

## Considering status when representing EEA nationals

### Part B - Worker and Retained Worker Status

#### ***For representatives, advocates, support workers, and agencies, working with victims of trafficking/modern slavery***

Myth: My client can't have worker or retained worker status as his/her work in the UK was exploitative.

Truth: When looking at whether someone has worker or retained worker status, the test is not whether the work was legal, but whether it was 'genuine and effective'. Exploitative work does not prevent a person from being considered a worker.

A national of an EEA state, who is in genuine and effective employment in the UK, is a worker for EU purposes.<sup>1</sup> Accordingly, the relevant Decision Maker should look at whether the work is genuine and effective, and not 'on such a small scale as to be marginal and ancillary'.<sup>2</sup> The relevant factors the Decision Maker will consider on deciding whether work is 'genuine and effective' include:

- 1) Whether the work was regular or intermittent;
- 2) The period of employment;
- 3) Whether work was intended to be short term or long term;
- 4) The number of hours worked; and
- 5) The level of earnings.<sup>3</sup>

However, pursuant to European case law, the term 'worker' must not be restrictively interpreted. The Court of Justice of the European Union has repeatedly affirmed that the term 'worker' must be defined by European law, and it is not dependent upon UK law (see *Lawrie Blum v Land Baden - Wurttemberg* [1986] EUECJ R-66/85 (3 July 1986); *Levin v Staatsecretaris van Justitie* [1982] EUECJ R-53/81 (23 March 1982); *Lair v Universitat Hannover* [1988] EUECJ R-39/86 (21 June 1988)).

Exploitative work does not prevent a person from being considered a 'worker'. Neither does exploitative work fall outside the ambit of 'genuine and effective work'. In *JA v Secretary of State for Work and Pensions*<sup>4</sup> the Upper Tribunal found that the fact the contract for work is illegal as performed does not prevent the person concerned from being a worker. This case was about an EEA national who had worked cash in hand in a restaurant. The Tribunal stressed that it was the factual situation not the legal situation that determines whether the person is a worker. Further, in *EP v Secretary of State for Work and Pensions*<sup>5</sup> it was found that being trafficked into work does not prevent you from establishing worker status.

The obvious issue with an exploitative work history is that there is often very limited (or no) documentary evidence to support that the work took place. Decision Makers are sometimes solely reliant on the individual's account. This is why for victims the Conclusive Grounds (CG) Decision is an important evidential document. The CG Decision verifies that the government Single Competent

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<sup>1</sup> The Department of Work and Pensions Habitual Residence and Right to Reside Guidance, Chapter 7 Part 3, at 072810

<sup>2</sup> At 072816 and

<sup>3</sup> Ibid n2

<sup>4</sup> *JA v Secretary of State for Work and Pensions* [2012] UKUT 122 (AAC) (16th April 2012)

<sup>5</sup> *EP v Secretary of State for Work and Pensions* [2016] UKUT 445 (AAC)

Authority has considered the account of the person, alongside other relevant information and has found it credible, then issued a decision to that effect; finding that the person was subjected to the exploitation in their account and rendering them a victim of trafficking/modern slavery.

It is really important that representatives:

- 1) Gather any evidence they can (if it exists) to show that the person was in genuine and effective work e.g. payslips, bank statements showing pay was deposited, employment contracts, records from HMRC;
- 2) Set out why the client's work was genuine and effective. Explain to the Decision Maker that exploitative work does not fall outside the ambit of genuine and effective work; and
- 3) Provide a copy of the client's Conclusive Grounds decision and explain to the Decision Maker its significance.

This should be done in writing and given to the client to present to the Job Centre when they sit their HRT. Make sure the client insists the information provided is provided to the Decision Maker.

If a client has only done minimal work, representatives should still argue the client enjoys worker status. As little as two weeks remunerated work can be sufficient to find a person has worker status.<sup>6</sup> Further, in the case of *Genc v Land Berlin*<sup>7</sup> it was held that regular work of five and a half hours was sufficient to constitute genuine and effective work.

**Myth:** My client did not register as a job seeker straight away, so they cannot have worker/retained worker status under The Immigration (European Economic Area) Regulations 2016 (I (EEA) Regs) even though they were previously engaged in genuine and effective work.

**Truth:** Regulation (2)(b)(i) of the I (EEA) Regs does require a person to register as a jobseeker, however a gap between the work ending and registration does not necessarily mean your client has lost worker status.

If the delay between your client's work ending and registration as a job seeker is more than a few days, the relevant Decision Maker will consider whether there are reasonable grounds for the delay, or whether it is undue delay.<sup>8</sup> The longer the delay, the more compelling the reasons need to be.<sup>9</sup>

So, what should you do if your client is in this position?

- 1) If they have not yet registered as a jobseeker, register them straight away (submit a claim for Job Seekers Allowance or Universal Credit); and
- 2) Provide representations as to why the delay was reasonable and not undue. Examples include:
  - a. Your client was in a situation of modern slavery/human trafficking
  - b. Your client was/is in an NRM safe house recovering from their exploitation
  - c. Your client was/is destitute
  - d. Your client's health – mental, physical and/or suffering from an accident

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<sup>6</sup> *Barry v London Borough of Southwark* [2008] EWCA Civ 1440

<sup>7</sup> *C-14/09* [2010] ECR I-00931

<sup>8</sup> *SSWP v MM (IS)* [2015] UKUT 128 (AAC) paras 47-52

<sup>9</sup> Child Poverty Action Group *Benefits for Migrants Handbook*, 8<sup>th</sup> Edition, 2016. At page 152

We have successfully argued that time in an NRM safe house is a reasonable delay. However, time in the NRM can vary (the longer the delay the harder to argue), and your client is always in a better position if there is no delay. So, if you can, help your client to register as soon as possible to protect their position.

If you need advice about a client's eligibility as an EEA national, you can contact the AIRE Centre: <https://www.airecentre.org/> a legal charity who specialise in rights under European law, and in relation to welfare benefits, the Child Poverty Action Group: <http://www.cpag.org.uk/>. The Hope for Justice team of Independent Modern Slavery Advocates can also give advice in relation to the rights of victims of trafficking/modern slavery who are EEA nationals, call us on 0300 008 8000.

***Please note this document does not constitute immigration advice and is not intended to be used and/or distributed as immigration advice***