



The Social Security, Housing Benefit and
Council Tax Benefit (Miscellaneous
Amendments) Regulations 2007
(S.I. 2007 No. 1331)

Report by the Social Security Advisory Committee
under section 174(1) of the Social Security
Administration Act 1992 and the statement by the
Secretary of State for Work and Pensions in
accordance with Section 174(2) of that Act.

*Presented to Parliament by the Secretary of State for Work and Pensions
by Command of Her Majesty
May 2007*



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Statement by the Secretary of State for Work and Pensions in accordance with Section 174(2) of the Social Security Administration Act 1992

THE SOCIAL SECURITY, HOUSING BENEFIT AND COUNCIL TAX BENEFIT (MISCELLANEOUS AMENDMENTS) (No. xx) REGULATIONS 2006

Introduction

1. Draft Regulations were referred to the Social Security Advisory Committee (“the Committee”) on 2 August 2006 in accordance with section 172(1) of the Social Security Administration Act 1992.
2. The proposed Regulations would exclude “persons from abroad” from making an “advance claim” under regulation 13 of the Claims and Payments Regulations. Regulation 13 can apply in a situation where, although an individual claimant does not satisfy the conditions of entitlement to benefit at that particular point in time, the Secretary of State takes the view that, unless there is a change of circumstances, the conditions of entitlement will be satisfied on a specific date occurring within the next three months. In such a case, the Secretary of State may treat the claim as made from that specific date and award benefit accordingly.
3. Following, the Court of Appeal judgment in *Bhakta*¹, the Secretary of State is not precluded from awarding benefit in advance through applying regulation 13 in relation to persons from abroad. Such a determination requires him to specify when an individual claimant would satisfy the habitual residence test (including the right to reside aspect). The benefits that contain the habitual residence test where this advance claims power is relevant are Income Support (IS) and income-based Jobseeker’s Allowance (JSA(IB)). The proposed Regulations would exclude a person from claiming one of those benefits in advance in those circumstances. They would apply a similar exclusion in respect of similar advance claims powers for State Pension Credit, Housing Benefit (HB) and Council Tax Benefit (CTB) – benefits which also generally require a claimant to be habitually resident.
4. The purpose of the habitual residence test is to safeguard the social security system from abuse by people who wish to come to the UK to live off benefits. The test was introduced into income-related benefits² in 1994 and there have been a number of modifications to the test over time. The most significant amendment was in May 2004 when the right to reside aspect was introduced. That aspect of the test was further modified in April 2006 so that certain rights to reside do not satisfy that aspect of the test. The present habitual residence test provides that a person must, subject to certain exemptions, have a relevant right to reside and be habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland (known as the Common Travel Area (CTA)) to qualify for income-related benefits. The purpose of the test is to combat abuse of the benefits system by people who have come here for a short stay and wish to fund their time in the UK by claiming benefits or who stay longer and who, for various reasons, may decide to live indefinitely in the UK without being economically active.

1 Secretary of State for Work and Pensions v *Bhakta* [2006] EWCA Civ 65.

2 The income-related benefits are Income Support, State Pension Credit, income-based Jobseeker’s allowance, Housing Benefit and Council Tax Benefit.

5. The Government believes that, although the advance claims provisions are a highly useful discretionary tool available to the Secretary of State and operate to the benefit of individual claimants and the DWP alike in some circumstances, bringing the habitual residence test within the scope of the advance claiming provisions serves to weaken the test. The proposed regulations will ensure the underlying principle of the test to prevent exploitation of the social security benefit system is preserved.

6. I am very grateful both to the Committee and to those who made representations to it. The views expressed and the resultant report have benefited from careful and constructive thought and the arguments for not proceeding with the proposed legislation have been advanced in a cogent and powerful way. Nonetheless, after very careful consideration, I have decided that the draft legislation should be submitted for Parliamentary approval as originally intended. This statement sets out, in accordance with section 174(2) of the Social Security Administration Act 1992, my reasons as to why I have not felt it appropriate to give effect to the Committee's recommendation on this occasion. Despite being unable to accept the Committee's central recommendation, there are other aspects of concern mentioned in their report that I have been able to address more positively. This statement therefore sets out the extent to which I have been able to heed and apply their advice.

The Committee's report and the Government's response

Introduction 7. **The Committee acknowledged that decisions on habitual residence could be complex but stated that in their view they were not uniquely difficult. Respondents to the Committee's report have noted examples of equally challenging decisions.**

8. The Court of Appeal judgment concerned a case that was decided under the original habitual residence test before the right to reside aspect was added in May 2004. Nonetheless, the judgment is still relevant now that the test is a two-stage test.

9. The Government accepts that habitual residence decisions are not uniquely difficult but it believes that applying the judgment, in practice, has led to a more complex decision-making process. Provided none of the exemptions to the test applies, decision-makers are required, first, to consider whether a person has a right to reside in the UK. This may require consideration of both domestic legislation and EC law in deciding, for instance, whether a person is a work-seeker or is economically in-active. If a person has a right to reside the decision maker then considers whether the person satisfies the second stage of the test – namely whether the claimant is in fact habitually resident. Under this part of the test the decision-maker is required to take account of all the circumstances of the case, including whether or not a person has a settled intention to reside and whether he or she has been resident for an “appreciable period of time”. If both stages are satisfied then the person satisfies the habitual residence test.

10. Where a person demonstrates a settled intention but has not been here for an “appreciable period of time” the decision-maker is now required, following the judgment, to consider using the discretionary powers available to the Secretary of State to decide a date in the future, but within three months of the date of claim (or four months in the case of claims for State Pension Credit), when the person will be habitually resident. Again this involves the decision-maker in carrying out a further weighing of evidence about the claimant's circumstances to decide a future date. This adds a further step to what is already a lengthy decision-making process. For this reason the Government believes that applying the advance claims provisions in the context of the habitual residence test has introduced an inappropriate level of complexity and speculation into the decision-making process.

11. **The Committee has noted that respondents to the consultation exercise rejected the Department's view that the determination of an advance claim would involve the decision-maker speculating about the date from which the habitual residence test could be satisfied.**

12. The Government acknowledges that the effect of the Court of Appeal judgment is that in some cases it would be possible for a decision-maker to find a future entitlement date with reasonable certainty. However, in most cases the Government believes that a decision-maker would have to move into what might be termed as the impermissible realm of speculation in order to make an advance award of benefit. An example of where this might happen is where a UK national who, following a brief period of residence makes a claim for benefit but has had no previous periods of residence in the UK and has maintained significant links with their country of origin. This contrasts with the person in the Court of Appeal case who had previous periods of residence in the UK and also had strong family ties here. Accordingly, the Government considers that it will be rare that the advance claims provisions will be relevant to decide a future date on which a claimant will be habitually resident.

13. The Committee's report says that the advance claims provisions contain a discretionary rather than a mandatory power and if the burden on decision-makers in speculating about future events is considered too great they have discretion under the existing provisions not to make such a decision.

14. The Government agrees that the advance claims provisions do not oblige the Secretary of State to treat a claim as made in advance in every case. However, the Secretary of State is required to consider when it would be appropriate to use or not use his discretion and that in turn adds to the complexity of the decision-making process. If the Secretary of State chooses not to exercise his discretion in the claimant's favour this will, in practice, increase the number of potential legal challenges. The Government would consider this to be a particularly unwelcome development, given the other avenues that exist for dissatisfied customers to seek redress when they have been held to have failed the habitual residence test. A person, for example, who is disallowed benefit on the grounds of failing the habitual residence test can apply for a revision of that decision, or appeal against it to an appeal tribunal or, separately or in conjunction with either of those choices, make a new claim to benefit at a later date.

15. The Committee were concerned that excluding the habitual residence test from the advance claims provisions could invite a sequence of re-claims, punctuated by appeals against a succession of disallowances, and could place greater burdens upon the claimant and the Department alike.

16. As discussed, the Government believes that only a small number of cases are likely to benefit from the advance claim provisions. Generally, this is where the decision-maker finds the claimant has a settled intention to reside and the only unsatisfied element of the test is that the claimant has not resided for an appreciable period of time. The Government believes that removing the habitual residence test from the advance claims provisions, in practice, is likely to have a minimal effect on the number of re-claims and subsequent appeals against disallowance of benefit. Our experience generally suggests that people only make one repeat claim to benefit.

Operating the Habitual Residence Test

17. The Committee's report questions the Department's assertion that the inclusion of a consideration of the possibility of entitlement arising at a future date would be either especially problematic or administratively burdensome. The Committee has suggested that these burdens could be avoided by introducing, at the point of claim, an administrative process for gathering a range of evidence with a view to establishing when an appreciable period of residence will have been completed.

18. The Government believes that the processes already in place enable decision-makers to request further information from the claimant. Where additional information is required, a decision-maker can request it from the claimant without jeopardising the claimant's date of claim or the date from which he or she would subsequently be entitled to benefit.

Administrative issues **19. The Committee expressed concern that people who initially failed the test and subsequently appealed the decision to a Tribunal were not advised to make a further claim to benefit pending the appeal being heard.**

20. The Department intends to carry out a review of customer information and communications to ensure customers are made aware of the implications of failing the habitual residence test. As part of that process it needs to be emphasised by the Department that neither the fact that a person's claim for benefit has been disallowed on the grounds that the habitual residence test has not been satisfied, nor the fact that there is an outstanding appeal against that decision, prevents that individual from making a fresh claim for benefit. The Department considers that improved communications with customers is the best way of reducing any stress or uncertainty faced by customers in making a claim for income-related benefits.

21. The Committee said they could find no evidence that applying advance claims provisions to the habitual residence test could open up the risk of fraud and error. The Committee also thought that there were in-built protections against abuse in regulation 13- namely: the advance period in respect of which an award can be made is limited to three months (four months in the case of State Pension Credit), the fact that the decision maker should take a view on whether he thought a change in circumstances is likely and exercise his discretion or not in the light of that opinion and the fact that claimants were subject to the normal rules on reporting changes.

22. Although, there are built-in protections there are other factors which lead the Government to a conclusion that, without the amending legislation in place, there will be more instances of fraud and overpayments. In practice a person who is receiving benefit at regular intervals is often more aware of his/her responsibility to report a relevant change of circumstances than a person not yet receiving any benefit, even though it may have been awarded. In the not uncommon situation where a person arrives in the UK, claims benefit but then leaves within a very short period of time, there is scope for overpayments to accrue if claims in advance are allowed from such persons and they do not report the fact that they have left the UK.

23. It would be possible to check the customer's circumstances before paying the benefit, but it would be strange to introduce further cumbersome procedures as part of a change supposed to smooth the claims process.

24. The Government therefore, believes that in order to continue to protect the integrity of the benefit system it is reasonable to expect a person who fails the test, for whatever reason, to make a fresh claim to benefit.

Summary of Responses to the Consultation **25. The Committee's report and respondents questioned why the Department had offered no evidence that the guidance on the judgment had proved problematic in operation.**

26. Following the Court of Appeal judgment guidance was issued to decision-makers and was welcomed by a respondent as it included case studies for how the rule should apply in practice. On receiving the Committee's report the Department decided to assess how the guidance was being applied in practice.

27. Initial findings have indicated that there is evidence that some decision-makers are having difficulty applying the guidance relating to the judgment in a proper and consistent manner. For example, evidence suggests that decision-makers are applying the advance claims provisions in circumstances where it is hard to see on what basis a future date of habitual residence can be predicted with sufficient certainty. One option would be to amend the guidance. However, in the light of the other considerations discussed, the Government does not like this option. Although it cannot be quantified precisely there is a risk of exploitation against which the Government needs to safeguard the benefit system.

28. The Government believes that if the test is not applied in the way intended it could lead to abuse of the benefits system by allowing advance awards to people who have not yet demonstrated a settled intention to settle in the UK.

**The Committee's
Conclusions**

29. The Committee's Report expresses the view that the Department has made neither a convincing nor compelling case for excluding the habitual residence test from the advance claim provisions and are therefore removing a useful procedure for decision makers.

30. The Government cannot accept the Committee's conclusion on this point. In particular, this statement explains the practical impact on the administrative process; making decision-making even more complex and perhaps requiring the gathering of additional evidence for deciding a future date on which a person could be habitually resident which is onerous and in most cases unnecessary. There is also evidence that decision-makers are having difficulty applying the judgment as intended. In addition, the Government believes that the advance claim provisions are not suitable for making habitual residence decisions because it could expose the benefit system to further abuse and error.

31. The Committee's report expressed the view that the burden should not be on the claimant because he or she is not in a good position to judge whether he or she has met the habitual residence test.

32. The Government believes that people who come to the UK are generally able to find out, in advance, what the requirements are for meeting the habitual residence test. Information can be obtained from leaflets and from the Department's website. They themselves will also know what their purpose is in coming to the UK and whether they intend to settle here and what steps they have already taken to be resident.

**The Committee's
Recommendation**

33. The Government notes the Committee's recommendation that the Government does not proceed with these proposed amendments. The Government has considered very carefully the recommendation but for the reasons outlined in my statement and, in particular, the need to continue to protect the benefit system against exploitation, intends to proceed.

Conclusion

34. The Government is grateful to the Committee and those interested parties who responded to the consultation exercise for their consideration of the draft regulations and their comments on them.

35. The Regulations are now laid before Parliament.

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The Rt Hon John Hutton MP
Secretary of State for Work and Pensions
Richmond House
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London
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6 October 2006

Dear Secretary of State

REPORT OF THE SOCIAL SECURITY ADVISORY COMMITTEE UNDER SECTION 174 OF THE SOCIAL SECURITY ADMINISTRATION ACT 1992

THE SOCIAL SECURITY, HOUSING BENEFIT AND COUNCIL TAX BENEFIT (MISCELLANEOUS AMENDMENTS) (No. xx) REGULATIONS 2006

1. Introduction

1.1 At the Committee's meeting on 2 August 2006, officials from the Department for Work and Pensions presented these proposed changes to the income-related benefits for our consideration. The proposals to amend regulation 13 of the Claims and Payments regulations would have the effect of excluding 'persons from abroad' from the provisions permitting 'advance claims' to be made in respect of Income Support (IS), income-based Jobseeker's Allowance (JSA), State Pension Credit (SPC), Housing Benefit (HB) and Council Tax Benefit (CTB).

1.2 Separate regulations, similar in effect, are proposed for Northern Ireland.

1.3 On 9 August the Committee published a press release inviting comments on the proposals to reach us by 15 September 2006. We received and took into account representations from 7 organisations and individuals. These are listed at Annex A.

1.4 We would like to thank all those who made representations to the Committee, and officials from the Department for Work and Pensions (DWP) for their assistance.

2. Details of the Proposals

2.1 The proposed changes, intended to come in into effect in October 2006, would exclude people from abroad who must satisfy a test of 'habitual residence' in order to qualify for the income-related benefits from the scope of Regulation 13. This regulation allows the Secretary of State to make an advance award of any benefit where there is at present no entitlement but it appears that there will be at a future date (within 3 months) if there is no change of circumstances.

2.2 Fuller details of the changes are set out in the Explanatory Memorandum reproduced at Annex C and summarised below:

2.3 The amendment has been proposed against the background of changes to the habitual residence test that were introduced in May 2004 and April 2006 that provide that a person cannot be treated as habitually resident in the Common Travel Area unless he or she can demonstrate the appropriate right to reside there. People arriving in the UK and making claims to benefit are generally required to satisfy the test. However, there are some exemptions, for example EEA workers.

2.4 In February this year, the Court of Appeal in *Secretary of State v Bhakta [2006] EWCA Civ 65* upheld a decision of the Commissioner in CIS/1840/2004 that the Decision Maker (DM), on behalf of the Secretary of State, does have the Regulation 13 power to make an advance award of benefits from the date habitual residence is likely to be established, subject to the 3-month limit. The Commissioner held that the mere passage of time did not amount to a change of circumstances, and thus making an advance award was not precluded.

3. The Department's Position

3.1 The Department has stated that the 'advance claims' provision is effectively an administrative easement, benefiting both DWP staff and the claiming public. It is employed when a claim would be disallowed, but it is evident that entitlement will arise at a future date (the Department offers the examples of a claimant attaining a 'qualifying age' for benefit within three months of the original claim, and a claimant for whom the period covered by final earnings will shortly expire). The claim is not disallowed and there is no requirement to submit a further claim when entitlement arises.

3.2 In the case of those claimants who are required to satisfy the habitual residence test for benefit, the Department points out that habitual residence is not a term defined in legislation (although there is an extensive body of domestic and EU case law on its interpretation). The question of whether the claimant is habitually resident is determined with reference to all the circumstances of the case, but the key factors will be whether there exists a 'settled intention' to reside and whether the residence has been for an 'appreciable period of time'. However, both these factors should be considered within the wider circumstances of the individual case.

3.3 The Department has indicated that, following the Court of Appeal judgment, it does not regard it as either practical or appropriate to apply the advance claims provisions to claims involving a determination of both the right to reside and habitual residence. It explains that the advance claims provisions are intended to apply to more easily predictable future events, and cites potential complexity, the burden on Decision Makers (DMs) of the discretion to speculate about future events and circumstances, and the risk of fraud and abuse as militating against permitting such an administrative easement to decisions on habitual residence.

4. The Committee's views

Introduction

4.1 Our starting point for consideration of these proposals is the fact that Regulation 13 confers a power, but not an obligation, to make a decision on advance claims in the prescribed circumstances. If, in individual cases involving habitual residence or indeed other complicating factors, the burden on DMs in speculating about future events is considered too great, they have the discretion under existing provisions not to make such a decision. Clearly, then, the existence of such a burden is not, by itself, a sufficient argument to deny a discretionary power in habitual residence cases.

4.2 In its memorandum, the Department does not explicitly address this point, but a consideration may be that consistently adverse decisions on the application of a discretionary advance claims provision may lead claimants to seek judicial review on the grounds that the discretion has been fettered. We appreciate this and other arguments invoked against advance claims, but as is made clear in the remainder of this report, there are significant advantages in the preservation of the discretion and we consider that these outweigh the identified disadvantages.

4.3 We also appreciate that decisions on habitual residence are not always clear cut and that specialist decision-making skills have been developed across the Department to handle these cases (including centralised decision-making for certain claimant groups). However, these decisions are not uniquely difficult, and we would question the Department's assertion that the inclusion of a consideration of the possibility of entitlement arising at a future date would be either especially problematic or administratively burdensome. With regard to the former, a range of evidence could be requested and assessed at the point of claim. With regard to the latter, it seems to us that the consequences of not considering future entitlement – inviting a sequence of re-claims, punctuated by appeals against a succession of disallowances – places greater burdens upon the claimant and the Department alike.

4.4 We have also noted that in the *Bhakta* judgment, Auld L J commented:

“The mere possibility that later unforeseen circumstances, such as ill health or family tragedy, might affect the will or ability of a claimant to adhere to an intention to settle here should not, in my view, prevent the Secretary of State from deciding in his or her favour on a claim for advance income support.

... it is not necessary ... that there should be certainty or near certainty of the claimant achieving whatever ‘appreciable period’ of actual residence is considered appropriate by the decision maker. It is plain from the wording of Regulation 13 (1) that something less than certainty is required, since it confers on the Secretary of State a power to make such an award where, in his ‘opinion’, the claimant will satisfy a claim at a future date ‘unless there is a change of circumstances’.”

Accordingly, the Court determined that the issue was one of reasonable foresee-ability, not certainty.

Operating the Habitual Residence test

4.5 In order to satisfy the test of habitual residence in the United Kingdom (UK), a person must have a ‘right to reside’ in the UK, have taken up residence and lived there for a period of time. In addition to *Bhakta* there have been several other significant pieces of case law in recent years¹ that address the questions of what constitutes residence, and the period of time that must elapse before that residence becomes ‘habitual’. As we understand it, someone who has taken up residence and expressed an intention to settle in the UK is not expected to have resided for a fixed period in order to demonstrate that he is settled here: depending on the facts of the case, the period could be quite short. The critical issues for DMs are whether the evidence presented by the claimant supports the expressed intention to settle in the UK, and what that evidence suggests would be an appropriate period of residence for that intention to have been fulfilled. Early case-law, which required such matters as financial viability to be taken into account, has now been superseded, with the result that the test is now much easier to apply.

4.6 Obviously, the gathering of such evidence in the course of taking a claim for an income-related benefit will not always be straightforward, especially where it is necessary to delve into the detail of an individual’s circumstances in the course of a ‘phone-based’ interview. Nevertheless, we can see no reason why evidence cannot be considered with a view to establishing when an appropriate period of residence will have been completed, in much the same way as the evidence would be considered retrospectively. For example, in those cases of UK residents who return to the UK after a period spent living and/or working abroad, and persons entitled to UK passports who may migrate to the UK with a view to settlement without previously having lived here, such evidence could be expected to be available to be weighed up at the initial claim.

¹ **Nessa v Chief Adjudication Officer [1999] 1 WLR 1937 and Swaddling v Adjudication Officer (Case C-90/97) [199] ECR 1-1075.**

Administrative issues

4.7 Before *Bhakta*, it was commonplace for those claimants who had 'failed' the habitual residence test, and been refused benefit to make frequent re-claims for benefit, appealing each refusal, until such time that they 'passed' the test. We know that in terms of both claims procedures in Jobcentre Plus and The Pension Service, and the workings of the Appeal Tribunals, these cases will have been generating considerable work for all concerned. Furthermore, someone who fails the test and then appeals but does not reclaim, may wait several months for the appeal to be heard. The claimant may well have been able to satisfy the test not long after the initial claim, and yet could lose the appeal as the tribunal can only look at the case down to the date of decision. By the time a successful claim has been made, several months of benefit entitlement will have been lost. It is also evident from the findings (paragraph 26) of the Tribunal of Commissioners that ruled in the *Bhakta* case in 2003 that from the claimant's point of view, the Department's failure to inform her of her right to pursue a re-claim whilst the appeal was pending risks maladministration. The observations of our respondents suggest that the circumstances of the *Bhakta* case are still commonplace.

4.8 Claimants who did not have access to representation and support from a specialist agency may not have appreciated that a re-claim could be made as and when an extended period of residence could be offered as proof that residence had become 'habitual'. Certainly, the communications claimants receive (in the form of notices of disallowance, for example) do not prompt a re-claim, or offer sufficient reasons for the disallowance to suggest that re-claim is a possibility. The information on the habitual residence test that is publicly available (for example on the Department's website) would be of little assistance to the claimant in this respect. Accordingly, we would question the Department's presumption that the would-be claimant will somehow know when the point has been reached at which residence is 'habitual' and a claim can succeed.

4.9 We have considered the Department's assertion that advance claims open up the risk of fraud and abuse by offering a target point for those willing to wait for public funds to be made available. We find no evidence for this and think it unlikely because the scope to exercise discretion that is offered by Regulation 13 is balanced by in-built protection against abuse. The period within which an award may begin is limited to three months, and the DM is not compelled to use his discretionary power where he determines that the facts suggest that a change of circumstance is likely to occur. At the same time, the normal rules on the reporting of changes of circumstances would apply to a claimant who is subject to an 'advance claim' determination, and we cannot see any particular risk of an increase in overpayments in relation to habitual residence cases.

5. Summary of Responses to the Consultation

5.1 We were struck by the consistency of the messages and evidence that were presented to us by respondents. Without exception, they pointed to the discretionary nature of the advance claims provision and the lack of evidence that the exercise of discretion in habitual residence cases would present either exceptional difficulties for DMs or be particularly open to abuse. A number of respondents offered examples of equally challenging cases that DMs routinely have to deal with. Likewise, the general ‘usefulness’ of the provision – in terms of reducing the administrative burden of repeat claims and appeals, the stress and uncertainty of this cycle upon claimants, and the potential to reduce complexity was identified.

5.2 Most respondents rejected the Department’s assertion that the determination of an advance claim would involve the DM in ‘speculation’. Instead, the DM would be making an assessment of ‘... the likelihood or reasonable foresee-ability, not a certain prediction’. As the Court observed in the *Bhakta* case: *‘Where reasonable confidence as to continuity of such an intention becomes speculation in such decision-making is essentially a matter of fact for the decision maker’*. Other respondents noted that the facts of the cases with which they had been involved (for example, a UK national returning to the UK following a relationship breakdown who had severed all links with her former country of residence) pointed clearly to the continuity of intention and the DM would clearly be as well, if not better, placed than the claimant to assess when habitual residence would become established.

5.3 One respondent praised the guidance issued by the Department after the appeal judgment that the proposed amendment would overturn as *‘...eminently sensible ... including case studies for how the rule would apply in practice.’* The Court of Appeal had judged that the determination of what would constitute the necessary period of residence fell within the remit of the DM, and the Department has not offered any reasons why such a determination should more properly fall to the claimant himself. This respondent also questioned why the Department had offered no evidence that the guidance on the judgment had proved problematic in operation.

5.4 Respondents also cited poor, and sometimes incorrect or misleading information to claimants (for example, telling them that they cannot claim again until an appeal is disposed), particularly for claimants whose first language is not English, as hampering the effective, fair and open operation of the habitual residence test. Similar concerns were expressed about standards of decision making across the Department, pointing in particular to failures to reconsider decisions during the sometimes lengthy periods that appeals are pending.

5.5 None of the respondents supported the proposed amendments and there was a strong consonance in both their observations on the current operation of the test, and the reasons put forward for the retention of an advance claims provision for this category of cases.

6. Conclusions

6.1 We do not think that the Department has made either a convincing or compelling case for change. Rather than closing a potential loophole, and avoiding complexity for DMs, an opportunity is being missed to allow DMs to exercise reasonable judgement where the facts of the case merit the exercise of discretion, and avoid some of the administrative and procedural 'log jams' that follow from repeated claims and appeals. Advance awards are not common for any type of claim, and the DM would always need to be clear that other disqualifying events are unlikely, such as taking up work.

6.2 From what we know of the workings of the system in practice (for example, the claim/appeal/reclaim/appeal cycle) we can see no advantage in relying on the would-be claimant's developing appreciation of the circumstances of his residence to determine whether and when he should pursue a claim then. The claimant is unlikely to be as well placed to make a judgement as is the DM, who understands the law and guidance on it, and its interpretation, and is trained to weigh up the evidence.

7. Recommendations

7.1 We recommend that the Government does not proceed with these proposed amendments.

Richard Tux

Committee Chairman

ANNEX A

Harrow Citizens Advice Bureau

London Advice Services Alliance

Hounslow Social Inclusion, Welfare Rights and Money Advice Unit

Child Poverty Action Group

Stockport Advice

Immigration Law Practitioners Association

Law Centre (NI)

ANNEX B

Chairman: Sir Richard Tilt

Members: Kwame Akuffo
Les Allamby
Simon Bartley
Brigid Campbell
Dr Angus Erskine
Richard Exell OBE
Alison Garnham
Professor Helen Kempson
Laurie Naumann
Professor Anthony Ogus CBE
Patricia Smail
Professor Robert Walker
Professor Janet Walker

Secretariat: Gill Saunders (Secretary)
Anna Bee
Ethna Harnett
Bob Elbert
Denise Clark

EXPLANATORY MEMORANDUM

HABITUAL RESIDENCE AND ADVANCE CLAIMS

1. The proposed amendment is to regulation 13 of the Claims and Payments Regulations.
2. This is a provision which enables a person to make a claim in respect of a future period where there is no present entitlement but, on the existing circumstances, an entitlement will arise on a fixed and certain day. It is effectively an administrative easement which operates for the benefit of both DWP staff and the claiming public. It avoids a claim being disallowed and the individual advised to submit another claim when entitlement arises. It is commonly used in cases where, for example, the claimant will reach a qualifying age within three months or the period covered by final earnings will shortly expire.

Benefit entitlement and habitual residence

3. Current Income Support, income-based Jobseeker's Allowance, State Pension Credit, Housing Benefit and Council Tax Benefit regulations require that a person be habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland (generally known as the Common Travel Area). The habitual residence test was amended on 1 May 2004 when the Social Security (Habitual Residence) Amendment Regulations 2004 came into force. The amendment provides that no person shall be treated as habitually resident in the Common Travel Area if he or she does not have a right to reside there.
4. The test was further amended from the 30 April 2006 when the Social Security (Persons from Abroad) Amendment Regulations 2006 came into force. The amendment modified the right to reside aspect of the test so that certain rights to reside do not satisfy that aspect of the test.
5. There are some categories of individuals who are exempt from the habitual residence test. They include
 - Workers, self-employed persons, persons who retain either status and their family members for the purposes of Council Directive No 2004/38/EC;
 - A person who has a right to reside permanently in the UK by virtue of Article 17 of Council Directive No 2004/38/EC;
 - A person who is an accession State worker requiring registration who is treated as a worker for the purpose of the definition of "qualified" person in regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 pursuant to regulation 5 of the Accession (Immigration and Worker Registration) Regulations 2004;

- Refugees;
- Those who have been granted exceptional leave to enter or remain in the UK;
- A person who has been deported, expelled or otherwise removed by compulsion of law from another country to the UK (unless they fall within one of the categories of claimant who are subject to immigration control under section 115(9) of the Immigration and Asylum Act 1999);
- A person who has left Montserrat since 1 November 1995 because of the effect on that territory of a volcanic eruption.

6. The term 'habitually resident' is not defined in legislation. There is, however, a substantial body of domestic and EC case law and decisions of Social Security Commissioners on how that term should be interpreted. The question of whether a person is habitually resident is a question of fact, to be decided by looking at all the circumstances in each case. The key factors in deciding whether someone is habitually resident are whether he or she has a '**settled intention**' to reside and whether he or she has been actually resident for an '**appreciable period of time**'. Case law and Commissioner's decisions indicate that what amounts to a settled intention and an appreciable period of time are, again, matters which depend on the circumstances of each individual case.

The amendment

7. It is against this background and a recent Court of Appeal decision that the amendment arises. The Court of Appeal decision concerned the habitual residence test prior to the changes made to the test in May 2004, when the right to reside aspect of the test was introduced.

8. The Secretary of State lost his appeal to the Court against a Commissioner's decision which held that the advance claim provisions should not be excluded from the Secretary of State's consideration when entertaining a claim from a "person from abroad" who had yet to satisfy the habitual residence test.

9. The Commissioner held that the mere passage of time might be enough to enable the person concerned to satisfy what was then the habitual residence test so that it should be possible for the Secretary of State to determine, ahead of time, when that test would be satisfied and therefore make use of the advance claim provisions. The Court upheld the Commissioner's decision.

10. The Secretary of State's view is that when considering the habitual residence test a decision maker needs to take into account such a variety of factors that it is impossible to predict a point in time in the future when a person becomes habitually resident. By contrast the advance claim provisions are ostensibly aimed at more easily predictable future events.

11. The Secretary of State's policy is that his decision-makers should look at the habitual residence part of the test as it applies to an individual at the date of decision on their claim to an income-related benefit. The key factors, as mentioned above, in deciding whether someone is habitually resident are if he or she has a settled intention to reside and whether he or she has been actually resident for an appreciable period of time.

12. Until the recent Court of Appeal decision, none of the case law or Commissioner's decisions had looked at the role of Claims and Payment regulation 13 in deciding these issues. Normal practice would be for decision-makers at the date of decision to decide whether a person had demonstrated a settled intention and had been in the UK for an appreciable period of time. If they decided the person had a settled intention but had not been in the UK for an appreciable period of time they would not be considered to be habitually resident and would be required to make a fresh claim for benefit. This could involve in some cases individuals making several claims to benefit before they are able to satisfy the test. Although, possibly onerous for claimants it does however place responsibility with them to decide whether they have reached the point where they consider they have spent an appreciable period in the UK to be habitually resident and so make a fresh claim.

13. The effect of the Court of Appeal judgment is to permit the decision-maker to use discretionary powers in regulation 13 to make an advance award where in his or her opinion the claimant will satisfy the requirement to be habitually resident at a future date unless there is a relevant change of circumstances, and the future date is within three months of the date of claim. If the claimant reports a change of circumstance ie that they do not intend to remain in the UK, the decision maker can revise the decision. The provision would be used where the claimant satisfies all the conditions of entitlement to benefit and has also demonstrated a settled intention to remain here and the only issue remaining is the passage of time before they become habitually resident. However, in practice, once an award is made there is unlikely to be further scrutiny of whether the claimant is habitually resident.

14. The Court of Appeal judgment effectively transfers the responsibility away from the claimant to the decision-maker. This could lead to far more decisions to make an advance award of benefit or, at least, require decision-makers to consider making an advance award in a greater number of circumstances. This will lead to additional complexity in the already overtaxed area of social security decision making. An increase in the number of advance claims could also lead to a greater occurrence of fraud or error. Although regulation 13(2) of the Claims and Payments Regulations makes provision for changes in circumstances, the onus is on the claimant to report the change. Further complexity could arise where the claimant disagrees with the future date decided by the decision-maker and could appeal the decision because he/she thinks the decision is unreasonable.

15. Therefore, Secretary of State's view is that his decision-makers should look at the habitual residence part of the test as it applies to an individual at the date of decision on their claim. They should look for an appreciable period of actual residence in the UK at that point in time as evidence to support a genuine intention to settle here.

16. The Secretary of State's further intention is that the amendment should apply to exclude both the right to reside aspect and the actual habitual residence aspect of the habitual residence test from the scope of Regulation 13. In other words at the date of decision the decision-maker should first of all consider whether a claimant has a right to reside in the Common Travel Area and then whether they are habitually resident there. Significantly he does not want his decision-makers to face the prospect of having to speculate about the future in relation to any aspect of the test. For this reason he is not prepared to let the decision of the Commissioner and the judgment of the Court stand.

The proposed amendment would exclude "persons from abroad" and hence the possibility of satisfying the habitual residence test (including the right to reside aspect) using this provision, from the scope of regulation 13.

17. So from the date the amendment comes into force it will not be possible for "persons from abroad" to make advance claims to IS, income-based Jobseeker's Allowance and Pension Credit.

18. Similar amendments are being proposed in respect of legislation affecting Housing Benefit and Council Tax Benefit. We are currently consulting the Local Authority Associations on the proposed amendments to the Housing Benefit and Council Tax Benefit regulations.

19. I would stress that amending the legislation in the way proposed will not necessarily affect eventual entitlement to benefit of the individual concerned. Essentially it is excluding people from abroad from an administrative provision.

SOCIAL SECURITY

Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) (No. xx) Regulations 2006

<i>Made</i>	- - - -	xxx
<i>Laid before Parliament</i>		xxx
<i>Coming into force</i>	- -	[] October 2006

The Secretary of State for Work and Pensions makes the following regulations in exercise of the powers conferred upon him by sections 5(1)(a), (c), (d), (e), 189(1) and (4)(a) and 191 of the Social Security Administration Act 1992(1).

[In accordance with section 173(1)(b) the Secretary of State has obtained the agreement of the Social Security Advisory Committee that proposals to make these regulations should not be referred to it.]

In accordance with section 176(1) the Secretary of State has consulted with organisations appearing to him to be representative of the authorities concerned.

Citation and commencement

1. These Regulations may be cited as the Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) (No. xx) Regulations 2006 and shall come into force on [] October 2006.

Amendment of the Social Security (Claims and Payments) Regulations 1987

2.—(1) The Social Security (Claims and Payments) Regulations 1987(2) are amended in accordance with the following paragraphs.

(2) In regulation 13 (advance claims and awards)—

(a) in paragraph (3)(3) omit—

(i) “Subject to paragraph (4),”;

(ii) “disabled person’s tax credit,”; and

(iii) “working families’ tax credit,”;

(b) omit paragraphs (4), (5), (6), (7) and (8); and

(c) at the end add—

“(9) Paragraphs (1) and (2) do not apply to—

(a) a claim for income support made by a person from abroad as defined in regulation 21AA of the Income Support (General) Regulations 1987(4); or

(1) 1992 c.5. Section 191 is cited for the meaning given to “prescribe”.

(2) 1987/1968.

(3) The relevant amending instruments are S.I. 1991/2384, 1992/247, 1999/2572, 1999/3178, 2002/3109, 2005/1551,

(4) S.I. 1987/1967. Regulation 21AA was inserted by S.I. 2006/1026.

(b) a claim for a jobseeker's allowance made by a person from abroad as defined in regulation 85A of the Jobseeker's Allowance Regulations⁽⁵⁾.”.

(3) In regulation 13D⁽⁶⁾ (advance claims for and awards of state pension credit), after paragraph (3) add—

“(4) This regulation does not apply to a claim made by a person not in Great Britain as defined in regulation 2 of the State Pension Credit Regulations 2002⁽⁷⁾.”.

Amendment of the Council Tax Benefit Regulations 2006

3. Regulation 69 of the Council Tax Benefit Regulations 2006⁽⁸⁾ (time and manner in which claims are to be made) is amended in accordance with the following paragraphs.

(1) For paragraph (10) substitute—

“(10)(a) Subject to sub-paragraph (b) where a person has not become liable for council tax to a relevant authority but it is anticipated that he will become so liable within the period of 8 weeks (the relevant period), he may claim council tax benefit at any time in that period in respect of that tax and provided that liability arises within the relevant period, the authority shall treat the claim as having been made on the day on which the liability for the tax arises;

(b) this paragraph does not apply to a claim made by a person from abroad.”. and

(2) For paragraph (12) substitute—

“(12)(a) Subject to paragraph (b) where the claimant is not entitled to council tax benefit in the benefit week immediately following the date of his claim but the relevant authority is of the opinion that unless there is a change of circumstances he will be entitled to council tax benefit for a period beginning not later than the thirteenth benefit week following the date on which the claim is made, the relevant authority may treat the claim as made in the benefit week immediately preceding the first benefit week of that period of entitlement and award benefit accordingly.

(b) this paragraph does not apply to a claim made by a person from abroad.”.

Amendment of the Council Tax (Persons who have attained the qualifying age for state pension credit) Regulations 2006

4. Regulation 53 of the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006⁽⁹⁾ (time and manner in which claims are to be made) is amended in accordance with the following paragraphs.

(1) For paragraph (10) substitute—

“(10)(a) Subject to sub-paragraph (b) where a person has not become liable for council tax to a relevant authority but it is anticipated that he will become so liable within the period of 8 weeks (the relevant period), he may claim council tax benefit at any time in that period in respect of that tax and provided that liability arises within the relevant period, the authority shall treat the claim as having been made on the day on which the liability for the tax arises;

(b) this paragraph does not apply to a claim made by a person from abroad.”.

(2) For paragraph (12) substitute—

“(12)(a) Subject to paragraph (b) where the claimant is not entitled to council tax benefit in the benefit week immediately following the date of his claim but the relevant authority is of the opinion that unless there is a change of circumstances he will be entitled to council tax benefit for a period beginning not later than the thirteenth benefit week following the

⁽⁵⁾ S.I. 1996/207. Regulation 85A was inserted by S.I. 2006/1026.

⁽⁶⁾ Regulation 13D was inserted by S.I. 2002/3019.

⁽⁷⁾ S.I. 2002/1792. Regulation 2 was substituted by S.I. 2006/1026.

⁽⁸⁾ S.I. 2006/215.

⁽⁹⁾ S.I. 200/216.

date on which the claim is made, the relevant authority may treat the claim as made in the benefit week immediately preceding the first benefit week of that period of entitlement and award benefit accordingly.

(b) this paragraph does not apply to a claim made by a person from abroad.”.

Amendment of the Housing Benefit Regulations 2006

5. In regulation 83 of the Housing Benefit Regulations 2006(10) (time and manner in which claims are to be made) for paragraph (10) substitute—

“(10)(a) Subject to sub-paragraph (b) where the claimant is not entitled to housing benefit in the benefit week immediately following the date of his claim but the relevant authority is of the opinion that unless there is a change of circumstances he will be entitled to housing benefit for a period beginning not later than the thirteenth benefit week following the date on which the claim is made, the relevant authority may treat the claim as made on a date in the benefit week immediately preceding the first benefit week of that period of entitlement and award benefit accordingly;

(b) this paragraph does not apply to a claim made by a person from abroad.”.

Amendment of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006

6. In regulation 64 of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006(11) (time and manner in which claims are to be made) for paragraph (11) substitute—

“(11)(a) Subject to sub-paragraph (b) where the claimant is not entitled to housing benefit in the benefit week immediately following the date of his claim but the relevant authority is of the opinion that unless there is a change of circumstances he will be entitled to housing benefit for a period beginning not later than the seventeenth benefit week following the date on which the claim is made, the relevant authority may treat the claim as made on a date in the benefit week immediately preceding the first benefit week of that period of entitlement and award benefit accordingly;

(b) this paragraph does not apply to a claim made by a person from abroad.”.

Signed by authority of the Secretary of State for Work and Pensions.

Date

Parliamentary Under Secretary of State,
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Regulation)

These regulations amend the Social Security (Claims and Payments) Regulations 1987, the Council Tax Regulations 2006, the Council Tax (Persons who have attained the qualifying age for state pension credit) Regulations 2006, the Housing Benefit Regulations 2006 and the Housing Benefit (persons who have attained the qualifying age for state pension credit) Regulations 2006.

Regulation 2 amends the Social Security (Claims and Payments) Regulations 1987. Paragraph (3) excludes persons from abroad from making advance claims for income support and jobseeker’s

(10)S.I. 2006/213.

(11)S.I. 2006/214.

allowance. Paragraph (4) excludes persons from abroad from making advance claims for state pension credit.

Regulation 3 amends the Council Tax Regulations 2006 to the same effect as regulation 2(4).

Regulation 4 amends the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 to the like effect.

Regulation 5 amends the Housing Benefit Regulations 2006 to the like effect.

Regulation 6 amends the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 to the like effect.



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