CHILD BENEFIT AND CHILD TAX CREDIT - RIGHT TO RESIDE ESTABLISHING WHETHER AN EEA NATIONAL IS/WAS A WORKER OR A SELF-EMPLOYED PERSON UNDER EU LAW

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INTRODUCTION

1 Persons claiming Child Benefit[1] and Child Tax Credit[2] are required to have a right to reside[3] in the United Kingdom.

1 Child Benefit (General) Regulations 2006, regulations 23 and 27 for Great Britain and Northern Ireland; 2 Regulation 3(5) of the Tax Credits (Residence) Regulations 2003; 3. N.B. Other than a specific right to reside available by reason of the ruling of the CJEU in Ruiz-Zambrano Case C-34/09

2 Among those having a right to reside are:

1. workers

2. persons who retain their worker status because

2.1 they are in duly recorded involuntary unemployment after having been employed in the UK, as long as they have registered as a jobseeker with the relevant employment office **or**

2.2 work as an employee in the UK has stopped because the person is temporarily unable to work due to illness or accident

3. self-employed persons

4. persons who retain the status of a self-employed person because they are temporarily unable to pursue their activities as a self-employed person as a result of an illness or accident

5. Family members of persons described in sub-paragraphs **1** to **4** above.

3 It is important then for caseworkers to understand what the criteria are for deciding whether a person is or was a "worker" or a "self-employed" person. The purpose of this guidance is to provide more detailed advice about those criteria.

MEANING OF A WORKER/SELF-EMPLOYED PERSON – TWO TIER APPROACH

4 It is well established that for EU law purposes, in order to be a worker or self-employed person, the person must be doing work which is genuine and effective and is not on such a small scale as to be marginal and ancillary[1]. "Self-employed" people must also pursue an activity which is genuine and effective and not marginal and ancillary, but which is furthermore not characterised by a relationship of "subordination" which has been held to be an essential feature of the concept of a worker[2]. In order to clarify the position for caseworkers and to make it easier for them to focus on those cases where it is important to consider all the circumstances of the person concerned, HMRC has decided a Minimum Earnings Threshold is to apply, as part of a two tier process.

Tier 1: Whether the Minimum Earnings Threshold has been met or will be met for a required period; and

Tier 2: In cases where the Minimum Earnings Threshold criteria have not been met whether the EEA national was in genuine and effective work assessed against a set of secondary criteria.

1. Case C-53/81 D.M. Levin v Staatssecretaris van Justitie (employed persons) and Case C-268/99 Jany and Others v Staatssecretaris Van Justitie (self-employed persons); 2. Case c-107/94 Asscher v Staatssecretaris Van Financiën

Tier 1 – Minimum Earnings Threshold

5 An EEA national who has worked as an employee or, in a self-employed capacity will be automatically considered as a worker or self-employed person for the purposes of EU law **if:**

1. their average gross earnings from employment or self-employment in the UK, were more than £646 pcm (or £149 a week) in 2013/14, and £663 pcm (or £153 a week) in 2014/15, and

2. their gross earnings were at, or above that level for a continuous period of 3 months immediately before the date from which benefit has been claimed.

If these conditions are met, caseworkers should accept that the work activity was genuine and effective and that while the work was done the EEA national had worker or self-employed status, as appropriate, in EU law. In this case there is no need to apply the Tier 2 assessment in paragraph 7 below.

6 The level of the Minimum Earnings Threshold is linked to the level of the HMRC Primary Earnings Threshold (PET), which is the point at which employees must pay Class 1 National Insurance Contributions. Self-employed have to pay Class 2 and Class 4 NICs around this point too. As the PET level is up-rated every April, caseworkers should ensure that they use the PET level relevant to the 3 month period of gross earnings from employment or self-employment under consideration. Where this period spans the April PET uprating, caseworkers should use the pre-uprating PET rate for the entire 3 month period.

Tier 2: Minimum Earnings Threshold criteria not met

7 In all cases where an EEA national's average gross earnings from employment or self-employment fall below the Minimum Earnings Threshold and/or their earnings have not been at, or above, that level for a continuous period of 3 months, the caseworker will need to examine each case as a whole, taking account of all circumstances, to determine whether the EEA national's activity was genuine and effective, and not marginal or ancillary and decide whether the person is/ was a "worker" or a "self-employed person", applying the guidance set out below.

DECIDING IF A PERSON IS/WAS A "WORKER" – FACTORS TO TAKE INTO ACCOUNT

8 Article 45 of the Treaty on the Functioning of the European Union (TFEU) says that freedom of movement for workers shall be secured within the EU and the Immigration (European Economic Area) Regulations 2006 define "worker" as meaning a worker within the meaning of Article 45[1].

1 Regulation 4(1)(a) of the Immigration (European Economic Area) Regulations 2006 (SI 1003/2006)

9 The following principles can be derived from EU case law:

1. the term "worker" has an EU law meaning[1] and may not be interpreted restrictively.[2].

2. The term “worker” applies to employees rather than the self-employed. In EU law terms the essential characteristic of an employment relationship is that a person performs services for and under the direction of another person in return for which they receive remuneration[3]
3. In deciding whether a person is a worker, account should be taken of all the occupational activities the person has undertaken in the host member state[4].
4. As a “worker” they must receive remuneration, unpaid voluntary activity is not “work”.[5]
5. The mere fact that there is a legally binding employment relationship is not of itself conclusive of whether the employee is a worker[6]
6. A person working part-time can be a “worker” provided that the work undertaken is genuine and effective but not where activities are on such a small scale as to be regarded as purely marginal, or ancillary.[4]
7. As long as the work is “genuine and effective” it is irrelevant whether it yields an income lower than the amount considered the minimum required for subsistence in the host Member State.[7] (in the case of the UK, the relevant applicable amount for an income-related benefit)
8. The fact that a person seeks to supplement the remuneration from his work by means of financial assistance drawn from public funds does not preclude him from being regarded as a worker.[8]
9. Once it has been established that the person is genuinely exercising his right of free movement as a worker, the motives which have prompted the worker to work in another Member State are irrelevant, provided the work is genuine and effective.[9]
10. A person employed under an “on-call” or “zero-hour” contract is not precluded from being a worker provided the work is genuine and effective.[10]
11. An employee undertaking genuine and effective work is a worker even if the person is employed under a contract that is performed illegally[11]
12. A commissioner has held that a claimant’s physical incapacity to do the work she had undertaken and the fact that she had been dismissed from it after a short period **were** relevant to the issue of whether the work was genuine and effective.[12]

1 Case C-75/63 Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten; 2 Case C-53/81 D.M. Levin v Staatssecretaris van Justitie; 3 Case C-357/89 Raulin (1992) ECR 1027 4 C-359/89 Raulin v Netherlands Ministry of Education and Science; 5 CIS/868/08 & CIS/1837/06 ;6 Case C-344/87 Bettray v Staatssecretaris van Justitie; 7 Case C-53/81 D.M. Levin v Staatssecretaris van Justitie; 8 Case C-139/85 Kempf v Staatssecretaris van Justitie; 9 Case C-53/81 D.M. Levin v Staatssecretaris van Justitie (para 23); 10 Case C-357/89 Raulin (1992) ECR 1027 11 JA v SSWP (ESA) [2012] UKUT 122 (AAC), CE/2190/11; 12 CSIS/467/07

10 Where the Minimum Earnings Threshold is not met, the caseworker will need to consider two questions

1. Is the person exercising their EU freedom of movement rights as a "worker" (see paragraphs 11 and 12) and
2. Is the work "genuine and effective" (see paragraphs 13 to 20)

Is the person exercising their rights as a worker?

11 In order for a person to be exercising their EU law rights of free movement as a "worker", there must be a real link between that person and the labour market of the host member state. A worker must be actually pursuing activities as an employed person, or seriously wish to pursue activities as an employed person[1] . Accordingly, before considering the guidance below about whether the work itself is genuine and effective, caseworkers may consider the preliminary question of whether the claimant is genuinely exercising their EU rights as a "worker".

1 De Biasi v Secretary of State for the Home Department [2012] EWCA Civ 1015

12 In deciding this question, caseworkers can look at all the circumstances, including the person's primary motivation in taking up employment and whether, during periods when they were not employed, the person seriously wished to pursue employment by actively looking for work with a genuine chance of being engaged[1].

Note: if a person is exercising their EU rights, their conduct before and after periods of employment (including their primary motivation) are not relevant when considering whether work is genuine and effective (see paragraphs 13 to 20).

1 MDB Italy v Secretary of State for the Home Department [2012] EWCA Civ 1015

Genuine and Effective Work

13 Provided the caseworker is satisfied that the claimant is in fact exercising their rights as a worker in accordance with the guidance in paragraphs 11 & 12 above then he can consider whether the work is genuine and effective and not marginal, or ancillary.

14 This question of when a person is a "worker" has also been considered by an Upper Tribunal ("UT") judge[1]. In the case before the UT the claimant was an EEA national who had entered the UK in 2004. They claimed Income Support in July 2005. The evidence of the claimant's work record was not entirely clear but he produced a pay slip dated 31.12.04 showing payment of £90 for one week's work comprising 15 hours. In addition there was evidence from an employment agency confirming that the claimant had undertaken temporary bookings on behalf of the agency over the period 7.1.05 to 4.2.05.

1 NE v SSWP [2009] UKUT 38 (AAC), CIS/1502/07

15 The UT judge said that the issue before him could be said to be whether the claimant had genuinely and effectively become a worker rather than a work seeker. The UT judge said (at paragraph 9):
"Where work is undertaken for periods which can be expected from the outset to be for a very short period and is known to be temporary, the person concerned is obliged to keep looking for work and often he or she cannot realistically be said to have become established in work and to have ceased to be a work seeker."

16 In the UT judge accepts that there is a distinction between temporary employment for a brief period and indefinite employment that has been curtailed prematurely. However it is not the case that all agency workers remain work seekers. There will be cases where temp work is nonetheless for a prolonged period and many agency workers will be able to show that the agency has regularly found them work albeit for short periods and that they have become established members of the national workforce. On the other hand the Judge held (in paragraph 9).
Where a person has worked only intermittently for very short periods, as in CIS/1793/2007 the claimant is more likely to have remained a work seeker because the work performed has been marginal.

17 In CIS/1793/2007, a Social Security Commissioner decided that the claimant, an EU national who came to the UK in 2001, had not been a worker at any time prior to his claim for Income Support in August 2005. He listed the following factors leading to that judgement

1. the claimant had only worked for a total of 10 weeks in a period of 3 or 4 years
2. 4 of those weeks comprised work found by an agency which was temporary and known to have been temporary at the time
3. work had been intermittent **and**
4. the number of hours in the employment relationships was so small as to be marginal or ancillary.

18 It can be seen from the case law that when determining whether or not someone is a worker, the following can be relevant considerations:

1. whether work was regular or intermittent
2. the period of employment
3. whether work was intended to be short-term or long-term at the outset
4. the number of hours worked

5. the level of earnings

In some cases judges have weighed, for example, low hours against long duration of work as part of their overall assessment of whether work is genuine and effective. However, the case law does not identify one consistent approach to applying these and other factors: each case must be decided on its own merits.

Part time Work

19 Work below the Minimum Earnings Threshold that is part time, or low paid, is not necessarily always marginal and ancillary. A part time worker may be considered a worker for EU purposes and retain a right to residence in the UK as long as the work is genuine and effective.

20 It is not possible to provide a formula of hours, earnings and periods of work which determine whether or not a person is a worker.

EXAMPLES

Example 1

21 An EEA national arrives in the UK and stays with a relative who has a shop. She does not have an offer of a job, but helps out in the shop for an hour or two when she can, for which she is paid £20 per week. She claims Child Benefit and Child Tax Credit immediately on arrival on 10.3.14. As the earnings were clearly below the Minimum Earnings Threshold, the caseworker considered whether the work in the UK was genuine and effective. He decided that given the low number of hours, the irregularity of the work and the relationship between the claimant and the shop owner, the work here is marginal and ancillary. The caseworker decided that the claimant is not a "worker". The caseworker also determined that the claimant:

- was not a job-seeker[1] as she was not actively seeking work; and
- was not a self-sufficient person[2] as she did not have an income above the level of the relevant applicable amount for an income-related benefit and comprehensive sickness insurance.

1 Guidance on who is a job-seeker can be found in the Tax Credits Technical Manual [TCTM02073] or the Child Benefit Technical Manual [CBTM10070]

2 Guidance on who is a self-sufficient person can be found in See Tax Credits Technical Manual [TCTM02075] or the Child Benefit Technical Manual [CBTM10070]

Therefore, as she did not have a right to reside, she was not entitled to Child Benefit and Child Tax Credit.

Example 2

22 An EEA national who claims Child Benefit shows that he has been working for three hours per day, five days per week for the last four months. The caseworker decides

that the work is genuine and effective because it is not on such a small scale as to be marginal and ancillary. The work was on a regular basis continuing for a reasonable length of time.

Example 3

23 A German national who came to the UK on 18.6.13. On 20.6.13 she made an arrangement with a British family to act as an *au pair.* The agreement was that she would work 13 hours per week, in return for which she would receive £35 and free board and lodging for herself and her child. At the outset the intention was that the arrangement would be long term, but the arrangement was terminated by the family on 28.7.13. On 31.7.13 a claim was made for income-based Jobseeker's Allowance, Child Benefit and Child Tax Credit.

The caseworker considered whether the claimant might be a worker who had become involuntarily unemployed and decided that she had been a worker as her activities as an *au pair* had been genuine and effective because:

- she had provided services of economic value to her employers in return for remuneration;
- the arrangement had been intended at the outset to be long term and had terminated unexpectedly early;
- she is in duly recorded involuntary unemployment and registered as a jobseeker with the relevant employment office.

Example 4

24 A Dutch national claimed income-related Employment and Support Allowance, Child Benefit and Child Tax Credit. She worked in the Netherlands from 1995. The firm she was working for in the Netherlands closed down in June 2010 and so she came to the UK to look for work. It emerged that in the period since June 2010 the claimant had been looking for work and that between 2010 and 2012 she had been doing unpaid voluntary work. The caseworker decided that the claimant did not have a right to reside as a worker. In particular the claimant wasn't a person who retained worker status because she had never been a "worker" in the UK. Her activities had consisted of voluntary community work which was outside the "economic" form of activity for remuneration which is an essential factor in being a "worker". The caseworker determined that she was not a job-seeker as she was not actively seeking work and she was not self-sufficient as she did not have an income above the level of the relevant applicable amount for an income-related benefit and comprehensive sickness insurance. As she did not have a right to reside, she was not entitled to Child Benefit or Child Tax Credit.

Example 5

25 The claimant was a Polish national. She sustained a back injury in a car accident in Poland in 2008 and, despite medical treatment the result was that she was unable to stand for more than half an hour at a time. She came to the UK on 18.3.13 and started work as a full-time shop assistant on 20.3.13. The claimant worked for about 2 weeks, following which she went off work for a week due to severe back pain. She was paid Statutory Sick Pay for this absence. The claimant then returned to work for a few days but she was unable to continue. The claimant did not return to work and her employment was terminated on 15.5.13. Claims for income-related Employment and Support Allowance, Child Benefit and Child Tax Credit were made on 2.6.13. The caseworker examined whether the claimant had been a "worker". He assessed all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue. Following Commissioner's decision CSIS/467/07, the caseworker held that the claimant's physical capacity for work was an issue when considering the employment relationship which was critical to the determination of whether the claimant was a worker. The caseworker decided that the existing nature of the claimant's condition, the lack of physical capacity to do the work, the short interrupted duration of the employment and the reasons for the claimants dismissal were compelling grounds for finding that the claimant had not been a worker. The caseworker therefore decided that the claimant did not have a right to reside as a worker. The caseworker also determined that she was not:

- a job-seeker as she was not actively seeking work; and
- self-sufficient as she did not have an income above the level of the relevant applicable amount for an income-related benefit and comprehensive sickness insurance

Therefore, as she did not have a right to reside, she was not entitled to Child Benefit or Child Tax Credit.

SELF-EMPLOYMENT

26 The UT has held that, in order for a person to be regarded as self-employed for the purposes of the right to reside, the activity as a self-employed person must be genuine and effective rather than marginal or ancillary[1].

1 Case C-268/99 Jany and Others v Staatssecretaris Van Justitie; see also Bristol City Council v FV (HB) [2011] UKUT 494 (AAC), CH/2859/11

27 The Minimum Earnings Threshold described in paragraph 5 above may not always be easy to apply in the case of self-employed persons but in general if:

1. average profits (before tax and NI) are more than £646 pcm (£149 pw) **and**

2. average profits have been at, or above that level, for a continuous period of 3 months,

the caseworker should accept that the self-employment is genuine and effective and they can be considered as self-employed under EU law.

28 If average profits are below than that level and/or have not been at or above that level for a continuous period of 3 months, the caseworker will need to examine the case under the Tier 2 process in paragraph 7 with a view to determining whether the self-employment is genuine and effective.

29 Caseworkers should exercise care in applying the guidance on EU case law in paragraphs 9 and 10 on the meaning of "worker" to the question of whether self-employment is genuine and effective. Account must be taken of the different nature of self-employment: it may include periods of relative inactivity and there will be a period particularly as a business is starting up, when the person may be working long hours, but not yet receiving much profit.

30 In a UT decision about Housing Benefit[1], the Judge dealt with a claim by a Romanian national who had arrived in the UK in 2007. The FTT had found that the claimant had been working as a Big Issue seller for about 3 years. She worked for about 16hours per week, rising later to 24. Profits for August to November 2010 averaged £45pw. For November and December 2010 this rose to £150 per week, giving an average weekly profit of £90 per week for August to December 2010. The UT judge confirmed the FTT's decision that this amounted to genuine and effective self-employment.

1 Bristol City Council v FV (HB) [2011] UKUT 494 (AAC), CH/2859/11

EXAMPLES FOR SELF-EMPLOYMENT

Example 1

31 A Czech national arrived in the UK on 4.1.14. She claimed income-based Jobseeker's Allowance and Child Benefit on 11.2.14. She said that he had a right to reside as a self-employed person. She had a contract with a local business under which she provided it with bookkeeping services. The contract was for 2 hours work per month, at a fee of £25 an hour and the claimant had completed the work for January 2014 on 1.2.14 and had not been provided any work for February. She had not advertised her services, nor had she sought any other contracts. On 14.2.14 a caseworker considered the claim. He decided that the claimant's self-employment activities were marginal rather than genuine and effective and so the claimant did not have a right to reside as a self-employed person. The caseworker also determined that she was not a job-seeker as she was not actively seeking work and she was not

self-sufficient as she did not have an income above the level of the relevant applicable amount for an income-related benefit and she did not have comprehensive sickness insurance. As she did not have a right to reside, she was not entitled to Child Benefit.

Example 2

32 A French national arrived in the UK on 6.1.14 and claimed income-related Jobseeker's Allowance, Child Benefit and Child Tax Credit on 17.3.13. She had been working on a self-employed basis as an interpreter. Since arriving she had worked for 12 hours per week on average, charging a fee of £15 per hour. The caseworker decided that the claimant's activity as a self-employed person was genuine and effective and that consequently the claimant had a right to reside as a self-employed person. The caseworker was satisfied that the claimant was willing and able immediately to take up an employed earner's employment and that she was actively seeking work. The caseworker awarded Child Benefit and Child Tax Credit accordingly.

CONTACTS

If you have any queries about this memo, contact the Child Benefit Helpline.

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[February] 2014