1. The aim of this paper and the training session it accompanies is to improve the ability of those in Scotland working with victims of human trafficking to assist and advocate on behalf of trafficking victims who are EEA nationals. As EEA national victims are rarely threatened with expulsion from the UK, the primary aim of this session is to enable advisers to help EEA trafficking victims get access to material support, mainly housing and benefits.

2. The session will cover the following:
   a. who ‘EEA nationals’ are;
   b. the legislative framework governing the rights of EEA nationals generally in the UK;
   c. access to benefits for EEA national trafficking victims;
   d. housing and community care issues for EEA national trafficking victims;
   e. NHS care for EEA trafficking victims;
   f. immigration issues affecting EEA national trafficking victims; and
   g. criminal law issues affecting EEA national trafficking victims.

3. Most of the law in this area applies the same way through the United Kingdom (or Great Britain). Where the law is different in Scotland, a Scottish flag has been put in the margins.

4. The ‘EEA’ is the European Economic Area, that is, the twenty-seven Member States of the EU,\(^1\) Iceland, Lichtenstein and Norway. Citizens of these EEA countries enjoy certain rights, under European Union law, to live in other EEA countries (described below in part b). Following a bilateral agreement between the EU and Switzerland, Swiss nationals also have these rights. In UK law,\(^2\) the term ‘EEA national’ refers to a nationals of Switzerland or any EEA State other than the United Kingdom.

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\(^1\) The EU Member States are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

\(^2\) The Immigration (European Economic Area) Regulations 2006, Regulation 2(1).
5. In the first year of the National Referral Mechanism (1 April 2009 – 31 March 2010), 706 people were referred as victims of trafficking: 563 non-EEA nationals, 38 British Citizens, and 105 EEA nationals, most from the new EU Member States that joined in 2004 and 2007.

6. Human trafficking might be viewed as a negative side effect of one of the fundamental freedoms of European Union citizens: the free movement of persons. As set out in further detail below, EEA nationals can enter the UK without any restrictions and stay for up to three months for any purpose, and for longer in certain circumstances. This may make it easier for human traffickers, who do not have to secure entry visas for them, although of course traffickers may have more difficulty controlling EEA nationals, who generally have the right to work or take up self-employment in the UK. Problems are most likely to arise for Romanians and Bulgarians who have the right to enter the UK, but most of whom are not yet allowed to work here: they may be particularly vulnerable to traffickers, especially when they do not realise that they are not allowed to work in the UK (they are allowed to work in many other EU Member States, which creates confusion).

b. The Legislative Framework
7. This is a reference section for those who want to understand the law better. It may be helpful to start by reading the substantive sections below on EEA national trafficking victims’ rights and then refer to this section to understand the legislation in more detail.

8. EEA nationals’ freedom to enter and reside in the UK is governed by provisions of EU Treaty law, EU secondary law and domestic (UK) law.

a. EU Treaty law. The Treaties are the primary legal instruments of the European Union legal order. There are two treaties (which, together, are known as the ‘Lisbon Treaty’ and came into force on 1 December 2009): The Treaty on European Union (‘TEU’) and the Treaty on the Functioning of the European Union (‘TFEU’). Any provision of the Treaty that is clear, precise and unconditional has ‘direct effect’. That means that a person can rely on it before the domestic courts. EU law is supreme over domestic law, so if there is a conflict between EU Treaty law and a provision of domestic law, the EU Treaty law provision prevails. The same goes for other forms of EU legislation, such as Directives and Regulations. The provisions on free movement are found in the TFEU. There are also provisions provided for in the Charter of Fundamental Rights (‘the Charter’ or ‘CFR’), which according to Article 6 TEU has the same legal status in the EU legal order as the Treaties. The main provisions of the Treaties relevant here are:

i. Article 18 TFEU: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’ This is the basic principle of EU free movement law: EU citizens should not be discriminated against simply on the basis of their nationality. As the European Court of Justice (the principal judicial organ of the EU, known as the Court of Justice of the European Union since 1 December 2009, and referred to hereinafter as the ‘ECJ/CJEU’) has put it, ‘Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the
same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.\(^3\)

ii. **Article 20(2)(a) TFEU**: ‘Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States.’

iii. **Article 21(1) TFEU**: ‘Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.’ Based on Articles 20(2)(a) and 21(1) TFEU, it seems that the content of this right is found in other legislation. However, in non-trafficking contexts, the ECJ/CJEU has found that EU nationals and their family members may rely directly on this provision to assert a right to reside in another EU Member State.\(^4\)

iv. There are also TFEU provisions which cover the specific situation of EU migrant workers (Article 45), self-employed persons (Article 49) and providers of services (Article 56), guaranteeing them equal treatment as compared with host State (i.e. UK) nationals. It is important to note that the ECJ/CJEU has interpreted Article 45 TFEU as providing a right of residence to EU migrant jobseekers, i.e. EU migrants who are actively seeking work and have ‘genuine chances of becoming engaged’; these migrants are also entitled to access financial benefits designed to facilitate their access to the labour market.\(^5\)

v. **The Charter of Fundamental Rights**. The Charter is an instrument that protects fundamental rights, much like the European Convention on Human Rights. It only applies to EU Member States like the UK, however, when they are implementing EU law.\(^6\) A Protocol to the Lisbon Treaty that applies only to the UK and Poland may further limit the

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3 Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, para 31.
4 Case C-413/99 *Baumbas and R v Secretary of State for the Home Department*, para 84.
5 Cases C-22&23/08 *Vatsouras & Koupatantze v Arbeitsgemeinschaft Nürnberg 900*, para 40.
6 Charter of Fundamental Rights, Article 51(1).
The applicability of the Charter here; the CJEU is currently considering this in a non-trafficking case.\textsuperscript{7} The relevant provisions of the Charter are:

1. **Article 21(2)**: ‘Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited’. This may strengthen the non-discrimination provision found in Article 18 TFEU.

2. **Article 45(1)**: ‘Every citizen of the Union has the right to move and reside freely within the territory of the Member States.’ This may expand the rights of migrant EU citizens who are not technically entitled to reside or access benefits in the UK under secondary legislation.

3. **Article 5(3)**: ‘Trafficking in human beings shall be prohibited’. This can be used to enhance arguments on behalf of trafficking victims.

b. **EU secondary law.** The European Union institutions have enacted secondary legislation to implement the right of free movement of persons. There are three main instruments:

i. **Directive 2004/38.** This is a comprehensive framework governing the free movement rights of EU citizens and their family members. A Directive is an instrument of EU law that must be transposed into domestic law, which the UK has done, as explained below. However, if a provision of a Directive is clear, precise and unconditional, the deadline for transposition has passed (which it has for Directive 2004/38), it has direct effect and can be relied on directly before the authorities and courts of the UK. Directive 2004/38 provides, among other things:

1. EU citizens can enter another Member State and reside there for up to three months for any reason.\textsuperscript{8}

2. EU citizens can reside in another Member State and reside there for any period of time as long as they are workers, self-employed, self-sufficient (i.e. with comprehensive sickness insurance and sufficient resources to avoid becoming a burden on the social

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\textsuperscript{7} Case C-411/10 N.S. v Secretary of State for the Home Department (pending).

\textsuperscript{8} Article 6.
assistance system of the State) or students (with comprehensive sickness insurance and a declaration that they have sufficient resources), or if they are the family member of such a person. Family members include spouses, civil partners, children under 21, older children who are dependent on their parents, and dependent relatives in the ascending line.

3. After five years’ ‘continuous’, ‘legal’ residence in the UK, EU citizens and their family members acquire permanent residence here automatically. Breaks of not more than six months in any year do not interrupt continuous residence. There is some debate about what ‘legal’ means; the UK has implemented this in a specific way, explained below.

4. EU citizens who are exercising residence rights in the UK in accordance with the Directive are entitled to the same treatment as British Citizens in relation to all matters falling within the scope of the Treaties, including welfare benefits and housing.

5. EU citizens exercising residence rights under the Directive cannot be expelled from the UK except on grounds of public policy, public security or public health, and in even more restricted circumstances if they have acquired permanent residence, have lived in the UK for ten years or if they are children.

ii. Regulation 492/11 (formerly Regulation 1612/68). Under EU law, Regulations are like ordinary legislation: they apply directly, without transposition into the domestic legal system. Regulation 492/11 relates solely to migrant workers. Some of its provisions overlap with Directive 2004/38 as well. However, a recent case confirmed that Regulation 492/11 is still important in some situations. Article 10 of the Regulation

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9 Article 7(1).
10 Article 2(2).
11 Article 16(1).
12 Article 16(4).
13 Article 24.
14 Article 27.
(formerly Article 12 of Regulation 1612/68) provides that the children of EU migrant workers shall be allowed to enrol in education courses in the UK under the same conditions as British Citizens. The CJEU recently confirmed that this implies that such children are permitted to stay in the UK until they have finished their education, even if their worker-parent stops working or leaves the country; this also implies that the child’s primary carer is allowed to stay in the UK with the child and access social assistance benefits and housing on a non-discriminatory basis whilst here.¹⁸

iii. Regulation 883/04. This Regulation provides for the coordination of social security schemes in the European Union. It is very complicated legislation, but ensures, for example, that certain social security benefits (like pensions) can be exported (e.g. for British pensioners living in Spain). It also ensures that periods of social security (i.e. National Insurance) contributions are ‘aggregated’, so, for example, Jobcentre Plus takes into account social security contributions made in other EU countries as if they were National Insurance contributions when determining if an individual is eligible for a contribution-based benefit, like contribution-based Jobseeker’s Allowance.

c. United Kingdom Law. Many provisions of EU law have to be transposed into domestic law, and there are other provisions of domestic law that affect EEA nationals in the UK. The following are the principal legislative instruments that affect EEA nationals in the UK.

i. The Immigration (European Economic Area) Regulations 2006. These Regulations were brought in to implement Directive 2004/38. They provide that EEA nationals can enter the UK upon producing a passport or national identity card,¹⁹ that they can stay in the UK for up to three months for any purpose,²⁰ and that they can remain in the UK for any amount of time if they are ‘qualified persons’ or family members of qualified persons.²¹ ‘Qualified persons’ are defined as: jobseekers, workers, self-employed persons, students

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¹⁸ Case C-480/08 Teixeira v London Borough of Lambeth.
¹⁹ Regulation 11(1).
²⁰ Regulation 13(1).
²¹ Regulation 14(1).
and self-sufficient persons, using the definitions of these terms given in Directive 2004/38.\textsuperscript{22} The Regulations also provide for the acquisition of permanent residence, but only for those who have resided ‘in accordance with these Regulations’ for five years;\textsuperscript{23} this may be more restrictive than the ‘legal residence’ requirement found in Article 16(1) of the Directive, and this is a question that is currently being litigated before the CJEU.\textsuperscript{24} The Regulations provide for the expulsion of EEA nationals on grounds of public policy, public security and public health, as in the Directive.\textsuperscript{25} The Regulations also provide for the expulsion of EEA nationals who do not have a right to reside under the Directive.\textsuperscript{26}

\textbf{ii. Schedule 3 to the Nationality, Immigration and Asylum Act 2002.} This piece of legislation excludes EEA nationals from a host of basic social assistance benefits, including: local authority accommodation and welfare support under the National Assistance Act 1948; the possibility of being housed by a local authority whilst a review or appeal is pending on a decision that a person is not eligible for housing; and welfare provision for the parents of children in need under the Children Act 1989.\textsuperscript{27} EEA nationals

\textsuperscript{22} Regulations 4 and 6.
\textsuperscript{23} Regulation 15(1).
\textsuperscript{24} Case C-325/09 Secretary of State for the Home Department v Dias (pending).
\textsuperscript{25} Regulations 19 and 21.
\textsuperscript{26} Regulation 19(3)(a).
\textsuperscript{27} The full list of exclusions is:

(a)section 21 or 29 of the National Assistance Act 1948 (c. 29) (local authority: accommodation and welfare),
(b)section 45 of the Health Services and Public Health Act 1968 (c. 46) (local authority: welfare of elderly),
(c)section 12 or 13A of the Social Work (Scotland) Act 1968 (c. 49) (social welfare services),
(d)Article 7 or 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)) (prevention of illness, social welfare, &c.),
(e)section 254 of, and Schedule 20 to, the National Health Service Act 2006, or section 192 of, and Schedule 15 to, the National Health Service (Wales) Act 2006 (social services),
(f)section 29(1)(b) of the Housing (Scotland) Act 1987 (c. 26) (interim duty to accommodate in case of apparent priority need where review of a local authority decision has been requested),
(g)section 17, 23C, 24A or 24B of the Children Act 1989 (c. 41) (welfare and other powers which can be exercised in relation to adults),
(h)Article 18, 35 or 36 of the Children (Northern Ireland) Order 1995 (S.I. 1995/755 (N.I. 2)) (welfare and other powers which can be exercised in relation to adults),
(i)sections 22, 29 and 30 of the Children (Scotland) Act 1995 (c. 36) (provisions analogous to those mentioned in paragraph (g)),
(j)section 188(3) or 204(4) of the Housing Act 1996 (c. 52) (accommodation pending review or appeal),
(k)section 2 of the Local Government Act 2000 (c. 22) (promotion of well-being),
(l)a provision of the Immigration and Asylum Act 1999 (c. 33), or
(m)a provision of this Act.
are only eligible for these forms of support if refusal would violate their rights under EU law or under the European Convention on Human Rights. The Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 also make it possible for local authorities dealing with destitute EEA nationals who have no entitlements to house them temporarily whilst they arrange for their transportation to their country of origin.

iii. The Social Security (Persons from Abroad) (Amendment) Regulations 2006. These Regulations amended a series of other Regulations by adding a habitual residence test, including a right-to-reside test, to access to a range of benefits, including: Housing Benefit, Council Tax Benefit, income-based Jobseeker’s Allowance, State Pension Credit and Income Support. The main effect of these Regulations is that in order to access these benefits, an individual must be ‘habitually resident’ (either in the UK or Great Britain, depending on the benefit). The habitual residence test has two parts: an individual must show she is ‘actually habitually resident’ (what it sounds like – that the UK is the centre of the person’s interests\(^{28}\)); and the person must show she has a right to reside, which, for EEA nationals, means a right to reside under EU law. Some EEA nationals (workers, self-employed persons and family members of such persons) automatically pass both parts of the right-to-reside test. Jobseekers can access income-based Jobseeker’s Allowance, Housing Benefit and Council Tax Benefit under the Regulations, but they and their family members are excluded from other benefits if they cannot show they are exercising a right to reside on some other ground. The habitual-residence test also applies to income-based Employment and Support Allowance, under Regulation 70 of the Employment and Support Allowance Regulations 2008.

\(^{28}\) The main case law on habitual residence is from the House of Lords: Nessa v Chief Adjudication Officer [1999] UKHL 41. However, for State Pension Credit, Income Support and income-based Jobseeker’s Allowance, which are social security benefits covered by Regulation 883/04, a slightly different test, set out in EU law, might apply. That test is found in Case C-90/97 Swaddling v Adjudication Officer, especially para 29.
iv. The Immigration and Asylum Act 1999, sections 118(1) and 119, prevent local authorities in Scotland from housing anyone who is ‘subject to immigration control’ unless that person falls within a category prescribed by the Secretary of State. The Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, as amended by The Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2008 details the categories. EEA nationals who are not exercising Treaty rights will probably be considered to be ‘subject to immigration control’ and be ineligible.

d. Scots Law.

i. National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989 (as amended). These Regulations govern EEA nationals’ access to NHS care in Scotland. They appear to work similarly to the equivalent legislation for England and Wales. The National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2008 amended these regulations to ensure that any victim of human trafficking identified as such under the Council of Europe Convention on Action Against Trafficking in Human Beings is not charged for NHS care.

ii. The Scottish Code of Guidance on Homelessness still reflects the view that all EEA nationals, regardless of their circumstances, are eligible for housing in Scotland. This appears to contradict the effect of The Immigration and Asylum Act 1999 and The Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, as amended by The Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2008. This is discussed below and in an attached advice the AIRE Centre did for Citizens Advice Scotland.

c. Access to Benefits for EEA Trafficking Victims

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9. Many EEA trafficking victims who do not wish to return to their home countries face destitution in the UK because they cannot access the same social assistance benefits that a British Citizen in their situation would receive. The first part of this section refers to means-test benefits to which the right-to-reside test applies. These include Housing Benefit, Council Tax Benefit, Income Support, income-based Jobseeker’s Allowance, income-based Employment and Support Allowance, State Pension Credit and Working Tax Credit. This section proceeds by showing what an EEA trafficking victim can do to get access to these benefits. In order to be eligible for any of the benefits listed above, an EEA national must also meet the other eligibility requirements (e.g. a means test) that are imposed on British Citizens. You should first make yourself an expert on what these benefits are and whether they are appropriate for the victims you are working with. For more on what these benefits are and what the other requirements are, visit [www.direct.gov.uk](http://www.direct.gov.uk).

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### Challenging the Right-to-Reside Test

Using an argument based on a complex piece of EU legislation, Regulation 1408/71, an argument was put to the Supreme Court of the UK that the right-to-reside test unlawfully discriminates against EU migrants. That case failed. *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11. However, the AIRE Centre and the Immigration Law Practitioners’ Association raised this matter several years ago with the European Commission who have the power to take their own legal action against the UK if they think there is a violation of EU law. They are still looking into the matter.

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10. **Take advantage of the thirty-day reflection and recovery period.** Like all trafficking victims, EEA victims are entitled to a minimum third-day (in the UK, usually forty-five day) reflection and recovery period under Article 13 of the Trafficking Convention, during which they are entitled to support, including accommodation. They normally will not get the benefits listed above during that period, but will get access to a specific programme (soon to be

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30 See above, page 9, and specifically the section on the Social Security (Persons from Abroad) (Amendment) Regulations 2006.
administered by the Salvation Army). It is after that period that they will need access to the benefits discussed above.

11. **Get a residence permit as a victim of human trafficking.** Article 14 of the Trafficking Convention provides that victims of trafficking should get residence permits either when ‘the competent authority considers that their stay is necessary owing to their personal situation’ or ‘the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings’. EEA nationals are eligible for these permits, which in the UK take the form of discretionary leave to remain from the UK Border Agency of one year, renewable. **Note that in accordance with Schedule 18 of the Legal Services Act 2007, it is unlawful in Scotland for those who are not regulated by the Law Society of Scotland, the Faculty of Advocates or the Office of the Immigration Services Commissioner to give immigration advice, which includes advice to EEA nationals applying for discretionary leave to remain as victims of trafficking, to individuals.** Those who are regulated by the Bar Council of England and Wales or the Law Society of England and Wales cannot give such advice in Scotland at present. The AIRE Centre can provide free legal assistance in these cases. The same restrictions do not apply to advice on welfare benefits or housing. **EEA nationals who have discretionary leave to remain are entitled to access benefits.** Also note that Romanian and Bulgarian nationals who have discretionary leave to remain can work without needing authorisation; normally Bulgarians and Romanians need permission to work unless they are exempt. This is therefore particularly a good solution for Bulgarian or Romanian victims, or those victims who are unable to work or look for work, for example, because they are still recovering from the trauma they have experienced.

12. **Get the person looking for work.** EEA nationals who sign on as jobseeker’s at Jobcentre Plus are eligible for income-based Jobseeker’s Allowance, Housing Benefit and Council Tax Benefit, as long as they can show that they are ‘actually habitually resident’ in the UK and as
long as they comply with the conditions imposed on jobseekers. Jobseeking EEA nationals who have already paid some National Insurance contributions in the UK may be eligible for contribution-based Jobseeker’s Allowance, which is paid at a higher rate, if they have made sufficient contributions (see below on contribution-based benefits). Jobcentre Plus must take into account social security contributions paid elsewhere in the EEA as if they were National Insurance contributions that had been made in the UK for this purpose. Bulgarian and Romanian nationals cannot access benefits this way unless they are exempt from worker authorisation. It is always worth checking if they are. The list of exemptions is found in Regulation 2 of the Immigration (Accession and Worker Authorisation) Regulations 2006, as amended. After six months the authorities may attempt to stop EEA jobseekers from receiving benefit. However, as long as the person is seeking work and has ‘genuine chances of being engaged’, she should still be eligible for the benefit and it is worth challenging this.

13. Get into work. Workers are eligible for all of the benefits that a British Citizen would get, including Housing Benefit, Council Tax Benefit and Working Tax Credit. Part-time work counts towards making someone a worker. Indeed, the number of hours is not what is relevant; the question is solely whether the work is ‘genuine and effective’. The ECJ/CJEU has found that work of as little as twelve hours a week counts as work. Bulgarians and Romanians can only work if they have authorisation to work (which it is possible for an employer to obtain by applying to the Home Office) or if they are exempt from authorisation. It is always worth checking if they are. The list of exemptions is found in Regulation 2 of the Immigration (Accession and Worker Authorisation) Regulations 2006, as amended. Women are still considered workers or self-employed during maternity periods.

31 The phrase comes from Case C-292/89 Antonissen v Secretary of State for the Home Department, para 21. The right of jobseekers to access benefits like income-based Jobseeker’s Allowance, which are designed to facilitate their access to the labour market, was confirmed in the Vatsouras case. See above, note 5.
32 Case 139/85 Kempf v Staatssecretaris van Justitie.
14. **Get into self-employment.** EEA nationals engaged in self-employment are also eligible for the full array of benefits, including Housing Benefit and Council Tax Benefit. The difference between self-employment and work under EU law is that a self-employed person is not working under the direction of another. In order to be considered self-employed, it is generally considered that the person’s activity must be stable and continuous. There is one case from the benefits jurisdiction where it appears the authorities accepted that a Czech national was self-employed even though he only conducted his self-employed activity for about three to four hours a week and did not make a profit from it.\(^{34}\) There is no restriction on Bulgarians and Romanians engaging in self-employment, and getting access to the benefits system that way. However, it is very important for Bulgarians and Romanians to make sure that they are not working ‘under the direction of another’, which would make them workers; if they work without authorisation they are committing a criminal offence.\(^{35}\)

15. **Demonstrate that the person still has worker or self-employed status.** It is possible for workers and self-employed persons to ‘retain’ their worker or self-employed status in certain circumstances. These include:

   a. **When a person is temporarily unable to work due to illness or accident.**\(^{36}\) This may cover trafficking victims who are considered to have been workers in the past and now cannot work due to traumatisation, or who may have worked for a short period and then are unable to work because of illness or accident.

   b. **When a person has worked for more than twelve months, becomes involuntarily unemployed and then signs on as a jobseeker at Jobcentre Plus.**\(^{37}\) In these circumstances, the person is not a mere ‘jobseeker’ but in fact retains her ‘worker’ status and may be able to get more benefits (and housing – see below) as a result.

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c. When a person has completed a fixed-term employment contract of less than twelve months or has worked for less than twelve months and become involuntarily unemployed, and then signs on as a jobseeker at Jobcentre Plus. 38 A person in this situation can retain worker status for at least six months.

d. When a person has been made involuntarily unemployed and takes up vocational training; if the vocational training is in the same area as the person’s prior employment, it does not matter whether she was made involuntarily unemployed. 39

It is important to keep in mind that a worker can retain her worker status after even a brief stint as a worker, for example, of as little as two weeks. 40 This may provide protection, for example, for a trafficking victim who begins work but then is temporarily unable to work due to illness or accident.

16. Demonstrate that the person is permanently resident. Normally, an EEA national acquires permanent residence after residing in the UK for five years. Under the EU legislation, the requirement is five years ‘legal’, ‘continuous’ residence. 41 Breaks of less than six months in one year do not interrupt continuous residence. There is some debate however as to what residence is ‘legal’. The UK, under Regulation 15 of the Immigration (European Economic Area) Regulations 2006, the person must show she resided in accordance with the Regulations for five years, which means being a ‘qualified person’ (jobseeker, worker, self-employed, self-sufficient or student) or the family member of such a person for five years. People who have been economically inactive for any period will probably have difficulty showing they were self-sufficient, since the UK Border Agency expects to see bank account records and private sickness insurance for that period. While there is domestic case law that

38 Directive 2004/38, Article 7(3)(c).
40 Barry v London Borough of Southwark [2008] EWCA 1440.
supports the UKBA’s view, the AIRE Centre maintains that this is the wrong approach. The AIRE Centre published an information note, available on request, about this issue. A8 nationals could not qualify as ‘jobseekers’ before 1 May 2011 if they were not exempt from worker registration or had not completed twelve months’ registered work under the Worker Registration Scheme, which applied to them from the time their countries joined the EU until that date. The UKBA has indicated that time A8 nationals spent working but were not registered will not count towards permanent residence. A2 nationals must have worker authorisation or be exempt from it to qualify as jobseekers or workers. Furthermore, the UKBA refuses to accept any A2 national as being permanently resident unless they have resided for five years from the date of Bulgaria and Romania’s accession to the EU, i.e. 1 January 2007. That means that no A2 national can qualify for permanent residence, according to UKBA, until 1 January 2012. There has already been one unpublished determination of the First-tier Tribunal challenging this and the AIRE Centre would encourage A2s who have lived in the UK legally for five years to make applications for permanent residence. Note that EEA nationals also acquire permanent residents if they reach pension age in the UK, provided they have worked here for twelve months prior to that, or if they are permanently incapacitated, provided they are workers or self-employed and have become permanently incapacitated, having lived in the UK for at least two years; but they do not have to show two years’ residence if their permanent incapacity is due to an occupational injury. The AIRE Centre is not aware of any examples of trafficking victims

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43 The list of exemption is found in Regulation 2 of the Accession (Immigration and Worker Registration) Regulations 2004. They include, for example, A8 nationals who had permission to work under the Immigration Rules before 1 May 2004 and complete twelve months’ of work before, on or after that date, or if they are family members of EEA nationals (other than those who are completing their first twelve months of work under the Worker Registration Scheme).
44 See the Accession (Immigration and Worker Registration) Regulations 2004.
45 Directive 2004/38, Article 17(1).
46 Directive 2004/38, Article 17(2).
showing that they acquired permanent residence under these two special provisions, however.

17. **Demonstrate that the person is the family member of a worker, self-employed person, jobseeker or a permanent resident.** Family members include spouses, civil partners, children under 21, older children who are dependent on their parents, and dependent relatives in the ascending line. Certain ‘other family members’ (e.g. siblings, cousins) can apply to UKBA to be recognised as ‘other family members’ and then get access to benefits through their relatives. Durable partners of EEA nationals (regardless of whether they are themselves EEA nationals) can also apply to UKBA to be recognised as a durable partner and get benefits through their partners.

18. **Demonstrate that the person is the primary carer of the child in education of an EU migrant worker.** This is something of a secret (and very complicated) rule; it is not found anywhere in UK law but results from the case law of the Court of Justice of the European Union.\(^47\) This will only work for trafficking victims who have children in the UK, and if the child has been in education at some time while its parent (the trafficking victim or another EEA parent) has been in work. This is the *Teixeira* and *Ibrahim* rule. The AIRE Centre can help confirm that this will work.

### Appeals Against Refusal of Benefit

Anyone can assist an EEA national with a benefits appeal, and you can use the principles above to assist yourself or contact the AIRE Centre. For benefits above, the normal procedure is that if a person is refused by Jobcentre Plus (e.g. for income-based Jobseeker’s Allowance, income-related Employment and Support Allowance or Income Support), the local authority (e.g. Housing Benefit or Council Tax Benefit) or the Pension Service (State Pension Credit):

1. The first thing to do is to ask the agency to re-consider its decision. You normally have a month for this.
2. If they do not change their decision, you can lodge an appeal with the First-tier Tribunal (Social Entitlement Chamber). Normally, the agency will actually forward your application to the Tribunal.
3. Anyone can represent a person before the First-tier Tribunal. If you are unsuccessful, normally you ask the Tribunal for a statement of reasons; there is a one-month deadline to ask.
4. After you get the statement of reasons, you can ask the First-tier Tribunal (again, usually within a month) for permission to appeal to the Upper Tribunal (Administrative Appeals Chamber). Normally the First-tier Tribunal will review its decision and could change it; if not, they must decide whether to grant permission to appeal to the Upper Tribunal.
5. If you are granted permission, you can also represent the person in front of the Upper Tribunal. If you are not granted permission, you can ask the Upper Tribunal directly for permission to go to the Upper Tribunal. At this stage, though it is advisable to ask for help, and if it goes beyond the Upper Tribunal, the person will need a solicitor. However, if the person has been refused all the way to the Upper Tribunal (i.e. appeal refused by the First-tier Tribunal, permission refused by the First-tier Tribunal, permission refused by the Upper Tribunal) that is the end of the line.

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\(^47\) Case C-480/08 *Teixeira v London Borough of Lambeth*; Case C-310/08, *London Borough of Harrow v Ibrahim*.
19. There are some benefits to which the habitual residence test (with its right-to-reside test) does not apply. Many of these are contribution-based benefits, like Maternity Allowance, contribution-based Jobseeker’s Allowance and contribution-based Employment and Support Allowance. The individual concerned needs to have made sufficient National Insurance contributions to be eligible. However, if the person has made some National Insurance contributions in the UK, Jobcentre Plus must also account other social security contributions she has made in other EEA States as if they were National Insurance contributions made here. This is still unlikely to help many trafficking victims. Disability Living Allowance, Attendance Allowance and Carer’s Allowance; instead, it is a presence test also have no right-to-reside test attached to them, but they are very specific benefits. See www.direct.gov.uk. If you are working with a trafficking victim who you think should be entitled to these benefits but who is refused, contact the AIRE Centre.

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**Note on Residence Documentation for EEA Nationals**

EEA nationals can (but are not required) to obtain residence documentation, either that they are resident (a registration certificate) or permanently resident (a permanent residence card). This will facilitate (but may not guarantee) access to benefits, but it always worth applying for. These applications are free of charge and must be delivered ‘immediately’ (for registration certificates) or ‘as soon as possible’ (for permanent residence cards). An application for a registration certificate can be made in person or by post, using form EEA1 (available at http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/eea11.pdf). A permanent residence card application can be made by post (or in person, but for a fee) using form EEA3 (available at http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/eea31.pdf). Please remember though that helping individuals with these forms is probably immigration advice/services and so you cannot do it unless you are regulated by the Office of the Immigration Services Commissioner (www.oisc.gov.uk) or if you are a solicitor or advocate in Scotland (i.e. regulated by the Law Society of Scotland or the Faculty of Advocates). The AIRE Centre can often help with these applications.

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d. Housing and Community Care for EEA National Victims of Trafficking

20. Access to housing, that is, either temporary accommodation from a local authority for homeless persons or permanent social housing, is a complex matter in Scotland. While housing itself is a devolved competence, immigration is not, and under the Immigration and
Asylum Act 1999 (sections 118(1) and 119) local authorities in Scotland are prohibited from allocation housing or providing homelessness assistance to anyone who is ‘subject to immigration control’. It was (and in Scotland remains) unclear how this applies to EEA nationals. The Court of Appeal in England and Wales\(^48\) in a judgment dating back to 2006 found that EEA nationals who were not exercising Treaty rights (i.e. were not ‘qualified persons’) were in fact ‘subject to immigration control’, but that meant that they were eligible for housing in Scotland because of an exception the legislation provided at the time, covering citizens of countries that had ratified the European Convention on Social and Medical Assistance. The Scottish Code of Guidance on Homelessness still reflects this, stating that all EEA nationals in Scotland are eligible for allocation of housing and homelessness assistance.\(^49\) However, the law changed in 2008 (see above, pages 11-12) to get rid of this exception. Because the case that decided whether EEA nationals who were not exercising Treaty rights is only binding on England and Wales, there is a lot of confusion in this area. Included in this packet is an advice the AIRE Centre provided Citizens Advice Scotland on this complex subject. In brief, though, if an EEA national is a worker, self-employed person, has ‘worker’ or ‘self-employed’ status, is permanently resident or is the family member of a permanently resident person, (s)he is entitled to housing and homelessness assistance in Scotland as if (s)he was a British Citizen. Otherwise, you should seek specialist advice (including from the AIRE Centre).

21. Under Schedule 3 to the Nationality, Immigration and Asylum Act 2002, the authorities in Scotland are also prohibited from providing certain forms of support to EEA nationals, including under the following:

a. section 12 or 13A of the Social Work (Scotland) Act 1968 (c. 49) (social welfare services);

b. section 29(1)(b) of the Housing (Scotland) Act 1987 (c. 26) (interim duty to accommodate in case of apparent priority need where review of a local authority decision has been requested); and

c. sections 22, 29 and 30 of the Children (Scotland) Act 1995 (c. 36) (welfare and other powers which can be exercised in relation to adults).

22. The test is whether refusing this assistance would break EU law rights or constitute a human rights violation. The AIRE Centre thinks that this entire set-up is problematic under EU law, but the way things work under domestic law, an EEA national who was actually entitled to these things would probably not need them, as she would be entitled to other benefits. It is a frustrating (and we think unlawful) scheme but so far we have been able to do little about it from a legal standpoint.

e. NHS Care for EEA Trafficking Victims

23. Anyone who has been formally identified as a victim of human trafficking is entitled to NHS care in Scotland. This is provided for under The National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2008.

24. If you have an EEA national who has not yet been recognised as a victim of trafficking and is being refused care, this is a complex matter and you can contact the AIRE Centre for further advice. However, any EEA national should be able to register with a GP either as a permanent or a temporary patient. If you are having problems with that, there may be a race-discrimination problem.

f. Immigration Problems for EEA National Victims

25. This section covers three issues:

   a. Expulsion of EEA national trafficking victims on grounds of public policy or public security.
b. Expulsion of EEA nationals because they are homeless.

c. ‘Voluntary’ returns funded by local authorities.

26. Note that in the first two situations, you cannot advise the trafficking victim about this situation unless you are a solicitor, a barrister or someone regulated by the Office of the Immigration Services Commissioner. In all three situations, you should seek advice, from the AIRE Centre or otherwise. If an EEA trafficking victim has not yet been referred to the National Referral Mechanism and this is happening to her, it may be appropriate to refer her, at least to delay this action and get her some support.

i. Expulsion of EEA national trafficking victims on grounds of public policy or public security.

27. Normally, it is unlawful to expel an EEA national from the United Kingdom unless that expulsion is justified on grounds of public policy, public security or public health. Specifically, the authorities must show that the person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. An expulsion can be based in part on a past conviction, but the authorities must show that the person represents a present threat. Expulsions must be proportionate, taking into account ‘considerations such as how long the individual concerned has resided [in the UK], his/her age, state of health, family and economic situation, social and cultural integration into the [UK] and the extent of his/her links with the country of origin’.

28. If an EEA national is a permanent resident in the UK, her expulsion will only be lawful if it is based on serious grounds of public policy or security, so it is worth trying to prove that someone faced with expulsion who has lived in the UK for five years is permanently resident. Someone who has resided in the UK for ten years can only be expelled on imperative

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50 Directive 2004/38, Article 27(1).
51 Directive 2004/38, Article 27(2).
52 Directive 2004/38, Article 28(1).
grounds of public security.\textsuperscript{54} An EEA minor can only be expelled from the UK on imperative
grounds of public security or if it is in her/his best interests.\textsuperscript{55}

29. EEA national victims of trafficking who have not been identified as victims often end up in
prison, convicted of offences committed in the course of the trafficking. The AIRE Centre,
which runs surgeries for EEA prisoners in some women’s prisons, has identified several
victims this way. Such individuals should not be expelled, the AIRE Centre believes, and,
indeed, should have their convictions reviewed.\textsuperscript{56} Those coming into contact with EEA
prisoners (or indeed any prisoners) should be sure to consider whether they may have been
trafficked.

ii. Expulsion of EEA nationals because they are homeless.

30. Last year, the UK also started a pilot project attempting to expel homeless EEA nationals
on the basis that they are not exercising residence rights in the UK.\textsuperscript{57} The AIRE Centre
thinks all such expulsions are unlawful; in many cases the individuals concerned will be
exercising residence rights. You can find a factsheet about this at
http://www.ilpa.org.uk/infoservice/30\%2010.08.00\%20Factsheet\%20on\%20homeless\%20EEA\%20nationals.pdf. If you are working with a victim in a situation like this, you should get
advice immediately. It would be particularly unlawful, the AIRE Centre believes, to expel an
EEA national trafficking victim on these grounds.

iii. ‘Voluntary’ returns funded by local authorities.

31. As explained above, local authorities are prohibited with providing EEA nationals in most
circumstances with basic forms of support. Local authorities do however have the power to
make travel arrangements for EEA nationals to return home, and to house them in the

\textsuperscript{54} Directive 2004/38, Article 28(3)(a).
\textsuperscript{55} Directive 2004/38, Article 28(3)(b).
\textsuperscript{56} See Regina v O [2008] EWCA Crim 2835.
\textsuperscript{57} The legal basis for this is Regulation 19(3)(a) of the Immigration (European Economic Area) Regulations 2006.
meantime. Homeless EEA national trafficking victims may therefore be offered accommodation if they agree to take a bus or plane ticket to return home. The AIRE Centre thinks this kind of ‘voluntary’ repatriation is very problematic and that most individuals should be eligible for benefits or able to make themselves eligible. Contact the AIRE Centre to discuss these cases.

g. Criminal Law Issues for EEA Trafficking Victims

32. Because free movement of persons has become so easy in the European Union, facilitating criminal activities (such as human trafficking), the European Union has developed certain legislative instruments meant to help EU Member States work together to combat crime and enforce criminal laws. Two of those may have adverse effects on EEA trafficking victims in the criminal justice system who have not yet been identified as victims.

33. The European Arrest Warrant is an expedited extradition procedure between EU Member States. It provides few procedural safeguards and is meant to allow States speedily to surrender suspected criminals or those who have to serve a sentence. Because of these speedy procedures, victims of human trafficking who may be at risk in their EU country of origin are particularly unlikely to be identified in this process. Human rights arguments – including the argument that a person will be subject to inhuman and degrading treatment or re-trafficking in the country to which she is being surrendered – can be made to stop a removal. It can also be argued that removal under a European Arrest Warrant will constitute an unjustified interference with the person’s right to respect for private and family life. Trafficking victims in these circumstances need a criminal solicitor to assist. The AIRE Centre can provide support.

59 The European Arrest Warrant was established by EU Framework Decision 2002/584/JHA.
60 Article 3 of the European Convention on Human Rights.
62 Article 8 of the European Convention on Human Rights.
34. **Mutual recognition of custodial sentences** means that prisoners can be sent back, without their consent, to another EU Member State to serve their sentences. This raises issues similar to the European Arrest Warrant. Victims may go unidentified and their returns may violate human rights principles. By December 2011, all EU Member States will have implemented the EU Framework Decision\(^63\) that allows for these non-consensual transfers. There are three circumstances in which the non-consensual transfer of prisoners between EU Member States will be permitted under the Framework Decision:

a. where the person is a national of the EU Member State to which she is being sent and she lives there;\(^64\)

b. where the person is being sent to the EU Member State where she will be sent on the basis of an expulsion/deportation order;\(^65\)

c. where the person is being sent to the EU Member State to which the person fled or otherwise returned because of the criminal proceedings that resulted in her imprisonment.\(^66\)

**g. Getting Help**

35. The AIRE Centre runs specialist projects on human trafficking. You can contact Sarah St.Vincent at [sstvincent@airecentre.org](mailto:sstvincent@airecentre.org) or Adam Weiss, AIRE’s Legal Director, at [aweiss@airecentre.org](mailto:aweiss@airecentre.org). In urgent situations, call the AIRE Centre on 0207 831 4276.

Adam Weiss
The AIRE Centre

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\(^63\) Framework Decision 2008/909/JHA.
\(^64\) Framework Decision 2008/909/JHA, Article 6(2)(a).
\(^65\) Framework Decision 2008/909/JHA, Article 6(2)(b).
\(^66\) Framework Decision 2008/909/JHA, Article 6(2)(c).