

Institute for Public Policy Research



TESTING TIMES

UNIVERSAL CREDIT AND THE
HABITUAL RESIDENCE TEST

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ABOUT THIS REPORT

This report fulfils IPPR's charitable objectives by informing the public on specific aspects of the universal credit system and by making recommendations to relieve poverty and disadvantage through reforms to the habitual residence test.

This report provides an overview of the habitual residency test and universal credit, but it should not be understood as providing advice to individuals or organisations applying for or resolving issues with a benefit claim.

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INTRODUCTION

Non-UK citizens and UK citizens returning from living abroad face different barriers to making a claim to universal credit (UC) to others living in the UK. They are often required to pass a habitual residence test (HRT) to establish their eligibility for UC.

Considering the importance of the HRT for those individuals affected, very little research has been conducted into how this test operates in practice and whether it is working as intended. Further, the government has released no statistics on the operation of the HRT in regard to UC and has refused numerous requests for information from both the public and parliamentarians on costs grounds. As such, this aspect of UC decision-making is shrouded in secrecy.

This research was commissioned by Islington Council following concerns that local residents were experiencing issues with the HRT, which resulted in them being incorrectly denied benefits or facing significant delays to their entitlements. This report intends to 'lift the lid' on this aspect of UC, with a focus on Islington residents and particularly EEA citizens, though findings are likely relevant for the UK as a whole.

As we highlight in the report's concluding remarks, there is a strong case for suspending the HRT in light of the mass redundancies and severe economic hardship resulting from the Coronavirus pandemic.

For this report, however, we focus on how the HRT operates in its current form and how it could be implemented better. This has involved desk research, as well as detailed discussions with claimants, welfare rights advisers and officials. We have also investigated the available quantitative data on the HRT to help develop the picture. This has involved working with Citizens Advice and seeking new government data via freedom of information requests.

The report begins by first setting out the policy and operational detail around the HRT. We then outline the available quantitative data, followed by our qualitative findings from our interviews with stakeholders. Finally, we summarise our key findings and recommendations for the government to help improve the functioning of the HRT in future.

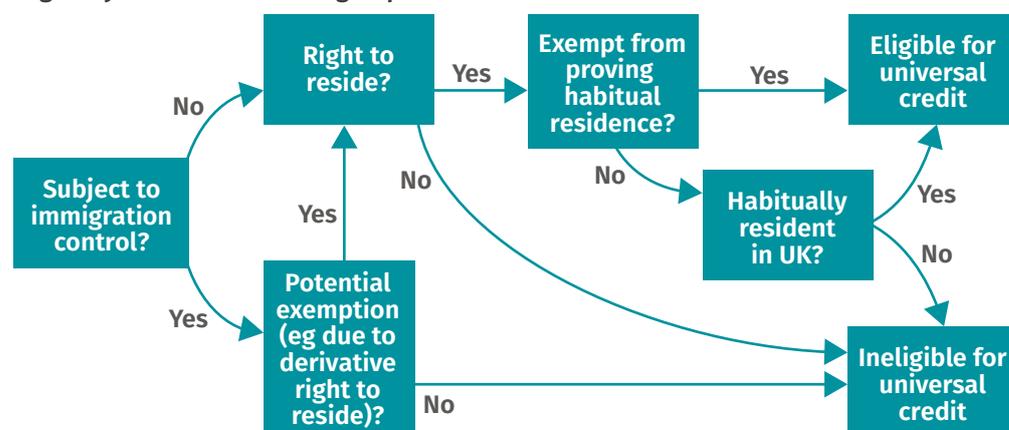
1. POLICY AND IMPLEMENTATION

The process for accessing universal credit (UC) varies depending on an individual's immigration status. People from outside the European Economic Area (EEA) who have 'no recourse to public funds' attached to their visa condition (or who have no immigration status at all) are not eligible for UC.¹

For everyone else, claiming UC requires showing that they are "in Great Britain". To prove this, they must usually show that they are habitually resident. This broadly means proving that the UK, Ireland, Channel Islands or the Isle of Man is the person's main home and that they plan to stay there. This 'habitual residence test' applies to EEA citizens, returning UK citizens, and non-EEA citizens with access to public funds. There are, however, some exemptions – for instance, refugees and those granted leave under the 'destitution domestic violence' concession do not have to prove habitual residence.

Alongside habitual residence, claimants must also have a "right to reside" to access UC. For EEA citizens, proving a right to reside is a complex process which depends on a multitude of factors including an individual's work history, whether they have children in school, as well as the circumstances of any partner they have (Citizens Advice 2019a). Returning UK citizens (and Irish citizens) do not need to prove their "right to reside" because they acquire this automatically by virtue of their nationality. On the other hand, for non-EEA citizens their "right to reside" is generally determined by their immigration status (or in some cases indirectly via EU law).

FIGURE 1.1
Eligibility for UC for different groups



Source: IPPR analysis

¹ More fully, the law states that in general all those subject to immigration control cannot access UC. This includes non-EEA citizens without permission to stay in the UK, non-EEA citizens with the NRPF condition, and non-EEA citizens whose leave to remain depends on a maintenance undertaking. There are, however, some exceptions: for instance, where someone has a 'right to reside' in the UK through an EEA family member.

For non-EEA citizens, having the right immigration status is likely to be the key barrier to accessing UC; and this is a decision made by the Home Office, with the Department for Work and Pensions (DWP) only being responsible for checking an individual's immigration status. For example, usually people who have indefinite leave to remain are not restricted from accessing public funds and automatically have a 'right to reside'; provided they can show they are habitually resident in the UK, they will be able to access UC.

On the other hand, for EEA citizens, determining whether claimants have a "right to reside" is a decision made by the DWP. This decision can be complex. Yet the outcome is critical for many people, given that UC is the largest element of the UK's social safety net for working age people – providing a lifeline in the event of an unemployment spell and topping up income for those on low and fluctuating pay.

UNDERSTANDING THE ELIGIBILITY CRITERIA

We next set out the different aspects of the HRT – what needs to be proven for each part and the typical evidential requirements.

Establishing habitual residence

Unless they fall under an exempt category, EEA citizens, returning UK citizens, and non-EEA citizens eligible for public funds must prove that they are "habitually resident in fact".

While there is no legal definition of habitual residence, it normally involves considering a number of factors, such as the length and continuity of residence, the reasons for coming to the UK, and a person's "centre of interest". In general, claimants must prove that their main home is in the UK, Ireland, the Channel Islands or the Isle of Man and that they intend to settle there. This would normally be established with documentary evidence – for example:

- a tenancy agreement or household bills which are addressed to the person making the claim
- proof that a child is attending a local school – for example, a letter or email from the local school
- proof of the usage of local amenities, such as a gym membership
- a letter or email from a doctor or dentist.

Citizens Advice recommends that two pieces of evidence should be provided to support this aspect of the decision (Citizens Advice 2019a).

Further, claimants must normally prove that they have been in the country for an "appreciable period" of time before they can make a claim, which is a period loosely defined but generally between one and three months. This must also be established by original documentary evidence, for example:

- a travel ticket or boarding pass
- bank and building society statements
- wage slips or tax documents.

Again, Citizens Advice recommends that two original documents are provided to support this aspect of the decision (Citizens Advice 2019a).

For EEA claimants only: Establishing whether a person has a "right to reside"

Determining someone's "right to reside" is by far the most complex aspect of any HRT decision. There are a number of routes through which someone can have a "right to reside" that enables them to claim UC (Citizens Advice 2019b).

1. Worker status

If an individual is working then they have a right to reside as a worker, provided the work is deemed as “genuine and effective”.

If a person earns an average of £183 a week and has been earning above that level for three months or more preceding their claim, then their work is automatically considered by DWP to be genuine and effective. Otherwise this assessment can be subjective and is determined on a case by case basis. Decision makers in this case are expected to factor in a variety of factors such as: whether the work was regular or intermittent, the period of employment, and hours and earnings (DWP no date). Both cash-in-hand work and zero hours contracts can be considered genuine and effective.

To prove worker status, documentary evidence of activities must be provided – such as employment contracts, tax documents, letters from employers etc – in order to establish the worker status.

People with worker status and their family members are exempt from proving they are ‘habitually resident in fact’ – once they have demonstrated their right to reside, this is sufficient for claiming UC.

2. Self-employed worker

Similar rules apply for those who are self-employed. If a person can prove average gross earnings of £183 per week and their earnings were above that level for three months or more preceding their claim then their work is deemed genuine and effective. Otherwise this is based on the subjective judgement of the decision-maker in a similar way as for employees. Documentary evidence requirements can be extensive in this situation as well. As with workers, those who have a right to reside as a self-employed person do not need to prove they are ‘habitually resident in fact’ in order to claim UC.

3. Retained worker status

People can also retain their worker status after finishing or temporarily pausing their employment. This applies when someone was previously in employment but who was then unable to continue in work for one of the following reasons (Turn2Us no date).

- If a person is made involuntarily unemployed (eg through redundancy).
- If a person is unable to work temporarily due to illness or accident, provided there is a good chance that they could work again in the future.
- If a person leaves their job due to pregnancy or childbirth, provided they return to work within a ‘reasonable period’.
- If a person is undertaking occupational training.

For those made involuntarily unemployed, retaining “worker status” can last for six months after the end of their employment. This can be extended if they were employed for at least a year and the individual passes a “genuine prospect of work” (GPOW) test (Turn2Us no date). The GPOW test is an assessment made by the job centre as to whether the person has compelling evidence of a genuine chance of being engaged in employment and that they are taking meaningful steps to do so.

Evidential requirements will vary depending on the circumstances of how the job was lost in the first place but clearly in some cases this would require documentary evidence such as medical records and letters from doctors, email exchanges between employees and employers, and pay slips.

4. Right to reside through a family member's right to reside

The family members of those with a right to reside may also have a right to reside in the UK. This includes both EEA and non-EEA family members. The rules for family members depend on the claimant's age and their circumstances. For instance, those aged 21 and over cannot make a claim through their parents or grandparents, but those aged under 21 can make a claim through their parents or grandparents, as well as through the spouse or civil partner of a parent or grandparent.

Similarly, for those of any age who depend on the support of a parent, grandparent, child or grandchild, they can obtain a right to reside through one of these relatives as well as through their relative's spouse or civil partner.

Table 1.1 summarises the different routes through which family members can claim a right to reside.

TABLE 1.1

Routes to obtaining right to reside through an EEA family member with right to reside

	Over 21	Under 21	All ages, if a dependant
Spouse or civil partner			
Parents or grandparents			
Spouse or civil partner of parent or grandparent			
Child or grandchild			
Spouse or civil partner of child or grandchild			

Source: IPPR analysis of Citizens Advice 2019b

In some circumstances, extended family members can also acquire a right to reside.

Evidential requirements will include documentary evidence of the person's relationship with the person who has the right to reside (for example, birth and marriage certificates) as well as proof of their right to reside (for example, through pay slips showing the relative is working). In situations where the individual depends on the support of a relative to live this also needs to be proven with documentary evidence.

It is worth noting that if the person subsequently divorces a partner they will lose their right to reside – and if someone loses their right to reside then so too will those family members whose claim is through them.

5. Derivative right to reside

Someone can claim a derivative right to reside in situations where a claimant is a primary carer of a child in education in the UK, provided there is some historic overlap between the child being resident in the UK and a parent (who must be an EEA citizen) being in work in the UK. For instance, a claimant's eligibility can be established through an ex-partner who is an EEA citizen, provided that the ex-partner was in work at the same time that their child was resident in the UK and the claimant is the primary carer of the child at the

time of claiming. In this situation a claimant can have a “right to reside” and so access the benefit system even if they themselves are not an EEA citizen.

These routes have emerged through case law with the aim of protecting the free movement rights of EEA citizens (EntitledTo no date).

Proving a derivative right to reside may require documentary evidence of activities which happened many years ago, whether that be historic payslips for the claimant, a partner, or possibly an ex-partner. This route can be particularly complex to establish.

6. Permanent right of residence

An individual may have a permanent right to reside if they can prove five continuous years where they have had a right to reside, where this right to reside can arise from a mixture of different reasons over different periods.

There are a number of different ways that someone can prove a right to reside for the purpose of securing permanent residence. For instance, they could show they have been:

- a worker or self-employed person
- someone with ‘retained worker’ status
- someone who can support themselves financially (known as being ‘self-sufficient’)
- a student who is self-sufficient
- a family member of someone with a right to reside
- a jobseeker.

It is important to note that this list includes certain forms of ‘right to reside’ which alone cannot grant entitlement for UC, such as being a jobseeker, but which can be used as the basis for proving a permanent right to reside.

A claimant can spend up to six months out of 12 outside of the UK each year, and one gap of up to 12 months in exceptional circumstances such as a serious family illness, without breaching continuity of residence (Citizens Advice 2019b).

Clearly, proving permanent right to reside could require a complex combination of different types of evidence to be gathered and evaluated over different time periods.

It is worth noting that anybody who would qualify for a permanent right to reside would also qualify for the EU settlement scheme, which we turn to now.

7. Establishing EU “settled status”

As a result of the UK’s withdrawal from the EU and the government’s plans to end the free movement of people, EEA citizens currently resident in the UK can apply for the EU settlement scheme to obtain settled or pre-settled status. Those with settled status are automatically treated as having a right to reside in the UK. To get settled status, applicants must prove to the Home Office five years of continuous residence (with permitted gaps as above). This residence is not conditional on any “right to reside” conditions as above - applicants simply need to show that they have lived in the country (HM Government no date). As such, it is a less stringent set of criteria and so likely a preferred route for many people wishing to access the benefit system, provided they have met the residence requirements.

The scheme represents an extension of welfare rights to some groups – namely those who have lived continuously in the UK for at least five years

but who would not otherwise have had a “right to reside” under any of the alternative routes set out above.

Individuals applying for the EU settlement scheme who can only prove they have been resident in the UK for under five years are granted “pre-settled status” by the Home Office. This can be upgraded to “settled status” once they can demonstrate a five-year period of residence. Those with “pre-settled status” who make a claim for UC will still need to prove their “right to reside” as before. For this cohort, the “right to reside” test will therefore continue to be relevant until they make a successful application for settled status. At the time of writing there are over 1.3 million citizens in the UK with pre-settled status (Home Office 2020). Until they get settled status, this group will face the same restrictions on the benefit system as they had before.

THE HRT DECISION-MAKING AND APPEALS PROCESS

Typically, an individual will make a claim for UC online and will be notified of the need to have an HRT when first attending the job centre as part of the usual process of making a claim. Work coaches will give claimants a time for their appointment and should provide advice on the documentary evidence they will need to bring to the interview in order to establish their eligibility.

In the interview that follows, work coaches are expected to gather all the necessary evidence required so that an accurate decision can be made. Evidence will be collected verbally as well as through provision of original documentary evidence. The work coach will collect all this information together into a case file which will then be sent to a ‘decision maker’ based in a central office separate from the job centre.

Aided by centrally issued guidance (called the Advice for Decision Makers or ADM), the decision-maker is expected to use the evidence and information provided to establish whether the claimant passes the HRT and determine their eligibility for UC. If the decision-maker requires further information or clarification, they can request this directly from the claimant digitally using the UC journal, a secure government digital platform.

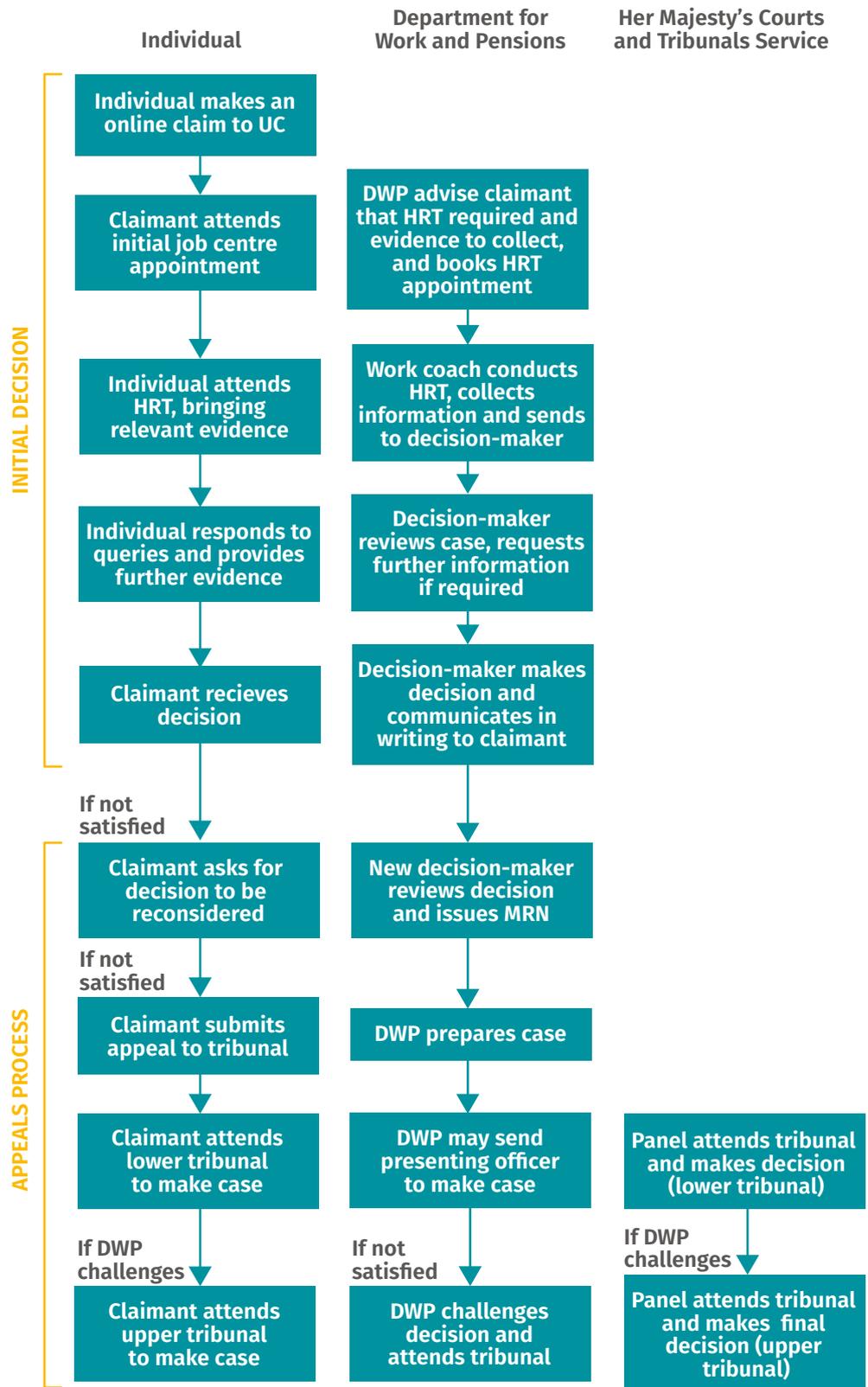
When a decision is made it will then be communicated to the claimant digitally with an explanation given for the decision.

If a claimant thinks the decision is wrong they can request an internal review, known as a ‘mandatory reconsideration’. A separate decision-maker will then review the initial decision and either overturn it or re-affirm the original decision. The claimant will then be issued with a letter explaining the outcome of the decision, a ‘Mandatory Reconsideration Notice’, which is formally required in order to advance their dispute to the social security and child support tribunal (Citizens Advice no date).

Finally, an individual is required to attend and make their case in front of a tribunal judge, who will review the decision and any new evidence provided and then make a decision. The decision will then be implemented unless the DWP chooses to challenge it, which would lead the case to advance to the second-tier tribunal to be reviewed a second time.

FIGURE 1.2

The HRT decision and appeals process



Source: IPPR analysis

As figure 1.2 makes clear, the process can be very drawn out and could be potentially difficult for an individual to navigate without support.

In 2018/19, the average wait for a social security tribunal case to be heard was 29 weeks, up from 23 weeks in the previous year (MoJ 2020). Throughout this period, an individual who fails the HRT does not receive any financial support from the government. This is different, for example, to a situation where someone is appealing a fitness for work decision under UC, where claimants receive the “assessment rate” of payment throughout the appeals process.

SUMMARY OF FINDINGS

Our analysis of the system demonstrates the following key points about the HRT.

- For UK citizens returning from abroad and for non-EEA citizens who are eligible for public funds, the HRT is effectively limited to establishing if the person is “habitually resident in the UK”.
- However, for EEA citizens the test also involves proving a “right to reside”. Determining whether they have a “right to reside” is potentially very complex, with a large number of potential legal routes.
- Many of these decisions require considerable discretion from decision-makers: such as determining whether work has been genuine and effective or whether a person has a genuine prospect of work.
- There are potentially challenging evidence requirements for different routes to right to reside, including: proof of dependence and health conditions, work and earnings history, and those of partners and ex-partners, potentially delving into the distant past.
- When an EEA citizen obtains settled status after proving five years of continuous residence to the Home Office, they automatically pass the more complex “right to reside” element of the test (but must still pass the “habitual residence” element). This represents an extension of welfare rights for those EEA citizens who have five years of continuous residence who do not have any other right to reside. Even those who may have a permanent right to reside should find it easier to prove five years of residence, simplifying the process for many claimants who are entitled.
- Those EEA citizens who obtain pre-settled status will continue to need to navigate the complexity of the “right to reside” aspect of the HRT until they reach five continuous years of residence – meaning decisions on “right to reside” will be made in the benefit system until December 2025 based on the current Brexit timetable. As a result, numbers are expected to become smaller over time but the outcomes will remain critical for those affected.
- The decision-maker is a separate person to the person who collects the evidence and conducts the interview.
- The process of challenging a HRT decision is very drawn out and complex, with claimants denied access to any UC at all whilst the decision is being challenged in the tribunal system, which can take a long time.

2. STATISTICS ON THE OPERATION OF THE HRT

Here we consider the available quantitative data on the operation of the HRT. There are very limited existing published data to understand how this process operates under UC.

Although some data was historically produced on the operation of the Habitual Residence Test under the legacy system of benefits (DWP 2017), the Department for Work and Pensions has produced no statistics on the operation of the Habitual Residence Test with respect to Universal Credit. Previous attempts from parliamentarians and the public to extract any information on this have been unsuccessful.

Table 2.1 summarises the parliamentary questions (PQs) that have been raised and their responses prior to this research.

TABLE 2.1
Summary of parliamentary questions with respect to the HRT

Data requested	Requesting MP	Outcome
Outcome of appeals around HRT	Ruth Cadbury	Rejected 25 July 2019
Reasons for failing HRT when applying for UC	Ruth Cadbury	Rejected 25 July 2019
Applications to UC rejected due to HRT	Stella Creasy	Succeeded 24 June 2019 for UC, but not set in the context of the number of claims
Applications to JSA rejected due to wHRT	Stella Creasy	Available as part of the published statistics (DWP 2017), but not for 2017/18
Applicants for UC subject to the HRT	John Grogan	Rejected, 10 April 2019
Proportion of people who passed the HRT	John Grogan	Rejected, 10 April 2019
Average time taken to make a determination for HRT	John Grogan	Rejected, 10 April 2019
Number of non-UK EU citizens who have been refused UC on the basis they do not have the right to reside	Stuart McDonald	Rejected, 21 January 2019
Proportion of EEA Nationals who have been asked to sit a HRT	Philippa Whitford	Rejected, 11 January 2019
Mandatory Reconsiderations of UC decisions relating to the HRT since July 2018 to March 2020, and number of decisions overturned	Claudia Webbe	Rejected, 16 March 2020
Length of decisions relating to HRT decisions for UC claims since July 2018 to March 2020	Claudia Webbe	Rejected, 16 March 2020
Reasons claims were refused UC since July 2018	Claudia Webbe	Rejected 16 March 2020

Source: IPPR analysis of UK Parliament 2020b

Similarly, responses to freedom of information (FOI) requests from members of the public published online have also yielded no or very limited results.

In short, the questions have generally been rejected on the grounds of cost, which means that the questions asked would take more than 3.5 days of officials' time in order to produce a response (What Do They Know no date) Given the straightforward nature of some of these questions, this raises serious questions about the government's ability to monitor the operation of its own policies in this area.

We recommend that more work is completed internally in order to understand in greater depth how the HRT operates under UC. This should include a statistical release in a similar fashion to that previously produced under the legacy system.

Furthermore, Her Majesty's Courts and Tribunals Service (HMCTS) produce statistics on tribunal overturn rates, but only for UC cases as a whole (MoJ 2020). It is not possible to disaggregate these to understand which particular aspects of UC are being challenged. As the UC rollout continues and becomes a greater proportion of the total caseload, it will become increasingly important that granular information on the aspects of the system being challenged are made available to understand how well they are functioning. **We recommend that tribunal statistics for UC are published with breakdowns by the type of decision being challenged.** This is important to understand the quality of original decision-making with respect to the HRT but also in other contentious areas, such as decisions around fitness for work or sanctions. More transparency is urgently needed.

NEW DATA

We analysed the response to a parliamentary question by Kate Green MP (UK Parliament 2020a), and built on this with a FOI request.

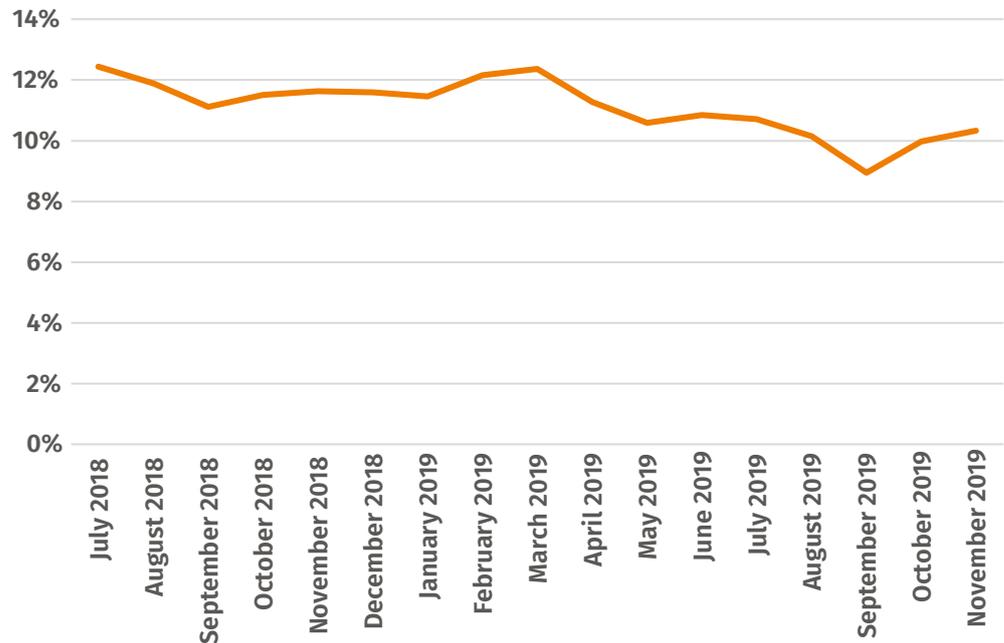
Considering the national picture we see that:

- around 16 per cent of claims to UC require a HRT over the period from July 2018 to November 2019 (IPPR analysis using DWP 2020). We would expect half of these to be EEA citizens based on historic data on the operation of the test in the legacy system² (DWP 2017)
- according to the latest data available, around one in 10 claims to UC which require a HRT are closed as a result of failing the HRT
- the number of claims that have closed due to the HRT has been increasing over time in absolute number due to the ongoing rollout of UC – with around 45,000 claims closed in the last 12 months of available data, although this will have likely grown considerably recently due to Covid-19
- the proportion of UC claims closed due to the failure of the HRT had been falling over the 17 months of available data up to November 2019.

2 We requested for this to be broken down by nationality category via FOI but a response was not provided within the FOI timescales, which may be due to Covid-19.

FIGURE 2.1

Proportion of UC full service claims closed due to failure of the HRT



Source: IPPR analysis of UK Parliament 2020a

Although we also requested geographical breakdowns in order to understand the picture in more detail in Islington or London, the DWP told us in their response to our FOI request that it was not possible for them to produce any geographic breakdowns.

Unfortunately, the data we have collected cannot tell us the extent to which these decisions to close a claim were incorrect, but they do give a sense of scale – illustrating that thousands of people living in the UK every year are refused UC due to failing the HRT.

CITIZENS ADVICE DATA

Citizens Advice provide support to people seeking to make a claim to benefits and help them resolve issues that they encounter when attempting to make a claim. In the last 12 months of available data,³ we were informed that 70 people have sought support from Islington Citizens Advice with respect to the HRT.

SUMMARY OF FINDINGS

- The DWP is unable to answer questions on how the HRT functions under UC. It has repeatedly refused requests to answer a number of straightforward questions.
- However, a recent PQ was able to establish from the DWP that around 45,000 claims to UC were closed due to failing the HRT in the last 12 months of available data. This is around 10 per cent of all those who take the test. The absolute number of claims will likely increase dramatically due to Covid-19, which has resulted in large increases in UC caseloads.
- Because of the way that tribunal statistics are currently reported in the data, it is not possible to know the rate at which decisions are overturned at tribunal, and thus there is no way of knowing the accuracy of DWP decision-making in this area.

³ Data provided by Islington CAB and refers to the period May 2019–April 2020.

3.

FINDINGS FROM INTERVIEWS

We spoke with claimants and welfare rights workers to understand in greater depth some of the issues encountered through the HRT process. This chapter summarises these findings and makes relevant recommendations

Complexity of the HRT decision, in particular with proving “right to reside”

As we set out in chapter 2, there are numerous complex routes to securing a right to reside, and advisers commented that many claimants are ill-equipped to understand what it is that they need to prove in order to get their decision overturned. Indeed, given that these cases are not particularly common, advisers explained that they would also have difficulty navigating the HRT and it would require substantial work to understand the right path to pursue.

“There are a huge amount of routes to go down ... in terms of immigration law it's massive”

Welfare rights adviser

The complexity of the current rules is also likely to be burdensome and costly to implement for DWP

Claimants may not realise they will “lose” their right to reside status if they do not make a claim

Claimants who lose their job may not realise that they are only entitled to retain their worker status, and thus their access to UC, for six months from the job loss (or potentially a little longer if the job lasted for over a year). We heard accounts where people did not immediately make a claim because they thought they would find a job but who were then subsequently unable to access funds because they had left it too late.

Poor claimant communications of HRT results

Advisers and claimants told us that letters and official communications conveying the result of HRT decisions are difficult to understand and not written in plain English. The communication of these decisions is opaque and there is a missed opportunity to inform claimants of the possible routes to proving their habitual residence.

We recommend that decision letters spell out the basis for the decision in more detail, broken down by different right to reside categories and examples of possible evidence for each category in plain English. Not only would this help claimants to understand the basis for decisions; it would also help them challenge the decisions and understand what evidence they might be able to provide in order to get a positive decision.

“Even the term ‘right to reside’ is a bit of an odd term, you know it needs explanation - especially if they've been here 20 years. It's very official wording.”

Welfare rights adviser

“They will just say ‘there is no proof you are incapacitated’ – that's it.”

Welfare rights adviser

“I was not even aware that it was called the habitual residence test, until I received the outcome and I was told that I failed it. I had no idea what was going on and it wasn’t clear what they were looking for.”

UC claimant

Letters should clearly set out the process of how to challenge the decision and flag access to relevant welfare rights advisers in the local area. They should also flag up any access to emergency funds as well as other parts of the benefit system they may be able to access, such as personal independence payment (for those with disabilities) and child benefit.

Challenges with providing documentary evidence of past activities

Even if an individual knows what they need to prove, claimants run into significant difficulties gathering documentary evidence of their past activities, and this is particularly difficult in cases which require going back several years in time. Claimants do not necessarily keep all written and documentary records of their past activities, and it was reported that claimants struggle to obtain historic documents from government agencies such as HMRC. For vulnerable claimants this can be particularly challenging. There is often an unreasonable expectation from the DWP that claimants should be able to collect all relevant information themselves.

“One of the frustrations is that the way that providing evidence is left with the client very much, and quite a lot of the official bodies that you think might be able to help aren’t, and in fact quite often throw at you that they haven’t got records beyond certain years. It’s a bit ironic. Officialdom gives up and doesn’t provide the evidence but expect the client to (be able to) do it.”

Welfare rights adviser

“The onus is on them to provide all the evidence ... particularly if they have mental health problems, it’s a real challenge.”

Welfare rights adviser

“Sometimes I couldn’t open the letters and messages, I went to ask someone to open the letters and messages for me. I couldn’t handle it ... I started seeing the envelopes as my enemies – like always bad news is coming.”

UC claimant

We were told that the DWP does not provide any support to claimants to help them gather evidence, even where it could be well placed to do so. This would come with some resourcing cost, which has been cut by 28 per cent between 2010/11 and 2018/19 (NAO 2019). **We recommend that additional resource is provided to DWP to support the gathering of evidence for vulnerable claimants.**

When claimants are unable to claim UC as a result of failing the HRT, they may have nothing to live on, resulting in financial hardship and distress.

If someone is refused UC on the grounds of failing the HRT, they may have nothing to live on until that is resolved – it is “all or nothing” for many claimants. As the appeals process is so drawn out, this could involve people having no support whatsoever for a long time, and we heard of claimants building up significant arrears and then later receiving large back payments. There are also financial and resource implications for local government and civil society, who often deal with the knock-on implications of people being without benefits for extended periods.

“With right to reside and universal credit, the important thing is that you get nothing, absolutely nothing – and it can go on for a long time.”

Welfare rights adviser

“I was in arrears for almost a year, fortunately my landlord didn’t evict me.”

UC claimant

Some advisers spoke positively of cooperation between the council and social housing tenants, noting instances where the council would hold off sending eviction notices whilst the appeal was ongoing. But others who were private tenants would not be as fortunate, unless they were able to come to an agreement with their landlord.

“The landlord was very generous to him and said he could stay, we had to prove to the landlord that it was in the hands of the tribunal ... If the landlord hadn’t said we could wait, he would have definitely been homeless.”

Welfare rights adviser

“Islington Council’s been very good in that they haven’t evicted these people ... but other landlords could.”

Welfare rights adviser

The situation for people who fail their HRT is more severe than, for example, a person challenging a fitness for work decision, as someone in this situation will at least receive the “assessment rate” of benefit throughout the appeals process from the point of being issued a ‘mandatory reconsideration notice’.

As such, we recommend that disputed HRT decisions in UC should be fast-tracked through the tribunal process

According to our interviews, the absence of all financial support for some time took a large toll on claimants’ mental and physical health, exacerbating existing conditions. It was also pointed out that having no money made finding work harder due to the costs of job-seeking, moving them further away from the labour market.

The DWP will not reopen cases and consider new evidence prior to a tribunal

Although claimants may initially have difficulty gathering evidence, they may later obtain evidence which if the DWP considered would cause them to overturn the original decision.

However, once the dispute process has reached a certain stage, there is no mechanism for further evidence to be provided and considered by the DWP, and a decision will not be made until it is considered at tribunal. Given the long waiting times for tribunal, this is problematic and extends people’s hardship unnecessarily. It is also inefficient, imposing administrative costs on the DWP by requiring preparations for tribunals that may ultimately prove unnecessary.

We recommend that systems for the DWP are developed internally to consider further evidence where it emerges prior to tribunal.

Genuine and effective work

Advisers reported that if work was under the earnings threshold it was automatically assumed to not be “genuine and effective” by DWP – despite case law to suggest this should not be the case. Advisers reported that this was felt to be a tick-box exercise and that when earnings were under these thresholds further investigation was required by decision-makers as to the nature of the work.

“They will immediately say that any work less than [the minimum earnings threshold] is not genuine and effective, but there’s case law to suggest this is not the case and the DWP just ignore that, so yes, it’s a big issue.”

Welfare rights adviser

“It is said that the nature of her work was temporary and not genuine and effective. This seems to be a surprising conclusion when a large percentage of the workplace is actively encouraged to take on zero-hours contracts”

Tribunal judge, ruling on a genuine and effective work decision
(quotation provided by welfare rights adviser)

“When I explained to her [at the jobcentre] why my income was low, and I explained to her the process of having new clients and everything, she understood, but then she said to me, ‘because you’re an EU national you need to prove that you were in genuine employment’. But what does it mean? I mean, I was working.”

UC claimant

We recommend that there should be much clearer guidance on how decisions are made in relation to genuine and effective work if individuals are paid under the earnings threshold, with robust justification for decisions made.

Digital literacy and access to the internet

As we set out in chapter 2, there is an opportunity for decision makers to seek further evidence and information regarding claimants’ circumstances through the UC journal.

Although effective use of the UC journal could clear up misunderstandings and improve the quality of decision-making on the HRT, this is based on the assumption of digital literacy and claimants having access to the internet. Advisers told us that claimants have difficulty remembering their passwords and accessing the journal and finding relevant messages – and would not be able to do this unassisted – which presents a missed opportunity to gather evidence. Some argued this was discriminatory.

“There are still people claiming that benefit, they’re in their 60s, they haven’t reached pensionable age yet, and some of them have never touched a computer before in their lives.”

Welfare rights adviser

The EU settlement-scheme can make it considerably easier for those with five years of residence to claim

A number of advisers recognised that in many situations the EU settlement scheme will have made life easier for claimants who have lived in the UK for at least five years. While many may have found it difficult to secure permanent residence by proving five years of continuous “right to reside”, many will have found it far easier to secure settled status. As such, the EU settlement scheme has made it easier for many people to access UC.

We heard that in some cases when a UC claimant was rejected due to failing the HRT, they were advised by the DWP to apply for settled status and then return to the DWP to make another claim. Although this may be practical advice given the current constraints, it highlights an inconsistency in the system. There are people for whom the department will acknowledge evidence of five years’ residence and who therefore in principle should be able to access the benefit system, yet who are denied UC because they are not pursuing the right bureaucratic route.

We heard that in some cases, tribunal judges had overturned HRT decisions where it was evident to the panel that the person had lived in the UK for five continuous years, and so it was clear that they would be entitled to benefits if they had applied for settled status. This logic could be applied by DWP decision-makers. People with five years' continuous residence could be considered to automatically pass the 'right to reside' test, given that their residence history would almost certainly make them eligible for settled status.

This is important as people often need to be able to access the benefit system as soon as possible, and simply advising them to apply for the EU settlement scheme does not help them with their immediate need for financial support. Without this measure, there is also a risk that some people who fail the HRT do not then apply for settled status and make another claim for UC.

We recommend that the DWP treats EEA citizens with five years of continuous residence as having a “right to reside” for the purposes of accessing benefits, and then supports claimants to apply for their EU settled status later as part of their conditionality.

We were also told of instances where individuals with five years' residence were being rejected out of hand and being told to apply for the scheme – as opposed to making an assessment of their situation as it currently stands. But in some cases, claimants clearly could meet the right to reside requirement more easily via another route and should not lose out as a result.

Confusion over transition from legacy system to UC and people losing out from transition

People who had previously been able to access the benefit system have now found they are unable to access UC. This may arise because under the new system, an individual cannot have a “right to reside” purely through being a jobseeker. Claimants therefore who move from the legacy system to UC – for example, through a deterioration in health – could find they are suddenly unable to access the benefit system at all.

“A 61-year old EU national in the UK was claiming JSA but needed to switch to ESA due to deteriorating health. However, this option was not available, instead requiring switching to UC; this claim was subsequently refused due to failure of the HRT, meaning that they lost entitlement to benefit altogether.”

Case study, provided by Citizens Advice

“So they've been going along quite happily on the legacy benefit. Something happens, they move house, a simple matter, and then their world completely changes because they're not entitled anymore ... 'I was on ESA, and now I'm destitute'”

Welfare rights adviser

“For UC the whole system changed and it was very negative”

-UC claimant

In addition, in some cases claimants who cannot access UC may still be able to access other benefits. DWP should provide advice to claimants about their ability to access benefits – including benefits such as child benefit, personal independence payment, or 'new style' JSA or ESA if their circumstances are relevant. However, advisers told us claimants were not always correctly informed of their options.

The impact of the HRT process on the mental health of claimants

Our interviews with UC claimants highlighted the serious impact of the problems of the HRT on individuals' livelihoods and mental health. Interviewees talked about how the process of being rejected for UC severely affected their confidence and self-esteem. Despite in a number of cases living in the UK for decades, interviewees spoke of facing a convoluted and disorientating bureaucratic process to demonstrate their residence rights. This left claimants experiencing feelings of anxiety and helplessness.

"I lost my confidence. I feel rubbish. Before I was standing straight while I was teaching, I knew I was doing a good job, I have always walked confidently ... now I feel myself [to be] a rubbish, useless person."

UC claimant

"The stress was making me very anxious and depressed, and sometimes I was not having meals for days. I was losing my energy and feeling anxiety. I could not sleep during the night ..."

UC claimant

"I didn't sleep for a few nights ... I was having panic attacks so I had to be on medication for a few days ... I thought if the worst comes to the worst I will ask help from friends or family. But it just felt like in normal times it would have been very difficult, but considering the context [of the coronavirus outbreak] I could not even imagine that they would make this kind of decision without any real reason."

UC claimant

SUMMARY OF FINDINGS

Our conversations with claimants and welfare advisers outlined a process with considerable flaws, imposing unnecessary hardship on claimants. Claimants and advisers have to navigate complex decisions, which are poorly explained – and there are considerable challenges with providing the correct documentation and proving, for example, that work is “genuine and effective”. Although the EU settlement scheme represents an enhancement of rights for some claimants, this is no silver bullet. We have identified numerous channels by which the process should be improved, which warrant serious consideration.

4.

CONCLUSION

In the last 12 months of available data, over 400,000 claims to UC were associated with a HRT, the outcomes of which can make or break a claim to benefit. Those who fail the test will in many cases be unable to access any financial support. Disputing a decision by the DWP is a long and drawn-out process, driven by considerable tribunal waiting times, where claimants have zero entitlement throughout.

Despite the pivotal role that the HRT plays in the outcomes for these claimants, evidence suggests that the government has a poor understanding of how the test functions, given the large number of rejected requests for information from parliamentarians and the public. This is a basic transparency issue; there is no published data available to understand the extent to which HRT decisions are overturned at tribunal. As such, although we know that around 45,000 claims to UC were closed due to the failure of a HRT in the past 12 months of data, we cannot determine how many of these could be in error. As the HRT will likely continue to be relevant for years to come, the DWP should invest to gain a better understanding of how it functions.

As set out in the second chapter, decisions in this area can be incredibly complex, particularly with respect to the “right to reside” condition for EEA citizens. Claimants understandably have difficulty navigating this and vulnerable claimants in particular face challenges retrieving evidence to prove that they meet the criteria. The system does not provide any support for this group and claimants are worse off as a result. We have also identified wider issues: from assumptions around digital literacy to poor communications.

The EU settlement scheme will in many cases make issues simpler for claimants – but this is not a silver bullet as there are millions of claimants with pre-settled status who could need to access the welfare system, for whom the HRT will remain relevant.

In the context of the current Covid-19 pandemic, it is our position that such restrictions on the benefit system for migrants are not appropriate and that the HRT should be suspended for at least the duration of the crisis. People unable to access the benefit system at this time will have great difficulty accessing employment and it is unlikely they would be able to take the potentially drastic option of leaving the UK to access the benefit system in their own country, leaving them with no options. This will also place further huge burdens on stretched local governments and exacerbate the human cost of the crisis. This is at odds with the chancellor’s commitment to do “whatever it takes” in the wake of the Covid-19 pandemic.

However, even if the HRT is not suspended, there are nevertheless a number of necessary urgent reforms to improve its operation for now and in future. This includes clearer communication of HRT decisions, fast-tracking of HRT decisions through the tribunal process, and improved guidance on how decision-makers should classify ‘genuine and effective’ work.

The Covid-19 pandemic highlights the importance of an effective and universal welfare system. The HRT as it currently operates creates a series of major barriers for claimants, particularly affecting EEA citizens. Without changes to the current HRT process, many who are facing hardship as a result of the current crisis will continue to be left with no social safety net altogether.

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