Appendix 7a

Response paragraphs - habitual residence

Contents **Paragraphs**

INTRODUCTION

1 This appendix provides examples of response guidance to assist appeals officers when preparing responses to the FtT.

2 The paragraphs in this appendix are for use in cases where habitual residence is the issue under appeal. Guidance on when to use the paragraphs is included.

NOTES FOR RESPONSE WRITERS

3 The paragraphs are set out in blocks which can be included as appropriate depending on the grounds of appeal, and are only for use in cases where it has been established that the claimant has a right to reside in the United Kingdom. Guidance on the requirement to have a right to reside in the United Kingdom in order to be habitually resident is given in Part 3 of Chapter 7 of the DMG (Vol 2) at paras 071225 et seq.

BACKGROUND

4 In his decision in CIS/4474/2003, given in February 2004, Mr Commissioner Jacobs commented on the need to update the existing habitual residence template. He said:

"The Secretary of State has a standard template that is used for submissions to tribunals. That reflects the advice given to decision-makers and may influence the approach taken by tribunals. It has been in use for a long time. So long, in fact, that I remember it from my days as a tribunal chairman. It represents, as the representative submits, the initial response to the amendments that introduced the habitual residence test for Income Support. It has taken account of some of the later developments in the case law. But the coverage is limited and does not reflect the trends in actual decisions taken by Commissioners. An updated version would be helpful to tribunals as well as to claimants and their advisers".

5 There is, of course, no legislative definition of 'habitual residence'. Any legal argument on the point, including responses to FtT's, must be based on the relevant case law. As the Commissioner in CIS/4474/2003 commented, that case law has changed since the earlier template was written, and while some offices have updated in response to memos and DMG guidance, many responses currently being made are based on case law that is no longer current.

6 The paragraphs below differ from those commonly in use. They are shorter than most, and more focussed on specific issues and circumstances. It is important that the relevant unreported case law should be attached to each response.

USING THE PARAGRAPHS

7 There are 7 blocks set out in the Annex below, which it is hoped will provide sufficient argument for section 5 of the response in most habitual residence appeals. There will always be exceptions and if, for instance, human rights or other unfamiliar legal arguments are raised, you should refer to DMA Leeds for guidance. Whenever an appeal is pending, the case should be identified as 'Priority Guidance'.

8 Each response should begin with Block 1, Block 2 or Block 3, adding the other blocks as necessary for the circumstances of the case and the relevant case law. A copy of the case law referred to, and of the relevant legislation, should be attached to each response. If possible please avoid sending photocopies to tribunals, and use or print from electronic copies for each response.

Annex

Block 1 - IS claim introduction

The claimant has a right to reside in the United Kingdom.

Regulation 21(3) of the Income Support (General) Regulations 1987 provides that a person who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland is a person from abroad with, under Schedule 7 to those regulations, an IS applicable amount of 'nil'. The DM's decision now under appeal has been made under that regulation.

Block 2 - JSA claim introduction

Regulation 85(4)(iii) of the Jobseeker's Allowance Regulations 1996 provides that a person who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland is a person from abroad with, under Schedule 5 to those regulations, a JSA applicable amount of 'nil'. The DM's decision now under appeal has been made under that regulation.

Block 3 – SPC claim introduction

Regulation 2(1) of the State Pension Credit Regulations 2002 provide that a person is to be treated as not in G.B. if he is not habitually resident in the U.K., the Channel Islands, the Isle of Man or the Republic of Ireland. The DM's decision now under appeal has been made under that regulation.

Block 4 - The Swaddling judgment

The claimant argues that he/she is assisted by the judgment of the European Court of Justice in the case of *Swaddling v. Adjudication Officer* (Case C-90-97).

I submit that the relevant Commissioner's case law, interpreting the judgment for benefits purposes, is in the decision in R(IS) 6/99.

I submit that the judgment in *Swaddling*, including the explanation of the scope of Article 10a of Regulation 1408/71, cannot assist any person who does not have Community (including British) nationality, who has not worked in another Community country and who has not come to the United Kingdom from another Community country to work or to seek work, with a settled intention to remain in the United Kingdom for the time being.

In paragraph 14 of the decision in R(IS) 3/00 the Commissioner says

> "In my judgment, the particular answer given in the ECJ's ruling in *Swaddling* is to be regarded as limited to the circumstances of that case. It can only be relied on directly in cases which are substantially on all fours with Mr Swaddling's."

I submit that, given this narrow interpretation, the elements of the judgment arising from the facts of Mr Swaddling's case cannot assist any person who is not a British national, has not been established in the United Kingdom from birth, who has not gone to another Community country to work, and who has not returned to the United Kingdom from another Community country to work or to seek work, with a settled intention to remain in the United Kingdom for the time being.

In this case I submit that the claimant cannot be assisted by the judgment of the European Court of Justice.

Block 5 - The "worker" argument

No paragraphs available at present.

This is because we are waiting for the outcome of one important case that has been dealt with by the ECJ, and another which raises other questions about 'worker' status. For the time being it is likely to be necessary to ask tribunals to adjourn cases potentially affected by these issues.

In any case where the claimant argues that he/she is a "worker" for the purposes of European Community legislation, including submissions asserting that he/she falls within the scope of Article 10a of Regulation 1408/71, and therefore is not subject to the requirement to demonstrate habitual residence - an argument which will generally, but not exclusively, arise only in JSA claims - please pass the papers, as soon as possible, to ACI Leeds for guidance.

Block 6 - Previously habitually resident in the United Kingdom

The claimant argues that he/she has not lost the habitual residence that he/she previously had in the United Kingdom.

I submit that this is an issue considered by the Commissioner in CIS/4474/03, where he analyses the manner in which to make decisions on habitual residence where the person has previously been habitually resident in the United Kingdom. With regard to the situation where the person may not have lost his/her previous habitual residence, he says

> "The **first analysis** is that the claimant remained habitually resident here, despite being physically absent from the country. Obvious examples are where the claimant has gone abroad on holiday or for a short visit to relatives."

I submit that, in considering whether the person has retained his/her habitual residence, the DM must have regard to cultural differences in the length of visits to relatives. The DM must also have regard to unexpected changes in circumstances, such as the illness of the claimant, or of a relative who requires his or her care. In such cases the length of the absence originally intended will be influential.

In this case, however, I submit that because [*complete details*], the claimant did not retain his/her habitual residence in the United Kingdom during his/her absence in [*country*] from [*date*] to [*date*]. Consequently, the DM has considered whether the claimant resumed his/her previous habitual residence immediately upon his/her return to the United Kingdom, or whether an appreciable period of time is necessary for him/her to establish that his/her residence in the United Kingdom is habitual in nature.

The claimant [*also/alternatively*] argues that although he/she had lost his/her previous habitual residence in the United Kingdom before returning to the United Kingdom on [date] he/she resumed that previous habitual residence immediately on returning to the United Kingdom on [*date*].

The judgment in *Nessa* (R(IS) 2/00) addresses the question of the effect that a previous habitual residence in the United Kingdom may have in a case where the person has lost that habitual residence during his/her absence from the United Kingdom. It says

> "There may indeed be special cases where the person concerned is not coming here for the first time, but is resuming an habitual residence previously had (*Lewis v. Lewis*. [1956] I.W.L.R. 200: *Swaddling v. Adjudication Officer*, (Case C-90/97) ECJ Judgment 25 February 1999 (unreported)). On such facts the Adjudication Officer may or of course may not be satisfied that the previous habitual residence has been resumed. This position is quite different from someone coming to the United Kingdom for the first time."

I submit that the *Nessa* judgment requires DMs to consider whether a person who has lived in the United Kingdom before "is resuming an habitual residence previously had", a factor which may render unnecessary an appreciable period of time to establish habitual residence. In his decision in CIS/1304/97 and CJSA/5394/98 (the relevant paragraphs of which are also included as the Appendix to CIS/4474/03) the Commissioner sets out his view of the facts to be considered where the person concerned is not coming here for the first time, and may be "resuming an habitual residence previously had." In paragraph 18 he says, referring to Lord Slynn's words quoted above,

> "It is clear from that passage that a person who has previously been habitually resident will not automatically become habitually resident again on arriving back here. The question is: in what circumstances will habitual residence be resumed without the need for residence for an appreciable period? As the criteria to be applied in answering this

> question are not readily apparent from common experience or from the terms of the question itself, it is appropriate for a Commissioner to lay down guidance for the benefit of Appeal Tribunal and the officers who act on behalf of the Secretary of State."

In paragraph 22, under the heading "A returning former resident only bypasses the appreciable period requirement", the Commissioner says

> "The only advantage which a returning former resident has over anyone else is that it is not necessary to have resided in the United Kingdom for an appreciable period before the residence becomes habitual. The evidence must show that all the other elements of habitual residence are satisfied."

In paragraphs 34 to 38 under the heading "A three stage inquiry", the Commissioner sets out the manner in which he considers a tribunal should address the question of whether a person is resuming an habitual residence previously had

> "34. In a typical case, the inquiry into the facts will involve three separate but related stages: (i) the circumstances in which the claimant's earlier habitual residence was lost; (ii) the links between the claimant and the United Kingdom while abroad; and (iii) the circumstances of the claimant's return to the United Kingdom.
>
> 35. If the claimant's earlier habitual residence was lost on leaving the United Kingdom, the fact that the claimant's departure was temporary (albeit perhaps long-term) or conditional may be a point in favour of the claimant resuming habitual residence immediately on return. If the claimant left the United Kingdom with no intention of returning, that may be a point against resuming habitual residence on return. If the earlier habitual residence was lost not when the claimant left the United Kingdom but only as a result of events that occurred later, this may be a point in favour of the claimant resuming habitual residence immediately on return, especially if the loss of the earlier habitual residence was a result of circumstances outside the claimant's control.
>
> 36. The ties and contacts retained or established by the claimant while abroad must be considered. This includes contact with family and friends, property retained, and the length and purpose of visits. These show the extent to which the claimant has retained links with the United Kingdom which are sufficient to support a link between the earlier and resumed residence.
>
> 37. The circumstances of the claimant's return must show that the claimant is resettling in the United Kingdom for the time being. The significance of the circumstances of the claimant's return must be assessed in the context of the length of the claimant's absence from the United Kingdom, the changes that have occurred here during that time and the links that have been retained while abroad. The

circumstances will include steps taken by the claimant preparatory to returning.

38. The circumstances of a claimant's return include the possibility of there being habitual residence elsewhere. The most likely possibility is that habitual residence may have been retained in the country from which the claimant returned to the United Kingdom, but in particular circumstances there may be other possibilities. Looking at the case from this perspective will ensure that the decision is based on the whole factual picture and not on a partial presentation of those factors which show a link with the United Kingdom. This does not mean that the test is a comparative one. It only means that it is wrong to take too narrow a perspective when considering whether the claimant has established habitual residence immediately on return to the United Kingdom."

In this case, having regard to the form of inquiry set out above, I submit that because [*complete details*] the DM decided that the claimant did not resume his/her previous habitual residence in the United Kingdom immediately on returning here. I submit that in any case where Article 10a of Regulation 1408/71 does not have effect, it is necessary for an appreciable period of time to pass in order to demonstrate that his/her residence in the United Kingdom is habitual in nature. However, his/her previous habitual residence is one of the factors to which regard should be had in determining how long that period should be.

Block 7 - Appreciable period required

The claimant came to the United Kingdom for the first time (*except for a visit/holiday for [period] in [year]*) on [*date*] and is not a 'worker' for the purposes of Article 10a of Regulation 1408/71.

or

The claimant has previously been habitually resident in the United Kingdom, but as explained above (see Block 6), in accordance with the relevant case law the DM decided that he/she did not resume that habitual residence immediately upon his/her return to the United Kingdom. Consequently the same case law regarding the need for an appreciable period of time to pass in order to demonstrate that his/her residence in the United Kingdom is habitual in nature applies in this case as it would in that of a person who has not previously been habitually resident here. However, his/her previous habitual residence is one of the factors to which regard should be had in determining how long that period should be.

I submit that in any case where the claimant cannot be treated as habitually resident in the United Kingdom in consequence of Community law, any adjudicating authority should first have regard to the judgment of the House of Lords in the case of *Nessa*, given in October 1999. In that judgment the only speech was made by Lord Slynn, their Lordships all concurring. I submit that this is binding case law, which the tribunal must follow.

In his conclusions with regard to persons who had not previously been habitually resident in the United Kingdom, Lord Slynn said

> "If Parliament had intended that a person seeking to enter the United Kingdom or such a person declaring his intention to settle here is to have Income Support on arrival, it could have said so. It seems to me impossible to accept the argument at one time advanced that a person who has never been here before who says on landing, "I intend to settle in the United Kingdom" and who is fully believed is automatically a person who is habitually resident here. Nor is it enough to say I am going to live at X or with Y. He must show residence in fact for a period which shows that the residence has become "habitual" and, as I see it, will or is likely to continue to be habitual."

I submit that there is no fixed or pre-determined period in which a person's residence will become habitual. However, a number of Commissioners' decisions give a broad view on the issue. In paragraphs 13 and 14 of his decision in CIS/4389/99, the Commissioner says

> "In Lord Slynn's opinion in the *Nessa* case it is accepted that the appreciable period necessary to establish habitual residence can be short. He refers to a child abduction case, reported in 1994, where a month can be accepted as an appreciable time. The question in this case is whether a period of 22 days can be accepted as an appreciable time. I accept that in considering whether the period of a claimant's residence in this country is an appreciable period the adjudication authority should, as the claimant's representative argues, take note of the purpose of the exclusion of persons from abroad, as defined in regulation 21, from entitlement to benefit immediately on arrival in this country . . .
>
> My view is that, given the purpose of the benefit restrictions on new arrivals, the less the claimant's ability to leave this country to take up residence elsewhere the shorter is the period of residence here which can be regarded as habitual residence. However, it must be a period which is more than momentary in the claimant's life history and I think that cannot be less than a month. Anything less would largely defeat the purpose of regulation 21."

In the decision in CIS/4474/03 (copy attached) – a decision which has been accepted as helpful by both the Secretary of State and by tribunals since it was given in February 2004 - the Commissioner looks at the issue under the heading 'Periods of Appreciable Residence'. He says

> "This was another issue considered by Mr Commissioner Howell in R(IS) 6/96. The Secretary of State submits that the period of residence that he suggested was long by the standards of what Commissioners now accept when giving their own decisions on habitual residence. He submits when Commissioners give their own decisions on habitual residence, most accept a period of between one and three months as appreciable. That is my impression, although I

> see fewer of my colleagues' decisions than does the Adjudication and Constitutional Issues Branch, where the representative is based.
>
> What is an appreciable period depends on the circumstances of the particular case. But I agree with the Secretary of State that in the general run of cases the period will lie between one and three months. I would certainly require cogent reasons from a tribunal to support a decision that a significantly longer period was required.
>
> I suspect that the cases in which a tribunal might find that a long period of residence was required would, on examination, better be analysed as cases in which the tribunal was not satisfied that the claimant had a settled intention to remain for the time being."

In the context of the case law set out above, I submit that while there may be exceptional cases where the circumstances would indicate that an appreciable period of less than a month, or of longer than three months, might be appropriate, in the great majority of cases where a person's residence becomes habitual in nature, the necessary appreciable period is likely to be of between one and three months in duration.

I submit that, as the judgment in *Nessa* and the decision in CIS/4474/03 (among others) have indicated, the appreciable period cannot begin before the person

- is living in the United Kingdom, **and**
- has formed a settled intention to remain in the United Kingdom for the time being.

I submit that the appreciable period cannot begin while the person is resident in another country, even though the person may have decided to live and remain in the United Kingdom in the future.

I respectfully remind the tribunal that, when the DM made the decision now under appeal, the period during which the nature of the claimant's residence was considered was that between, and including, the date of claim [date] and the date of the decision [date], and that the tribunal may not consider circumstances that arose after the date of the DM's decision in deciding this appeal. The DM must, in every case, consider when the claimant formed a settled intention to remain in the United Kingdom for the time being, and that intention may have been formed before the date of claim.

In this case the DM decided that by the date on which the decision was made the claimant had not formed a settled intention to remain in the United Kingdom because [*give reasons*]

or

the claimant formed a settled intention to remain in the United Kingdom for the time being on [*date*].

The decision on the length of the appreciable period in each case is also made on the basis of the relevant case law. The *Nessa* judgment says

> "I do not consider that when he spoke of residence for an appreciable period, Lord Brandon meant more than this. It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, 'durable ties' with the country of residence or intended residence, and many other factors have to be taken into account."

The decision in CIS/4474/03 also addresses several of the factors which will determine the length of the appreciable period and, I submit, advises taking a pragmatic approach to balancing the weight of those factors. In determining any decision on habitual residence, the DM considers the relevance of the factors summarised below in accordance with the case law, and then gives the appropriate weight, if any, to each.

The list is not exhaustive.

1. What did the claimant do to establish his/her residence in the United Kingdom before arriving here?

In this case [*complete*]

2. What has the claimant done to bring his/her possessions with him/her to the United Kingdom. If any possessions were left behind in [*name of country*] was this because he/she could not bring them with him/her, or for another reason?

In this case [*complete*]

3. Does the claimant have a family – spouse or children? If he/she does, and they are not in the United Kingdom with him/her, does he/she intend that they will join him/her in the United Kingdom? Are there any particular obstacles or reasons for delay (for instance immigration procedures) in family joining him/her? Paragraph 13 of the decision in CIS/4474/03 is relevant to this question. The fact that close members of the claimant's family are not in the United Kingdom does not mean that he/she cannot have a settled intention to remain in the United Kingdom for the time being, nor does it preclude him/her from becoming habitually resident in the United Kingdom.

In this case [*complete*]

4. What existing ties does the claimant have with the United Kingdom? Has he/she visited the United Kingdom before coming here to live? Does he/she have relatives/friends in the United Kingdom with whom

he/she has been regularly in contact? If so, are those relatives/friends helping him/her settle in the United Kingdom?

In this case [*complete*]

5. Did the claimant bring any money with him/her to assist him/her in settling in the United Kingdom? Was he/she able to do so? Has he/she left any money or other capital resources in any other country? If so, was this because he/she could not realise or transfer those resources, or for another reason? Paragraphs 15 to 17 of the decision in CIS/4474/03, which address the issue of 'viability', are relevant to this question. In particular, the Commissioner says that

> "The danger of overemphasising viability is this. A claimant needs to establish habitual residence in order to claim an income-related benefit. A claim would not be necessary if the claimant has a guaranteed source of funds sufficient for survival. The danger is that the only claimants who can establish habitual residence will be those who have sufficient access to funds not to need it. That cannot be right. Habitual residence is a test of entitlement, not a bar to entitlement. It must be applied in a way that allows for the possibility of a claimant establishing both habitual residence and an entitlement to Income Support."

In this case [*complete*]

6. Since forming a settled intention to remain in the United Kingdom for the time being, has the claimant taken any action which demonstrates that his/her residence in the United Kingdom is, or is likely to become, habitual in nature? This might include registering for medical, dental or similar services, enrolling in educational provision for the claimant or for his/her children, seeking or obtaining suitable living accommodation and other actions that suggest an intention to remain in the United Kingdom. Actions such as opening a bank account or joining clubs, which have previously been given weight by DMs, may be seen as subject to the same concerns as have been raised with regard to viability. It may not be reasonable to expect a person who has no financial resources to take actions which would require financial outlay.

In this case [*complete*]

7. Because the items set out above are not exhaustive, the DM should consider any other factors which appear to be relevant to the decision.

In this case [*complete*]