

European nationals: the new housing eligibility test



Jon Holbrook and Peggy Etiebet consider how recent legislation and case-law has affected access to social housing by European Economic Area (EEA) nationals under Housing Act (HA) 1996 Part 6 (allocations) and Part 7 (homelessness).

Introduction

On 30 April 2006, the European Union (EU) Residence Directive (also known as the Citizens Directive) was transposed into UK law by the Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003.* The I(EEA) Regs extended the rights of EEA nationals to reside in the UK. The EEA is made up of the states of the EU plus Norway, Liechtenstein, Iceland and Switzerland. An EEA national is a national of an EEA state other than the UK (I(EEA) Regs reg 2(1)).

Almost contemporaneously, the government acted to restrict the right of some of those EEA nationals to access accommodation under HA 1996 Parts 6 and 7. On 1 June 2006, the Allocation of Housing and Homelessness (Eligibility) (England) Regulations (AHH(E)(E) Regs) 2006 SI No 1294 came into force. The AHH(E)(E) Regs establish the eligibility of EEA nationals to social housing (see box entitled 'Transitional protection').

This article explains the relevance of the eligibility test and the right to reside before considering four key issues:

- EEA nationals and their right to reside;
- eligibility for EEA nationals without a right to reside;
- eligibility for EEA nationals with a right to reside; and
- the family members of EEA nationals.

The relevance of eligibility

An applicant will only be able to access social housing if s/he is an eligible person. HA 1996 Part 6 provides that a local housing authority shall not allocate accommodation to a person who is ineligible (s160A(1)(a)). The fact that a would-be tenant has family members who are not eligible for assistance is not relevant (*R (Kimvono) v Tower Hamlets LBC* (2001) 33 HLR 889; QBD, 5 December 2000).

HA 1996 Part 7 provides that a person is not eligible for housing assistance if s/he is a

person from abroad who is ineligible for such assistance (s185(1)), albeit an applicant may be accommodated on an interim basis pending a decision on his/her eligibility (s188). However, if the decision on eligibility is adverse to the applicant, the local authority cannot continue to accommodate under either s188(3) (pending review) or s204(4) (pending appeal) unless accommodation is necessary to avoid a breach of a European Convention on Human Rights ('the convention') or EU Treaty right. (See Nationality, Immigration and

Asylum Act 2002 Sch 3, *R (Conde) v Lambeth LBC* [2005] EWHC 62 (Admin), 13 January 2005; [2005] 29 HLR 452; [2005] 2 FLR 198 (Admin), and *R (Mohamed) v Harrow LBC* [2005] EWHC 3194 (Admin), 13 December 2005.)

Furthermore, under HA 1996 Part 7, any assessment of an applicant's entitlement to social housing may be affected by the eligibility of an applicant's family members and/or those who could reasonably be expected to reside with him/her. This is because an ineligible family member is to be disregarded when the decision-maker decides whether the applicant is homeless or has a priority need for accommodation (s185(4)).

The Court of Appeal has found that s185(4) is incompatible with the right to respect for family life under article 8 of the convention. However, the government has declined to amend the provision and it still has the force of law. Accordingly, although a local authority may use its power under s192(3) to secure accommodation for a person who does not have a priority need, this power is not converted into a duty because s185(4) conflicts with the convention. Nor can a local authority have regard to the incompatibility when exercising

Transitional protection

The main body of this article is concerned with applications made on or after 1 June 2006 that are covered by the new AHH(E)(E) Regs. But transitional protection for those who applied before June 2006 means that the old eligibility regulations – ie, the Homelessness (England) Regulations (H(E) Regs) 2000 SI No 701 and the Allocation of Housing (England) Regulations (AH(E) Regs) 2002 SI No 3264, as amended, on 1 May 2004, by the Allocation of Housing and Homelessness (Amendment) (England) Regulations (AHH(A)(E) Regs) 2004 SI No 1235 – will continue to cover many applicants for the foreseeable future.

Although these old eligibility regulations (the H(E) Regs and the AH(E) Regs, as amended by the AHH (A)(E) Regs) were amended on 20 April 2006, the transitional protection in the amending regulations (the Allocation of Housing and Homelessness (Amendment) (England) Regulations 2006 SI No 1093) means that the old unamended regulations will continue to apply to the following:

- HA 1996 Part 6 applicants with a live application that was made before 20 April; and
- HA 1996 Part 7 applicants with a live application that was made before 20 April, ie, where an application for Part 7 accommodation was made before 20 April:

– which did not result in a notification before 20 April that the applicant was ineligible (in accordance with the notification duty of s184(3)); or

– which resulted in a notification of ineligibility for accommodation before 20 April and, immediately before 20 April, the applicant was occupying accommodation secured by the local authority.

Applicants may want to rely on the old unamended regulations in order to seek to become eligible on the basis of being subject to immigration control and a national from a state that has ratified either the European Convention on Social and Medical Assistance or the European Social Charter. However, it remains to be seen whether such a person from an EEA state, without a right to reside, could be classified as 'lawfully present in the UK' as the relevant eligibility class requires. (See *Szoma v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, 27 October 2005; [2006] 1 AC 564 para 28; [2003] EWCA Civ 1131, 30 July 2003, and *Kaya v Haringey LBC* [2001] EWCA Civ 677, 1 May 2001; (2001) 34 HLR 1. In both cases, the facts were different because the applicants had been given temporary admission under the Immigration Act 1971.)

its power under s192(3). (See Human Rights Act 1998 s3(2), *R (Morris) v Westminster City Council and R (Badu) v Lambeth LBC* [2005] EWCA Civ 1184, 14 October 2005; [2006] 1 WLR 505 paras 71–73.) Fortunately, the family member provisions of the I(EEA) Regs (see below) will often mean that s185(4) is not an issue for EEA applicants.

The relevance of the right to reside

The existence or otherwise of a person's right to reside in the UK is the starting point in establishing his/her eligibility for housing. Eligibility is regulated by the concept of a person being 'subject to immigration control'. The subject to immigration control test is defined by Asylum and Immigration Act 1996 s13(2) and Immigration Act (IA) 1971 ss2 and 3. Under the test, a person is ineligible to access social housing if s/he is either:

- a person who is subject to immigration control, but has not been included as eligible by a prescribed class (HA 1996 ss160A(3) and 185(2), see Classes A–E below); or
- a person who is not subject to immigration control, but is from abroad and has either been expressly made eligible or falls within a residual category (HA 1996 ss160A(5) and 185(3)).

An EEA national who does not have a right to reside is subject to immigration control. An EEA national who has a right to reside is not subject to immigration control. In *Barnet LBC v (1) Ismail (2) Abdi* [2006] EWCA Civ 383, 6 April 2006, the Court of Appeal declined the opportunity to declare, in the interests of the free movement of persons, that all EEA nationals were not subject to immigration control.

EEA nationals and the right to reside

All EEA nationals have the right to enter the UK (EU Residence Directive 2004/38/EC article 5 and I(EEA) Regs reg 11(1)). The right to enter is distinct from the right to reside in the UK. There are two types of EEA nationals: those with, and those without, a right to reside. There are three types of EEA nationals' right to reside: initial, extended or permanent.

Initial right to reside

Any EEA national who holds a valid national identity card or passport issued by an EEA state obtains an initial right to reside for three months beginning with the date of admission to the UK (I(EEA) Regs reg 13). The initial right to reside is subject to an EEA national not falling foul of either a 'public good' or an 'unreasonable burden' test.

The public good test gives the Home Secretary a power to remove a person on the ground of 'public policy, public security or

public health' (I(EEA) Regs reg 19(3)(b)). The unreasonable burden test causes the initial right to reside to cease if an EEA national becomes 'an unreasonable burden on the social assistance system of the [UK]' (I(EEA) Regs reg 13(3)(b)), albeit s/he must not be removed as an automatic consequence of having recourse to the social assistance system (I(EEA) Regs reg 19(4)).

Extended right to reside

'A qualified person' obtains an extended right to reside for so long as s/he remains a qualified person (I(EEA) Regs reg 14). A qualified person is an EEA national and s/he is in the UK as:

- a jobseeker;

Workers and jobseekers

Jobseekers

There is no rule that a person ceases to be a jobseeker after six months, although the longer a person has been without employment the harder it may be for him/her to satisfy the 'genuine chance of being [employed]' test: the term "jobseeker" means a person who enters the UK in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged' (I(EEA) Regs reg 6(4)). However, although jobseeker status gives an EEA national a right to reside, AHH(E)(E) Regs regs 4(1)(b) and 6(1)(b) expressly exclude a jobseeker from being eligible for either the allocation of housing accommodation or housing assistance.

Workers

Workers are expressly included as eligible for the allocation of housing accommodation and housing assistance (AHH(E)(E) Regs regs 4(2)(a) and 6(2)(a)). The European Court of Justice (ECJ) has identified three essential criteria which establish whether a person is a worker for the purposes of article 39 of the EC Treaty:

- The performance of services for, and under the direction of, another person.
- In return, the person concerned must receive remuneration.
- The person must perform services of some economic value subject only to a 'marginal and ancillary' test.

The rules on freedom of movement for workers: 'cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'

- a worker;
- a self-employed person;
- a self-sufficient person; or
- a student.

Practitioners may need to have regard to I(EEA) Regs regs 4–6, which expand on the definition of these categories. The public good test applies to the extended right to reside. The unreasonable burden test does not apply directly, but a self-sufficient person may lose that status if s/he becomes a burden on the UK's social assistance system (I(EEA) Regs reg 4(1)(c)).

Permanent right to reside

A permanent right to reside is given in limited circumstances. The largest category is likely

(*Levin v Staatssecretaris van Justitie* Case 53/81, 23 March 1982; [1982] ECR 01035 para 17). When considering this issue, practitioners should note that it is irrelevant to the concept of being a 'worker':

- that the person works part-time (*Levin* [1982] ECR 01035, para 17);
- that the person was previously unemployed for a long time (*Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, Case 413/01, 6 November 2003, paras 27 and 32); or
- what the person's motives were for seeking work (*Levin* [1982] ECR 01035, paras 20–23).

'Once the employment relationship has ended, the person concerned as a rule loses his status of worker' (*Martinez Sala v Freistaat Bayern* Case C-85/96, 12 May 1998, para 32. However, under I(EEA) Regs reg 6(2), a 'former' worker will be treated as a worker if:

- s/he is temporarily unable to work as the result of an illness or accident;
- s/he is recorded as involuntarily unemployed after having been employed in the UK, provided that s/he has registered as a jobseeker with the relevant employment office; and
- s/he was employed for one year or more before becoming unemployed;
- s/he has been unemployed for no more than six months; or
- s/he can provide evidence that s/he is seeking employment in the UK and has a genuine chance of being engaged;
- s/he is involuntarily unemployed and has embarked on vocational training; or s/he has voluntarily ceased working and embarked on vocational training that is related to his/her previous employment.

to be those EEA nationals who have resided in the UK for a continuous period of five years (I(EEA) Regs reg 15(1)(a)). However, this residence must have been in accordance with the EEA regulations, either the old (Immigration (European Economic Area) Regulations 2000 SI No 2326) or the new ones. An EEA national's mere presence in the UK, without a right to reside, will not give rise to a permanent right to do so.

A further category is 'worker or self-employed person' who has ceased activity. This category covers those who have reached retirement age or become permanently incapable of work (I(EEA) Regs reg 5). Once acquired, permanent residence is lost only through absence from the UK for a period exceeding two consecutive years. The public good test applies to the extended right to reside but the unreasonable burden test does not.

Eligibility for EEA nationals without a right to reside

The AHH(E)(E) Regs put the eligibility test for social housing onto an almost identical footing for HA 1996 Parts 6 and 7. The only difference is that under Part 7, there is an additional category of eligibility, Class E, which affects some people who claimed asylum before 3 April 2000.

EEA nationals who are subject to immigration control, ie, those without any of the three types of EEA right to reside, will only be eligible for assistance if they have a particular type of immigration status that is not EU-related. Under AHH(E)(E) Regs regs 3 and 5, the prescribed classes are:

- refugees (Class A);
- those with exceptional leave to enter or remain in the UK that is not subject to a no recourse to public funds provision (Class B);
- those who are habitually resident in the UK with unconditional leave to enter or remain in the UK, save for those with sponsors (Class C);
- those who left Montserrat after 1 November 1995 due to a volcanic eruption (Class D); and
- those who claimed asylum before 3 April 2000 in specified circumstances (Class E, which applies to HA 1996 Part 7 only).

Eligibility for EEA nationals with a right to reside

For EEA nationals who are not subject to immigration control, ie, those with a right to reside in the UK, the AHH(E)(E) Regs create two paths to eligibility for social housing: those who are expressly made eligible, and those who come within a residual category.

Those who are expressly made eligible

Under AHH(E)(E) Regs regs 4 and 6, the

following are expressly made eligible for assistance:

- workers (see box entitled 'Workers and jobseekers');
- self-employed persons;
- accession state workers requiring registration who are working for a registered employer (see new reg 5 of the Accession (Immigration and Worker Registration) Regulations 2004 SI No 1219 as inserted by the I(EEA) Regs Sch 5 para 7(5));
- family members of the above;
- those with a permanent right to reside derived from I(EEA) Regs reg 15(1)(c), (d) or (e). This category does not include those who acquire the permanent right to reside as a result of five years' continuous residence (see the residual category below), but it does include those workers or self-employed persons who have ceased activity (ie, those who have reached retirement age or become permanently incapable of work as set out in I(EEA) Regs reg 5);
- those who left Montserrat after 1 November 1995 due to a volcanic eruption; and
- those in the UK as a result of being deported, expelled or otherwise compulsorily removed from another country to the UK.

Those within the residual category

To come within the residual category, an EEA national needs to be habitually resident, and have a particular right to reside, in the UK; the so-called 'habitual residence plus' test. The required right to reside is defined negatively as a right to reside, which is not:

- derived from the applicant's status as a jobseeker or family member of a jobseeker; or
- an initial right to reside under I(EEA) Regs reg 13. There is a similar exclusion for those with a right to reside in the Channel Islands, the Isle of Man or the Republic of Ireland solely on the basis of their status as a jobseeker or under the initial right to reside provisions derived from the EU Treaty.

The following are among the persons who, subject to satisfying the habitual residence test, will come within the residual category:

- British citizens, because their right to reside is derived from their citizenship (IA ss1 and 2).
- Those who have acquired the permanent right to reside in the UK on the basis of five years' continuous residence, under a right to reside in the UK (I(EEA) Regs reg 15(1)(a)).

It seems unlikely that a 'self-sufficient person' could be eligible under this residual category, even if s/he satisfied the habitual residence test, because self-sufficient status and, therefore, the right to reside that it creates, is lost if a person becomes 'a burden on the social assistance system of

the [UK]' (I(EEA) Regs reg 4(1)(c)). Students may become eligible under this residual category if they satisfy the habitual residence test, but the situation should rarely arise because student status requires a would-be student to assure the secretary of state 'that he has sufficient resources not to become a burden on the social assistance system of the [UK]' (I(EEA) Regs reg 4(1)(d)).

Family members

Family members have been granted additional rights of residence by the I(EEA) Regs. The following persons are treated as the family members of another person under I(EEA) Regs reg 7:

- His/her spouse or civil partner (these expressions do not include a marriage/civil partnership of convenience (I(EEA) Reg reg 2)).
- His/her direct descendants (or those of his/her spouse/civil partner) who are either under 21 or his/her dependants (or those of his/her spouse/civil partner).
- His/her direct ascendants (or those of his/her spouse/civil partner) who are his/her dependants (or those of his/her spouse/civil partner).

These rules are applied more restrictively in respect of would-be family members of students (I(EEA) Regs reg 7(2)).

It is important to note that the family member does not have to be an EEA national, yet s/he may be, as a result of his/her right to reside derived from an EEA national, eligible for social housing as an applicant; for example, family members of workers (including certain accession state workers) and those who are self-employed are expressly rendered eligible for assistance. A family member with a right to reside must also be taken into account when considering priority need and/or homelessness. There are also circumstances in which 'extended family members' can acquire rights of residence that may cause them to be eligible. An 'extended family member' (as defined by I(EEA) Regs reg 8) may get rights of residence that bring him/her within the residual category of eligible persons. However, a family member cannot come within the express categories (AHH(E)(E) Regs reg 2(3)).

Conclusion

The rules on eligibility for social housing are complicated and an article of this length necessarily leaves many issues uncovered. For example, recent cases that have considered issues arising under the EU Treaty include: *Conde* (see above), *Mohamed* (see above), and *Collins v Secretary of State for Work and Pensions* [2006] EWCA Civ 376, 4 April 2006.

Practitioners should find it helpful when dealing with applicants from Europe to address the individual's circumstances in this order:

■ Does the applicant have a right to reside in the UK (ie, is s/he subject to immigration control)?

■ If the applicant is subject to immigration control, does s/he come within Classes A to E?

■ If the applicant is not subject to immigration control, what type of right to reside does s/he have?

■ If the applicant is not subject to immigration control, does s/he come within either:

– an express category; or

– the residual category (the 'habitual residence plus' test)?

* *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the union and their family members to move and reside freely within the territory of the member states amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Official Journal of the European Union L 158/ pp77–123, 30 April 2004, is available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/L_158/L_15820040430en00770123.pdf. The Directive and other relevant statutory material can also be found in *Free movement and residence of union citizens within the European**

Union, available at: http://ec.europa.eu/justice_home/doc_centre/citizenship/movement/doc/free_movement_281004_en.pdf.



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Gypsy and Traveller law update – Part 3



Chris Johnson, Marc Willers and Dr Angus Murdoch conclude their series of articles on the law as it relates to Gypsy and Traveller communities. This article looks at evictions from unauthorised encampments and homelessness. The authors welcome any case notes or comments from readers.

UNAUTHORISED ENCAMPMENTS

Article 8 as a defence to possession proceedings

In August 2006 *Legal Action* 40, we reported on the decision in *Kay and others v Lambeth LBC and others*; *Leeds City Council v Price and others* [2006] UKHL 10, 8 March 2006, in which the House of Lords concluded that article 8 of the European Convention on Human Rights ('the convention') will be engaged in the case of a possession action brought by a public landowner; but that in the vast majority of cases, the proper application of domestic law will provide automatic justification for the grant of an order for possession under article 8(2) (an exception to the rule being a case like *Connors v UK App No 66746/01*, 27 May 2004; [2004] 40 EHRR).

There can be no real doubt that the article 8 right to respect for private and family life will be engaged in circumstances where a

public landowner tries to evict Gypsies or Travellers camped on its land (see Stanley Burnton J on *R v Hillingdon LBC ex p Ward* [2001] HRLR 40), but there was some debate among the Law Lords about whether the article 8 right to respect for the home could ever be engaged in the case of an unauthorised encampment (see August 2006 *Legal Action* 40). Perhaps the definitive position was provided by Lord Scott who stated: 'It is clearly possible for a trespasser to establish a "home" in property that belongs to someone else but whether and when he has done so must be matters of degree' (para 128). However, Lord Scott did not think that the Travellers in *Price* had established a home because they had only been camped on the land in question for two days when possession action was commenced.

Public law challenges

Before *Kay and Price*, it was common practice for possession actions to be adjourned while

public law challenges to them were advanced by way of judicial review in the High Court (see *Avon CC v Buscott CA*, 2 March 1988; [1988] 1 All ER 841). However, all the Law Lords in *Kay and Price* were agreed that, in future, public law challenges should be raised as a defence to the claim for possession (unless the case was one in which a declaration of incompatibility might be sought).

Government guidance

In February 2006, the then Office of the Deputy Prime Minister (ODPM) published both Circular 01/06, *Planning for Gypsy and Traveller caravan sites* (see July 2006 *Legal Action* 20) and the *Guide to effective use of enforcement powers. Part 1: unauthorised encampments* ('the 2006 Guidance').¹ Since May 2006, responsibility for the provision of sites for Gypsies and Travellers rests with the new Department for Communities and Local Government (DCLG).

The 2006 Guidance is to be read in conjunction with the ODPM's 2004 *Guidance on managing unauthorised camping* ('the 2004 Guidance') and the previous Department of the Environment Circular 18/94 *Gypsy sites policy and unauthorised camping*.² The 2004 and 2006 Guidance only apply to England. The position in Wales is covered by Welsh Office Circular 76/94 and the *Guidance on managing unauthorised camping*. The guidance was issued by the Welsh Assembly Government and the Home Office in January 2005.

In Circular 01/06, the government recognised that the answer to unauthorised encampments is adequate site provision in the form of both public and private sites and both permanent and transit provision (see, for example, Circular 01/06 paras 11, 13, 19, 30 and 33). The 2006 Guidance reiterates that view and states that: