days in total)
4. prior to 1st July 2013 were legally working in the UK for at least 12 months (without a break of more than 30 days in total)
5. met 'highly skilled person' points based criteria under the immigration rules for entering the UK
6. have a qualification at degree level (or higher) obtained in the UK and within 12 months of obtaining the qualification they have applied for a 'blue registration certificate' confirming unconditional access to the UK labour market
7. are a family member of an EEA national (other than Croatia, Bulgaria or Romania national) who has a 'right to reside' in the UK

A Croatian national who is subject to the 'worker authorisation' requirement will not have a 'right to reside' in the UK as a jobseeker and they will only have a 'right to reside' as a worker if they are working within the terms of the 'worker authorisation' scheme. To do this they must be sponsored by an employer and obtain a valid 'purple registration certificate' before starting work.

Should they then lose their employment they will not be able to retain their worker status or 'right to reside'.

The right of abode: An individual who has the right of abode in the UK will normally have a UK passport describing them as a British citizen or a British subject. If they do not have this then they will normally have a 'certificate of entitlement' affixed to their passport (or other travel document) confirming they have a right of abode. An individual with a right of abode will have an unconditional right to live, work and study in the UK. They also have the right to apply for benefits and tax credits providing the normal rules of entitlement are met.

Leave to remain (Indefinite or Time Limited): Is an immigration status granted to a person who does not have the right of abode but who has been granted leave to remain in the UK. This permission could be given with or without time limit. A person with leave to remain is free to live, work and study in the UK. They also have the right to apply for benefits and tax credits providing the normal rules of entitlement are met.

6. Habitual Residence Test

In order to claim benefits the general rule is that the claimant must be 'present' and 'ordinarily resident' in the UK. In the case of some benefits the person may be absent from the UK for a short period and maintain entitlement (e.g. Pension Credit for up to 13 weeks on holiday). In other situations (e.g. State Retirement Pension and Industrial Injuries Disablement Benefit) a person may be living abroad and continue to be paid. In respect of the following benefits and tax credits a person must ordinarily be present and meet the 'habitually resident test' in order to qualify. This does not mean that the person may not claim during temporary periods of absence but it does mean that (unless the person is exempt from the HRT/RTR) in order to qualify the person must both have a right to live and be living in the UK.

Habitual Residence Test:

The **habitual residence test** was first introduced in 1st August 1994. It was amended from 1st May 2004 to also incorporate the '**right to reside**' test - a person must have a 'right to reside' in the 'Common Travel Area' (meaning the UK, the Channel Islands, the Isle of Man or the Republic of Ireland). The 'habitual residence test' applies equally to British nationals who return to the UK from a spell living abroad. The 'habitual residence test' was introduced as a response to concerns surrounding 'benefit tourism'. The 'right to reside' test was introduced out of concern about the impact of the joining of the A8 nations as part of the European Union. Successive governments have stated a continuing need for measures to safeguard the benefits system from abuse by those without any real connection to the UK.

Habitual Residence Test (HRT) and Right to Reside (RTR): Those who come to the UK from abroad wishing to claim one of the benefits highlighted below (see Part 9) must be able to meet the habitual residence test (HRT). This means that they are able to show that they have a legal right to live in the UK (i.e. they have a right to reside) and they have habitual residence (i.e. they have lived here for an appreciable period of time and intend to settle in the UK (or Isle of Man, Channel Islands or Republic of Ireland) and make it their home for the time being (i.e. they have habitual residence)).

Those exempt from the HRT (and RTR) includes:

- an EEA national who is a worker in 'genuine and effective work' - see below
- an EEA national who is self-employed person
- a 'family member' of a worker
- a 'family member' of a self-employed person
- an EEA national with a right of permanent residence

- a family member of an EEA national with a right of permanent residence
- a Croatian national in authorised work
- those with exceptional leave to enter or remain in the UK
- a refugee

EEA Worker: An EEA national who is working will only be exempt from the ‘habitual residence test’ and ‘right to reside’ tests providing they are in ‘genuine and effective work’ (not defined) - see Part 7: New Rules. An EEA national who was a ‘worker’ may retain their worker status in certain situations - for example, if they are temporarily unable to work due to ill-health or they have been made unemployed and are looking for work.

EEA Jobseeker: An EEA national who is a ‘jobseeker’ may only be considered to have a ‘right to reside’ providing that they have a ‘genuine chance of being engaged’ - see Part 7: New Rules. Before being able to claim any of the benefits listed above they would still be required to be ‘habitually resident’ - they have lived in the UK for an appreciable period of time and intend to settle in UK and make it their home for the time being.

Note: Any EEA national from any of the current EEA countries (including A8 and A2 countries) may move from one EEA country to another and have a right to reside providing they are economically active or are able to support themselves. Further, all EEA nationals including economically inactive EEA nationals have had a right to reside in another EEA country for at least first three months.

7. EEA Nationals: The New Rules

The following new rules were introduced in 2014 to coincide with the lifting of the ‘worker authorisation requirement’ for EEA nationals from the A2 countries (Romania and Bulgaria) in order to make it more difficult for EEA nationals to claim benefit. Under the new rules:

A. Habitual Residence - Three Month Rule: No-one (including British nationals and others coming to the UK for the first time) may be considered ‘habitually resident’ for Income-based Jobseeker’s Allowance unless they have for three months been living in the ‘Common Travel Area’ (meaning the UK, the Channel Islands, the Isle of Man or the Republic of Ireland) for three months.

B. Jobseekers - GPoW - Three Month Rule:

EEA nationals who are jobseekers (including a person who is able to retain their status as a worker because they involuntarily lost their job) would have to show that **after three months** (six months in the case of a person who has worked for at least 12 months and is able to retain their status as a worker because they involuntarily lost their job) they can ‘provide compelling evidence’ that they are ‘continuing to seek employment’ and that they have a ‘genuine chance of being engaged’ to have a ‘right to reside’ and to continue to get Income-based Jobseeker’s Allowance. See 8. Genuine Prospects of Work.

Immigration (European Economic Area) Regulations 2005 as amended by The Immigration (European Economic Area) (Amendment)(No.3) Regulations 2014 with effect from 10.11.2014.

C. Jobseekers - No Housing Benefit:

EEA nationals (other than British nationals) who only have a ‘right to reside’ as a ‘jobseeker’ no longer have access to Housing Benefit regardless of when they entered the UK. However, those who were getting Housing Benefit (and JSA as a jobseeker) prior to the rule change (1.4.2014) have been allowed to continue to receive Housing Benefit providing there has been no break in their claim. Note: Both ‘workers’ or ‘self-employed’ persons who retain their ‘worker’ status on stopping work (e.g. redundancy or due to ill-health) are not affected by this rule change. See HB Circular A6/2014 for further information.

D. Jobseeker - CB and CTC:

EEA nationals arriving in the UK from 1st July 2014 whose ‘right to reside’ is established as a ‘jobseeker’ need to live here for three months before they may claim Child Benefit and/or Child Tax Credit.

E. Workers - Minimum Earnings Rule:

A new minimum earnings threshold applies to help determine whether an EEA national is undertaking 'genuine and effective work' and so has the 'right to reside' as a 'worker' or 'self-employed' person. The threshold is £157.00 per week or £680 per month - equal to 24 hours at the national minimum wage/equal to the point at which Class 1 national insurance contributions are paid. Those earning less than the threshold will be assessed against a 'broader range' criteria to decide whether they should be treated as a 'worker' or 'self-employed' person. The above measures were introduced to protect the UK's benefit system and to discourage those with no established connection (or with a broken connection) to the UK from migrating here without a firm offer of employment or imminent prospects of work.

Universal Credit: Further, Since **10th June 2015** new provisions were added to the Universal Credit rules resulting in EEA nationals (or their family members) not being able to apply for Universal Credit if their 'right to reside' is as a 'jobseeker'. For the purposes of Universal Credit EEA nationals who are 'jobseekers' are treated as though they are not 'habitually resident' in the UK.

The Universal Credit (EEA Jobseekers) Amendment Regulations 2015 - Statutory Instrument 2015 No. 546 with effect from 10.6.2015

8. Genuine Prospects of Work

Since 10th November 2014 EEA nationals who are 'jobseekers' have had any entitlement to Income-based Jobseeker's Allowance restricted to three months (91 days) unless they can provide 'compelling evidence' that they are looking for work and have a 'genuine' chance of finding work (within the regulations it is referred to as 'being engaged').

The requirement to expect EEA national to have a genuine chance of obtaining employment after a period of job seeking was established in *Antonissen* a case of the European Court of Justice.

Early DWP guidance (DMG 15/14 - issued in June 2014 and DMG 2/15 - issued in February 2015) suggested that in consequence of this new rule Income-based Jobseeker's Allowance could only be paid beyond three months to EEA nationals where they are able to provide 'compelling evidence' that they have a 'genuine offer' of 'genuine and effective work' and that work was due to start within three months; or where the claimant has provided proof that they have 'genuine prospects' of imminently getting 'genuine and effective work' following a job interview. The guidance provides that in the first scenario an award of Income-based Jobseeker's Allowance may be extended by up to 3 months. In the second scenario, an award of IBJSA may be extended by up to 2 months. The guidance provides that if the circumstances of the EEA national changed improving the prospects of employment (e.g. they completed a vocational training course or moved to a location with improve labour market conditions) then that could be grounds for awarding or extending an existing award of Income-based Jobseeker's Allowance. In any event, this is only guidance and as such is not legally binding. In final analysis an award of Income-based Jobseeker's Allowance beyond 3 months all comes down to whether at the relevant point in time the EEA national may show that they continue to look for work and have 'genuine' prospects of work. In relation to this question *KS v SSWP - CSJSA/15/2016* held that 'compelling evidence' is no more than the requirement for evidence to establish on a balance of probabilities that the claimant is continuing to seek employment and that he has genuine chances of being engaged. The judgement held that on the question of 'compelling' it was up to the judge considering the matter to decide the actual weight and quality of evidence required in any particular case. In *SSWP v MB - CJSA/2042/2015* it was confirmed that to meet the 'genuine chance' threshold the chance must be more than marginal. It confirmed that it must be a 'genuine chance' of finding 'genuine and effective' work. It held that what is a question of 'chance' which by nature involves a degree of looking forward.

OS v SSWP - C/JSA/538/2016 held that evidence of obtaining employment (or not obtaining employment) after the date of the decision could be relevant.

9. Non-EEA Nationals - Right to Benefit (PSIC)

Most non-EEA nationals (i.e. persons from outside of the EEA who are non-EEA nationals) coming to the UK will have time limited leave to remain (e.g. whilst on holiday, period of employment or study) and their stay will be subject to the condition that whilst here they shall have 'no recourse to public funds' (NRPF). This means that they have no right to any benefits or tax credits deemed 'public funds' by immigration rules.

Public Funds:

- Income-based JSA
- Income-related ESA
- Income Support
- Child Tax Credit
- Working Tax Credit
- Child Benefit
- Carer's Allowance
- Housing Benefit
- Council Tax Reduction
- Pension Credit
- Attendance Allowance
- Disability Living Allowance
- Personal Independence Payment
- Universal Credit

Persons Subject to Immigration Control:

A 'person subject to immigration control' (PSIC) is a Non-EEA national (see Part 4 for details of the EEA countries) who:

1. requires permission (known as 'leave') to enter or remain in the UK but does not have it - this will include asylum seekers with temporary admission, those who remain beyond the period of limited leave, those who have entered the UK illegally and those who are subject to deportation; or

2. has permission (known as 'leave') to enter or remain in the UK on condition that they do not have recourse to public funds, or

3. has permission (known as 'leave') to enter or remain in the UK as a result of a maintenance undertaking - someone has agreed to maintain and accommodate them, or

4. has permission (known as 'leave') to enter or remain in the UK only because they are appealing against a decision to vary the terms of a previous leave agreement.

Normally a non-EEA national with 'limited leave to remain' would be in breach of the conditions of their stay should they seek to claim benefits and/or tax credits and could find themselves subject to deportation, refusal of permission to extended leave and/or prosecution.

The **exceptions** to this rule include:

1. a PSIC who has been granted permission to stay in the UK indefinitely (known as 'indefinite leave to remain') where their permission to remain is not conditional on the fact that they should have 'no recourse to public funds' - in these circumstances the PSIC would be eligible to claim benefits and tax credits subject to the normal qualifying rules.

2. a PSIC who has been given permission to stay (known as 'leave to remain') in the UK on the basis that someone will maintain and accommodate them (known as a 'maintenance undertaking') then they may claim Attendance Allowance, Personal Independence Payment, Disability Living Allowance, Child Benefit and/or Carers Allowance subject to the normal qualifying rules.

3. a PSIC whose has been granted permission to stay (known as 'leave to remain') in the UK on the basis that someone will maintain and accommodate them (known as a 'maintenance undertaking') and either:

- the person who agreed to maintain and accommodate the PSIC has since died; or
- the PSIC has since been resident in the UK for at least 5 years

In this situation, the PSIC would be able to claim Income Support, Income-based JSA, Income-related ESA, Pension Credit, Housing Benefit, Universal Credit, Attendance Allowance, Personal Independence Payment, Disability Living Allowance, Child Benefit and/or Carers Allowance.

Public Funds: Do not include contributory benefits (e.g. State Retirement Pension, Contributory JSA and Contributory ESA). Neither does it include Maternity Allowance, Industrial Injuries Benefit, Statutory Sick Pay, Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay. However, to access any of these benefits the person must be entitled to work in the UK and have worked and in the case of Retirement Pension, Contributory JSA and Contributory ESA paid sufficient NI contributions to qualify.

Note: Different rules can apply in the case of Swiss nationals and to nationals of Macedonia, Algeria, Morocco, San Marino, Tunisia, Turkey who are working in the Great Britain lawfully or they have ceased working in Great Britain because of pregnancy, childcare, illness or because they have reached retirement age. Do seek further information and advice as necessary.

10. HRT and RTR - Case Law

The '**habitual residence test**' was first introduced in 1st August 1994. It was amended from 1st May 2004 to also incorporate the '**right to reside**' test - a person must have a 'right to reside' in the 'Common Travel Area' (meaning the UK, the Channel Islands, the Isle of Man or the Republic of Ireland). The conditions of the 'right to reside' test are set out in Part 6.

Benefits Subject to HRT/RTR:

- Income-based JSA
- Income-related ESA
- Income Support
- Pension Credit
- Universal Credit

- Attendance Allowance
- Disability Living Allowance
- Personal Independence Payment
- Carer's Allowance
- Housing Benefit
- Council Tax Reduction

In the case of IBJSA, IRESA, IS, PC, HB, CTR and UC those people who do not have a 'right to reside' will not be 'habitually resident' (unless they may be exempt from the RTR test) and those that fail the 'habitual residence test' will not be entitled to the benefit.

Exempt Groups: Details of those who are exempt from the HRT and RTR are stated in Part 6. Those exempt from the HRT also includes those who:

- (a) have discretionary leave to remain in the UK
- (b) have leave to remain in the UK under the 'destitute domestic violence' concession
- (c) have been given 'temporary protection' under the displaced persons' provisions
- (d) have 'humanitarian protection' granted under immigration rules

This applied in respects of the benefits listed opposite except for AA, DLA, PIP and Carer's Allowance.

A substantial body of case law has developed surrounding 'habitual residence' and 'right to reside'. The following is aimed at providing an overview.

Habitual Residence:

Case law has established that the main factors to be taken into account when deciding whether or not a person is 'habitually resident' are twofold:

- '**settled intention**': Has the person a 'settled intention' to reside here; and
- '**appreciable period of time**': Has the person actually been resident here for an 'appreciable period of time'

Factors which may be taken into account in determining 'habitual residence' may include:

- the person's length and continuity of residence
- the person's future intentions
- the person's employment prospects
- the person's reasons for coming to the UK
- where the person's 'centre of interest' lies

People who have previously been 'habitually resident' in the 'Common Travel Area' (meaning the UK, the Channel Islands, the Isle of Man or the Republic of Ireland) and who return to resume their 'habitual residence' may be automatically treated as 'habitually resident' upon their return. EEA nationals who have worked in another EEA country may also (subject to their intentions and personal situation) be accepted as 'habitually resident' on their return.

Any decision on 'habitual residence' must be based upon the circumstances at the time when the decision on 'habitual residence' in made. However, circumstances are subject to change. This may mean that just because a person was not 'habitually resident' at that time does not mean that they are not 'habitually resident' now. Therefore, repeat claims may be needed.

Habitual Residence - Case Law:

A. CIS/1067/1995: A decision on 'habitual residence' must be made on the 'balance of probabilities' and the burden of proof lies with the DWP.

B. *Nessa v Chief Adjudication Officer*: A person may not be considered 'habitually resident' unless they have taken up residence in UK and lived here for a period of time. The duration of 'habitual residence' is not fixed and is dependent on individual circumstance.

C. CIS/1304/1997 and CJS/5394/1998: The stronger the settled intention the shorter the period of actual residence is needed (and vice versa).

D. CIS/1304/1997 and CJS/5394/1998: A person returning who was habitually resident may resume their habitual residence subject to the reasons why they left the UK, their links whilst away and their circumstances upon return.

E. CIS/12703/1996: A temporary absence (e.g. holiday) should not affect 'habitual residence' particularly where there is/has been a definite date of return.

F. R(IS)2/00 and CIS/11481/1995: The DWP must consider the whole period when deciding 'habitual residence' including the period between the date of claim and the date the decision is being made.

Right to Reside - Case Law:

G. *Zambrano*: European Court of Justice: Establishes that a 'primary carer' of a British citizen who is residing in the UK has an automatic 'right to reside' (and work) providing that the British citizen would be - unable to reside in the UK (or another EEA country) if that - person were to leave. In the *Zambrano* case, it was held that it - was necessary for Mr Zambrano (who was a Columbian national) to have a right of residence (and work) in Belgium to ensure that his dependent children (who were Belgium nationals) could genuinely enjoy the substance of their rights as EU citizens. Note: Give rule changes to the habitual residence test (November 2012) 'Zambrano carers' do not have the right to mainstream benefits/tax credits.

H. *Antonissen*: European Court of Justice: Held that EEA nationals who were work seekers have the right to remain (the 'right to reside') in another EEA country for at least six months and longer if they can show that they are continuing to seek and have genuine prospects of getting work.

I. *Vatsouras and Koupatantze*: European Court of Justice: Involved a case where the appellants had 'jobseeker' status in Germany and had their time-limited German equivalent to Income-based JSA stopped after three months. EUCJ held that 'jobseekers' fell within the scope of a 'worker' and that benefits that facilitate rights of access to the labour market are not 'social assistance' therefore may not be limits on entitlement.

Antonissen (see above) establishes 'jobseekers' have the 'right to reside' for at least six months. Therefore, it may be argued that limiting Income-based JSA to three months is incompatible with EU law. Further, the case law makes no reference to the need for 'compelling evidence' after six months (which the DWP applies through the 'genuine prospects of work' test) - it only requires that the jobseeker shows that they are seeking work and have a genuine chance of being engaged.

J. *Dano*: European Court of Justice: Ms Dano was a Romanian national and was living in Germany. She was paid German Child Benefit but nothing more. The EUCJ held that Ms Dano had no rights to social security benefit as she had no 'right to reside' this was because she was not a worker, self-employed or a jobseeker (she was not economically active).

K. *Ibrahim and Teixeira*: European Court of Justice: A child of an EEA national that is working (or has worked) in a host member country has the right to reside in that host member country where they are in education (post nursery education). A 'primary care' of such a child also has a 'right to reside' in the host member country. Further, in such an event any child of the primary carer would also have right to reside in the host member country, where failure to have such a right would result in the primary carer needing to leave the host member country. This underpins the principle that the child in education has the right to complete said education in the host member country.

L. *Czop and Punakova*: European Court of Justice: Held that Article 12 provides for the freedom of movement for workers within the EEA and confers a 'right to reside' on a primary carer of a child attending education where the primary carer is a worker (or a former worker).

However, the same 'right to reside' cannot be interpreted as conferring to those who are the primary carer of the child of a person who is self-employed.

M. *RM v SSWP*: UK Upper Tribunal: The appellant was a Norwegian national. She came here to work as a cleaner and presented as self-employed.

Her children entered school on arrival. She claimed Income Support as a lone parent but was refused on grounds that she did not have a 'right to reside'. The appellant argued that her 'right to reside' was secured as a primary carer of a child in education. The Upper Tribunal Judge held that had the appellant been a 'worker' (i.e. employed person) then she would have had a 'right to reside' as a primary carer. The Upper Tribunal Judge held that he was bound by *Czop and Punakova* (European Union Court of Justice) which held that a child of a self-employed person did not have a right to education in the UK. This was only a right of children of a worker. Permission to appeal to the Court of Appeal has been sought.

N. *Saint Prix*: European Court of Justice: Held a woman who gives up work (or seeking work) because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of a 'worker' (or jobseeker) provided she returns to work (or job seeking) within a reasonable period after the birth of her child.

O. *Oboh*: UK Court of Appeal: Rejected the argument that a 'right to reside' could exist for an extended family member where the dependence on them on the EEA national (with a right to reside) did not exist in the country from which the extended family member has come. The Court of Appeal held that the rules concerned those who were family members in the country from which they have come - the requirement was that the relationship of dependency or membership of household must have existed in another country as well as in the host country.

(Supported by *Rehman* - European Court of Justice). The provisions did not exist to facilitate family reunion. (Supported by *Metock* - European Court of Justice).

11. Asylum Seekers

An 'asylum seeker' is someone who is aged 18 or over who is awaiting a Home Office decision following an application for asylum/ refugee status to remain in the UK.

Asylum seekers are excluded from claiming the following mainstream Social Security benefits and tax credits and from working.

- Income-based JSA
- Income-related ESA
- Income Support
- Child Tax Credit
- Working Tax Credit
- Child Benefit
- Carer's Allowance
- Housing Benefit
- Council Tax Reduction
- Pension Credit
- Attendance Allowance
- Disability Living Allowance
- Personal Independence Payment
- Universal Credit
- DWP social fund payments

Asylum Support:

Section 95 Support: An asylum seeker who have no entitlement to benefit (and who may be considered destitute or about to become destitute within 14 days) are eligible for 'asylum support' - paid by the UK Border Agency. Asylum support amounts to housing support (provision of a house/flat to live in) plus an amount for basic living expenses - £72.52 per week couple, £42.62 per week single person aged 25 or over and £36.95 per week where aged 18 to 24 plus an additional amount of £52.96 per week is paid in respect of any children.

Section 4 Support: A person who has been refused asylum may be paid this whilst appealing. Payment is conditional upon the person agreeing to return to their country of origin should their appeal fail.

Once there is a decision on the asylum application and **Section 95 Support** stops after 21 days. If the applicant has children, then any asylum support will only end if the family has been certified by the Home Office as having failed to leave the UK.

If the asylum seeker is granted leave to remain in the UK then any Section 95 Support will end after 28 days. This is because the person will be eligible to claim social security benefits and tax credits (providing the normal rules of entitlement can be met). In order to get a **Section 4 Support Payment** the asylum seeker must be considered to be destitute (or about to become destitute within 14 days) and either:

1. be taking all reasonable steps to leave the UK; or
2. be unable to leave the UK because of some physical impediment to travel; or
3. have no viable route of return; or
4. applied for judicial review
5. show that it is necessary for them to remain in order to avoid breach of their human rights - avoid torture and inhuman or degrading treatment, right to a family life, right to liberty and right to a fair trial

If a person is granted refugee leave, humanitarian protection, discretionary leave or indefinite leave then they are no longer a PSIC - during this period they will have access to social security benefits and tax credits under the normal rules. If they are granted leave but their leave is conditional on them having 'no recourse to public funds' then they will remain a PSIC and not eligible to the 'public funds' listed in Part 9.

12. Information Guides

The City of Wolverhampton Council's Welfare Rights Service produces the following guides on benefits and welfare reform:

1. Universal Credit
2. Universal Credit - Claims and Payment
3. Universal Credit - The Claimant Commitment
4. Universal Credit - Sanctions and Hardship Payments
5. Universal Credit - Work Capability Assessment - Toolkit

6. Employment and Support Allowance
7. ESA - Work Capability Assessment - Toolkit
8. Personal Independence Payment
9. Personal Independence Payment - Toolkit
10. Form Filling - PIP2 and ESA50/UC50
11. Benefits for Young People
12. The Benefit Cap
13. The Spare Room Subsidy
14. DWP Social Fund
15. Local Welfare Assistance
16. Benefits and People from Abroad
17. JSA Sanctions
18. ESA Sanctions
19. Disputes and Appeals
20. Going to Appeal: First-tier Tribunals
21. Useful Contacts and Websites

If you would like a copy of any of the above Information Guides or you are in need of information and/or advice on a benefits or welfare reform matter, then please contact our Specialist Support Team:

☎ Telephone: (01902) 555351

✉ Email: A&C.WRS@wolverhampton.gov.uk

The details provided in this Information Guide are meant to provide a guide on to the benefits available to people from abroad. The details should not be treated as an authoritative statement of the law. The details may be subject to change by new regulation and/or case law. Do seek further information and advice as necessary.