

Introduction

It has been well documented that the Welfare Reform (Northern Ireland) Bill 2012 (hereafter 'the Bill') will have far reaching consequences for every section of society in Northern Ireland, spanning across all section 75 groups. This piece of legislation, the biggest to ever face the Northern Ireland Assembly, represents an ideological shift in social security policy and fundamentally the welfare state itself. Within this new ideology, there is a worrying trend that treats certain sections of society less favourably than others; for example migrant workers.

Current situation: EU law, migrant workers and access to benefits

Social security is an area of coordination in the European Union and the purpose of European law is to set down rules and principles to guarantee the right of free movement of persons in the EU, which is one of the fundamental principles of the EU. Since this reciprocal principle applies across the EU, British or Irish nationals have the same rights when living and working in other EU Member States.

Despite the perception often found in the media, a recent transnational study funded by the European Commission found that female migrants were shown in the UK case study to be more likely to receive benefits relative to native women.¹ It is worth highlighting some of the additional barriers that migrants face. For example, migrants have increased difficulty in accessing social welfare due to a lack of local knowledge and therefore navigating the administrative system, sometimes without access to appropriate interpreters, lead to increased difficulties. Migrants often need a lot of support to access their entitlements and this is evidenced by the fact that the Belfast Migrant assisted black and minority ethnic community members to access their entitlements (over £720,000 in less than three years).

In addition, the combined operation of EU law and social security law is very complex and can lead to incorrect application by decision-makers. Indeed, it is not only frontline staff; the European Commission is currently investigating the UK's application of the *right to reside test* following the *Patmalniece case* in the UK Supreme Court and it is expected that the Commission will rule that the UK has not been applying EU law correctly.

Therefore, it is clear that migrant workers already face a raft of barriers in accessing their entitlements in the UK.

¹ Institute for the Study of Labour (IZA) and the Economic and Social Research Institute (ESRI), Study on Active Inclusion of Migrants, September 2011, at page 78, available at: http://www.esri.ie/publications/search_for_a_publication/search_results/view/?id=3476.

NICEM's work on Welfare Reform to date

In October 2012, NICEM, along with many other civil society organisations, gave both oral and written evidence to the Committee on Social Development, pointing out the potential for the Bill to discriminate against migrant workers coming from other EU Member States. We repeated our concerns, focusing more specifically on the inadequate EQIA as well as equality standards, to the Ad Hoc Committee in December 2012.² To bolster our arguments in relation to compatibility with EU law, we sought an expert opinion from a specialist legal charity based in London, the AIRE Centre,³ which has witnessed the fallout of the same provision in the rest of the UK.

Paragraph 7 of Schedule 1 of the Bill – A new barrier to accessing Universal Credit and thereby discriminate against migrant workers

During the evidence sessions and indeed throughout public debate, it has been repeatedly noted that the real impacts of welfare reform will only become apparent once the regulations come into force.

Schedule 1 of the Bill already specifically provides for supplementary regulation-making powers relating to Universal Credit.

Universal Credit is the single 'work-focused' and 'working-age' payment, which will replace a number of existing benefits, namely income support; income based jobseeker's allowance; income based employment and support allowance; child tax credit; working tax credit; and housing credit. Based on NICEM's experience through the advice services provided by the Belfast Migrant Centre, these are the most common benefits claimed by migrant workers.

In addition, it is unclear what the status of Universal Credit will be under EU law, because, at the moment, many of the benefits being pulled into the Universal Credit net are currently classified as a "special non-contributory benefit", which has characteristics of both social security and social assistance, under EU law (Article 70 and Annex 10 Regulation 883/04). The rationale behind this classification is that EEA nationals exercising their right to free movement should be supported in the host Member State so as to ensure that they do not fall into destitution.

² Evidence is available on NICEM's website: www.nicem.org.uk/elibrary/publications.

³ The Advice on Individual Rights in Europe (AIRE) Centre's mission is to promote awareness of European Law rights and to assist marginalised individuals and those in vulnerable circumstances to assert those rights, more information available at: www.airecentre.org.

Paragraph 7 of Schedule 1 gives the power to make regulations that would treat EEA nationals⁴ differently. It provides:

- “Regulations may provide that a claimant who –
- (a) asserts a right to reside in the United Kingdom under the EU Treaties, and
 - (b) would otherwise fall within sections 19, 20, or 21,
- is to be treated as not falling within that section.”

Sections 19-21 of the Welfare Reform Bill exempt Universal Credit claimants from some elements of a new form of conditionality, so-called “work-related requirements”. The new work-related requirements include ‘work-focused interviews’ (section 15); ‘work preparation’ (section 16); ‘work search’ (section 17) and ‘work availability’ (section 18). Sections 19-21 provide specific exemptions to either all of these requirements (section 19) or the interview (section 20) or work preparation only (section 21) for persons who it is unreasonable to expect to seek work on any footing such as a person who is:

- sick/has limited capability for work;
- caring for children under 5;
- caring for a severely disabled person;
- over age at which woman retires (man or woman);
- in late stage pregnancy.

Paragraph 7 of Schedule 1 provides for the power to subject all EEA national carers and persons with disabilities to all work-related requirements, even in the case where British or Irish nationals in the same situation, i.e. falling within the scope of sections 19-21, would not be subject to same. NICEM strongly believes this would amount to direct discrimination prohibited by Article 18 of the Treaty on the Functioning of the European Union (prohibition on the grounds of nationality).

Potential impact of the Paragraph 7 of Schedule 1 power – the GB experience

A mirror image of paragraph 7 of Schedule 1 and sections 19-21 of the Welfare Reform Bill 2012, applicable to Northern Ireland, appears in the Welfare Reform Act 2012, which applies to Great Britain.

⁴ The European Economic Area includes Iceland, Lichtenstein and Norway as well as EU Member States.

This power has been used in the Universal Credit Regulations 2013 (S.I. No. 316), which will come into force on 29 April 2013. Regulation 93 provides that an EEA national jobseeker will be subject to all work-related requirements.

Therefore, EEA nationals having the same personal circumstances as British or Irish nationals will be subjected to all work-related requirements where the latter will not. For the EEA national jobseeker, who is a carer or who may have a disability, this can be quite an onerous task since s/he will have to search for work, in this dismal economic climate, for 35 hours per week.

In addition, Regulation 93 provides that the partner ("family member") of an EEA national jobseeker will also have to comply with all work-related requirements, whereas the British or Irish partner of a British or Irish jobseeker will not.

According to the Child Poverty Action Group, who are actively campaigning on, advising and taking test cases on welfare reform:

- "If Universal Credit is properly regarded as facilitating access to the labour market then an EEA jobseeker claiming it deserves to have the same rules applied to them as are applied to a UK jobseeker.
- That would certainly seem to prevent the differential treatment of the partners of jobseekers.
- Could it also mean that if an EEA jobseeker is themselves sick or pregnant etc. then Universal Credit must still be regarded as available to them on an equal footing?"⁵

NICEM's specific concerns relating to the potential implications of the power set out in Paragraph 7 of Schedule 1 of the Welfare Reform Bill 2012

NICEM feels that Paragraph 7 of Schedule 1 directly discriminates against EEA nationals and could therefore be subject to legal challenge, particularly given the fact that there pending infringement proceedings from the European Commission in relation to the right to reside test. Moreover, given the recent statements by UK Government Ministers in relation to curtailing access to benefits for EU migrants, which would be contrary to EU law, we are concerned that Paragraph 7 of Schedule 1 would only be the first in a new wave of discriminatory provisions against migrant workers exercising their right to free movement under EU law.

⁵ Presentation by Martin Williams (CPAG) on "Universal credit for EU jobseekers and their family members in the UK", delivered on 7 February 2013 at the AIRE centre's culminating conference on a European Commission funded project on *Special Non-contributory Benefits for EU Migrants: A Tri-city Project*.

NICEM's proposed amendment to the Welfare Reform Bill 2012

Amendment to Schedule 1 of the Welfare Reform Bill

It is proposed that Paragraph 7, which reads as follows:

“Regulations may provide that a claimant who –

(a) asserts a right to reside in the United Kingdom under the EU Treaties,

and

(b) would otherwise fall within sections 19, 20, or 21,

is to be treated as not falling within that section.”

be deleted from Schedule 1 of the Bill.