



The Income-related Benefits Schemes (Miscellaneous Amendments) (No. 3) Regulations 1994

(S.I. 1994 No. 1807)

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 Social
Security in accordance with Section 174(2) of that Act.

*Presented to Parliament by the Secretary of State for Social Security
by Command of Her Majesty.
July 1994*

LONDON: HMSO



The Income-related Benefits Schemes (Miscellaneous Amendments) (No. 3) Regulations 1994

(S.I. 1994 No. 1807)

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 Social
Security in accordance with Section 174(2) of that Act.

*Presented to Parliament by the Secretary of State for Social Security
by Command of Her Majesty.
July 1994*

LONDON: HMSO

SOCIAL SECURITY ADVISORY COMMITTEE

Mr M BETT	CBE Chairman
Mrs J ANELAY	OBE JP
Mr A DILNOT	
The Rev'd G H GOOD	OBE
Mr D GUERECA	
Mr N HARDWICK	
Mr M HASTINGS	
Professor A OGUS	
The Hon Mrs R H PRICE	CBE
Esme SCOTT	CBE
Professor O STEVENSON	CBE
Dr A V STOKES	OBE
Mr O TUDOR	
Mr R G WENDT	DL

Secretariat

Mr L C Smith	Secretary
Mrs J Waygood	Assistant Secretary
Mr R Elbert	Assistant Secretary
Mrs H Brown	

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

Introduction 1. The Income-Related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 1994 were referred to the Social Security Advisory Committee on 4 February 1994 for consultation in accordance with Section 174(1) of the Social Security Administration Act 1992. The title of these Regulations has since been amended to the Income-Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994.

2. These regulations will introduce a test of habitual residence into the Income Support, Housing Benefit and Council Tax Benefit schemes. This is part of a process of narrowing access to benefit for people the Government believes the taxpayer should not be asked to support. The regulations will also deal with some of the widely publicised abuses of these benefits by non-UK nationals.

3. The regulations also seek to extend the definition of persons from abroad in Housing Benefit and Council Tax Benefit to bring these benefits into line with provisions in Income Support in connection with the European Community (EC) Rights of Residence Directives concerning the economically inactive.

4. The test of habitual residence will apply to nationals of all countries currently entitled to claim these benefits, including United Kingdom (UK) nationals and nationals of the other European Economic Area (EEA) countries ie. all EC States plus Austria, Finland, Iceland, Norway and Sweden. Those who have established a right of residence in the UK as EEA workers will not be affected.

5. The Government has considered the views of the Committee and has decided to proceed with amended proposals, which have been altered for the reasons set out below in the comments on the Committee's recommendations.

Committee's Response 6. The Committee expressed sympathy with the view that the UK taxpayer, as a matter of principle, should not be expected to finance the living expenses of nationals from other EEA Member States who simply wish to stay for a few months in the UK, without intending to remain here or to look for work. However, the Committee felt that a habitual residence test was complex and of uncertain effect since it would have to be applied universally. Particular concern was expressed about the future entitlement to benefit of three groups; Irish nationals, UK nationals who return to this country after an absence abroad and refugees. For these reasons, the Committee **recommended that the proposal in its present form should not be proceeded with.**

7. The Government cannot accept this principal recommendation in its entirety. The precise size of the current abuse cannot be determined, but we need to act now before the loophole becomes more widely known and the costs escalate. Our proposals will place entitlement to these benefits on a similar

footing to that in other European countries. Failure to act at this time would not serve the interests of the taxpayer. However, in recognition of the historical and continuing close ties between the peoples of the Irish Republic and the UK, the draft regulations have been broadened so that people habitually resident within the Common Travel Area will be treated in the same way as people habitually resident in the UK. Residents of the Republic of Ireland, Channel Islands and the Isle of Man will not now be affected by these revised regulations.

8. We have noted the representations made to the Committee regarding the rights of workers and the principle of freedom of movement within the Community. EC Regulation 1612/68 entitles migrant workers to equal treatment with workers of the host state with regard to social advantages. This effectively requires that workers be exempt from the test in order to avoid indirect discrimination against non-UK nationals. We have therefore incorporated an exclusion from the habitual residence test for EEA workers to whom EC Regulation 1612/68 applies.

**Committee's
Recommendations**

9. In the event that the Government chose not to abandon these regulations, the Committee proposed a number of further recommendations. These recommendations and the Government responses to them are given below:

(1) There should be no change in the entitlement to benefit of the following groups of people:

(a) nationals of the Republic of Ireland:

RESPONSE: The Government recognises the historical and continuing close ties between the peoples of the Irish Republic and the UK and the implications of the Common Travel Area which allows people to move freely between the UK, the Republic of Ireland, the Channel Islands and the Isle of Man. There have never been immigration controls between the UK and the Republic of Ireland. Both British and Irish citizens are free to come and go, either way, as they wish because there is complete freedom of movement between the two countries, nor are passports required in order to travel. There is no residence restriction on a UK national's ability to claim Irish welfare benefits, which are paid at a level broadly equivalent to Income Support, even though other EEA nationals must apply for an Irish residence permit after 3 months. Similar historical and social factors apply to the Channel Islands and the Isle of Man.

The regulations have therefore been broadened so that people habitually resident within the Common Travel Area will be treated in the same way as people habitually resident in the UK. People habitually resident in the Republic of Ireland, the Channel Islands and the Isle of Man will not now be affected by these revised regulations.

(b) returning UK nationals

RESPONSE: We are unable to accept this recommendation. It would be contrary to European law to introduce new legislation in this area which would discriminate, either directly or indirectly, on the basis of nationality. All EEA nationals, including UK citizens, have to be treated on an equal basis. In consequence, those who have spent most of their working lives outside the UK may have to re-establish habitual residence if they decide to return and wish to claim Income Support, Housing Benefit or Council Tax Benefit.

(2) There should be an exemption from the proposed regulations for people with refugee status and those granted exceptional leave to remain in the UK.

RESPONSE: We accept this recommendation. Asylum seekers are already specifically exempt from the habitual residence test and it was never our intention that refugees or persons granted exceptional leave to

remain in the UK should be affected by the new test. In practice, we expect that habitual residence would have been established by the time of any subsequent or repeat claim, but accept that a possibility exists that it may not. We have therefore amended the regulations to clarify that all claims by refugees and those given exceptional leave to remain in the UK should be exempt.

(3) The following amendments should be made to the operation of the test:

(a) where it appears on first enquiry by questionnaire that a person is not habitually resident for the purpose of entitlement to Income Support, he or she should automatically be offered an interview and that local authorities should be encouraged to follow suit;

RESPONSE: It is for the Benefits Agency and Local Authorities to determine how best to administer this test and not for the Department to impose handling arrangements. It is likely that interviews will be conducted in many instances.

(b) the period of residence in the UK within which enquiries are made into habitual residence should be reduced from 5 years to 2 years;

RESPONSE: We accept this recommendation in principle. The period of 5 years included on existing claim forms has no significance for habitual residence. The Department wishes in future to limit the number of necessary enquiries and does not intend to question the circumstances of claimants clearly established in the UK. As part of the monitoring and evaluation of this policy initiative we intend to collect data which will indicate a reasonable time period to use in future. Revised claim forms will be introduced as necessary.

(c) where a person is receiving Family Credit (FC) or Disability Working Allowance (DWA), eligibility for Housing Benefit and Council Tax Benefit is accepted without the need for the local authority to apply a test of habitual residence;

RESPONSE: The regulations as now constituted treat both employed and self-employed earners who have worker's rights as being habitually resident. Therefore people in receipt of FC or DWA will under normal circumstances also be treated as habitually resident and as a consequence will satisfy this condition of entitlement to Housing Benefit and Council Tax Benefit.

(d) the habitual residence test should apply only to the claimant.

RESPONSE: We accept this recommendation. It has never been our intention that this test should apply to a partner or a dependent and we are pleased to put this beyond doubt in the amended regulations.

Committee's Comments 10. The Committee was concerned about the difficulties associated with the operation of the test. They regarded it as subjective, and difficult to apply with any degree of accuracy. The Government is opposed to the introduction of measures which complicate the benefits system and believe that a test at the point of claim is the least intrusive method of achieving the policy objectives. Alternative procedures used elsewhere, such as residence permits for all citizens, are intensely bureaucratic and out of keeping with our traditions.

11. The Committee also expressed concern about the ability of the local authority review system to deal effectively and consistently with disputes arising from the test. Although this was not within its remit and is not therefore a formal recommendation, the Committee felt that it would be advisable for all habitual residence decisions, including those arising solely from Housing Benefit and Council Tax Benefit, to be referred to the Social Security adjudicating authorities. Since EEA workers will not be subject to the habitual residence test,

the majority of non-UK nationals who claim Housing Benefit and Council Tax Benefit are also likely to claim Income Support. Housing Benefit and Council Tax Benefit have an adjudication and appeals system which is separate from the Income Support system. It would not be appropriate to single out one category of decisions for special treatment.

12. The Committee has suggested that the legislation should be expanded to take account of changes in the labour market where these have an influence on case law. They were concerned, for instance, that the emphasis on stable employment, implicit in the case law, did not reflect the realities of a labour market in which there was a growing number of part-time jobs and more fixed-term contracts. EEA nationals with worker's rights will not, as mentioned above, be subject to the habitual residence test. So far as other persons in employment are concerned, we believe it right to allow the Courts and the Social Security Commissioners to establish case law in this area. We will, of course, consider the need for additional legislation as and when the case law develops.

13. The existing conditions of entitlement for Income Support include the requirement to be both available for and actively seeking work. The Committee recognise that it would be unduly harsh to apply these tests more stringently to all claimants in order to weed out a minority of benefit tourists. These tests do not, of course, currently apply in Housing Benefit and Council Tax Benefit.

14. The Committee also noted that there is no intention to introduce interim payments of benefit during the appeal process. To do so would be to put these claimants in a far superior position to other appellants and is therefore not acceptable.

15. The Committee also expressed concern about the potential for racial discrimination against ethnic minority communities, members of which may make extended, although temporary, visits to family and friends abroad and who may find themselves unable to claim benefits immediately on their return. This concern was linked with other difficulties in adjudicating on habitual residence, given the number of factors that have to be taken into account, and led to the recommendation in paragraph 8 above. The Government is satisfied that there is no greater risk of racial discrimination in making an adjudication decision on habitual residence than in any other decision the adjudicating authorities are asked to make and believes that the monitoring of decisions and the normal appeals process will be sufficient to ensure equality of treatment.

16. We note the Committee's observation that there are limits to accessing social assistance which nationals from EEA States can receive in host states elsewhere, but which do not apply in the UK, making our system more generous in this respect than other Member States. Although the Committee does not endorse the proposals, the Government has to act to place access to our benefits on a similar footing. The Department needs to take these measures before the problem reaches greater proportions as not to do so would be to ignore the interests of the UK taxpayer.

Conclusion 17. The Government is grateful to the Committee and to those interested parties who responded to the consultation exercise, for their consideration of the draft regulations and their comments on them.

18. The regulations are now laid before Parliament.

Report of the Social Security Advisory Committee made under Section 174 of the Social Security Administration Act 1992 on: The Income-Related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 1994

Introduction

1. We give below our report on the draft of these regulations, which deal principally with the introduction of a test of “habitual residence” in the UK as a condition of entitlement to Income Support, Housing Benefit and Council Tax Benefit. The regulations also extend the definition of persons from abroad in Housing Benefit and Council Tax Benefit to bring these benefits into line with equivalent provisions in Income Support.

2. The draft regulations were referred to us on 2 February 1994 and on 4 February we published a Press Release inviting comments to reach us by 4 March. We were able to take account of replies received up to 15 March 1994. We received 79 representations, which are listed at Appendix 1 to this report, and we invited the Department of Social Security (DSS) to comment on the points made in the representations.

Scope and purpose of the Regulations

3. The content and purpose of the regulations were described for us in two explanatory notes provided by the Department, which are reproduced at Appendix 2. The proposals provide that a person must be habitually resident in the UK in order to be eligible for Income Support, Housing Benefit or Council Tax Benefit. For the purposes of this report, we refer to these three benefits as “the income-related benefits”. The test of habitual residence would be applied to all claimants, including UK nationals and nationals of other European Economic Area (EEA) States.¹ The Department’s supplementary note explains that the regulations also provide for a national of an EEA State who is required by the Home Secretary to leave the UK to be treated as a “person from abroad” and excluded from Housing Benefit and Council Tax Benefit. This provision would mirror the existing position which excludes such a person from Income Support. Both proposals would apply only to new and repeat claims for benefit made on or after the effective date of the regulations, which the Department intends to introduce in the Summer of 1994. This report deals largely with the habitual residence test proposal. We deal briefly with the provision to mirror Income Support provisions in Housing Benefit and Council Tax Benefit in paragraph 49 below.

4. Separate but identical changes are proposed for Northern Ireland.

5. Paragraph 3 of the Department’s explanatory note on the habitual residence test describes the introduction of the test as “. . . part of a process of narrowing access to benefit for people the taxpayer should not be asked to support”. The

¹The EEA consists of Member States of the EC, plus the following EFTA countries: Austria, Finland, Iceland, Norway and Sweden.

note explains that the proposal is also, in part, intended to “deal with the well-documented abuses of these income-related benefits by some non-UK nationals, which has caused public anxiety”. The Department adds that the test is intended to place conditions of access to the income-related benefits on a similar footing to eligibility conditions for comparable benefits in other EEA Member States.

6. Paragraph 10 of the note explains that the term ‘habitual residence’ is used in European legislation, in particular in Regulation (EEC) 1408/71 which deals with social security for migrant workers, and that the concept is already familiar to British adjudication authorities dealing with Unemployment Benefit. At paragraph 11, the Department provides examples, taken from case law, of the factors the adjudicating authorities may take into account when applying the habitual residence test. These are:

- where the person’s centre of interests lies;
- whether he or she has stable employment;
- the nature of the person’s employment;
- the person’s reasons for coming to the UK;
- the length and continuity of residence outside the UK; and
- the person’s future intentions.

The note states that, in order to decide whether a person is habitually resident, consideration of a combination of such factors will be necessary in order to fit the circumstances of the individual case.

Background

7. The majority of people from abroad whose admission to the UK is subject to immigration control are admitted on the understanding that they should not have recourse to public funds. With certain exceptions, they have always been excluded from Income Support and, since 1 April 1994, this exclusion has applied also to new or repeat claims for Housing Benefit and Council Tax Benefit. There are exceptions in all three benefits for certain groups, notably asylum seekers, people who are temporarily without funds (in these cases payment is limited to a maximum of 42 days) and those who are awaiting the outcome of an appeal on their immigration status. People in these groups are eligible to claim Income Support under the Urgent Cases provisions and have normal entitlement to Housing Benefit and Council Tax Benefit.

8. Different provisions govern the entitlement of nationals of EEA Member States. Under recent EEC Rights of Residence Directives, EEA nationals who are students, pensioners or otherwise *not economically active* may reside in the UK, as in any other Member State, on condition that they do not become a burden on the finances of the host State. If an EEA national who is living in the UK under the terms of one of the Directives makes a claim for Income Support, he or she may be declared by the Home Office to be no longer lawfully present in the country and required to leave.

9. Nationals of EEA Member States who come to this country to *seek work* and who have not previously worked in the UK are eligible for Income Support for a period of up to six months. After that period, if in the opinion of the Employment Services Claimant Adviser they are no longer actively looking for employment or they have no genuine chance of finding work, they may be declared no longer lawfully present in the UK by the Home Office and required to leave. The matter will then be referred to an adjudication officer and payment of Income Support will cease. An EEA *worker*, ie. an EEA national who is working, or is unemployed in the UK having previously had employment here, is currently entitled to claim income-related benefits under the normal rules.

10. The position of Irish nationals is different from other EEA nationals in that neither the work-seekers' time restriction nor the Rights of Residence Directives are applied to them. Under the Ireland Act of 1949, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the UK (see also paragraph 36). Irish people, whether they are workers, work-seekers, or not economically active, are not declared unlawfully present in the UK as a consequence of making a claim on public funds and required to leave. The DSS does not therefore currently ask Irish nationals for details of their dates of travel to the UK.

11. However, it is intended that, in order to be non-discriminatory, the requirement that a person must satisfy an habitual residence test to be eligible for the income-related benefits will apply to all EEA nationals, including Irish nationals, those EEA workers whose access to benefits is not currently subject to any special condition, and UK nationals. Non-EEA nationals, other than those in excepted groups, will remain excluded from benefit whether or not they satisfy the test of habitual residence.

12. In the Summer of 1993 there were a few, highly-publicised reports of people from EEA Member States receiving substantial amounts of benefit while apparently demonstrating little or no intention of finding work. Public reaction to such reports was perhaps understandably one of outrage and there was consequently pressure on the Government to remedy the situation. The Secretary of State signalled his intention in the Autumn of 1993 to introduce measures to curb "benefit tourism"—the use of benefits to finance short stays in the UK by EEA nationals. In a press release on 4 February 1994, he described the purpose of the proposed residence test as:

"to establish whether people are genuinely committed to living and working in Britain".

Responses to the proposals

13. The 79 responses we received came from a variety of sources, 42 of them from Irish individuals and organisations in the UK. The great majority of our respondents expressed strong reservations about the introduction of a test of habitual residence in the income-related benefits, taking the view that it would be administratively very complex, would lead to arbitrary decision-making and would affect a much greater number than intended. The general view was that an habitual residence test should not be implemented in its proposed form. For the reasons set out below, we have reached a similar conclusion. **Our primary recommendation therefore, at paragraph 50 of this report, is that the current proposal should not be proceeded with.**

The problem

14. The explanatory note from the DSS makes clear that the proposal to introduce an habitual residence test is in the broader context of the Department's drive to curb fraud and abuse of the benefit system. Several of our respondents suggested that current perceptions that there is a particular problem of abuse by non-UK nationals have arisen purely as a result of a few highly publicised cases. The Department has acknowledged that the numbers involved so far have not been large, but takes the view that they have the potential to grow with the expansion of the EEA. It seems to us reasonable that the Department should wish to take action before a problem reaches greater proportions. It is clearly prudent to do so. However, we share the concern of those who drew our attention to the administrative difficulties inherent in the proposed test, the likely disproportionate effect of the proposal on Irish nationals, and the implications for returning UK nationals, including those from ethnic minorities, and for refugees.

15. It appears that the proposed test would be introduced without a reliable estimate of the number and circumstances of the people who would be affected. The Department states that about 5,000 EEA nationals could be adversely affected (although there is no suggestion that these are all "benefit tourists"), but does not give an estimate of the impact on UK or Irish nationals. We can well

understand why there is at present no reliable figure on which to base such estimates. The relationship between the UK and Ireland has long been such that travel between the two countries is not regarded as different from travel within the UK, so no official count of movements has been made. Similarly, there has been no reason to count the number of UK nationals returning from lengthy periods living or working abroad. However, in trying to assess whether the proposed measure is reasonable, it would seem to be necessary to have a firmer idea of how many people from Continental Europe would be affected, since this is the group the Secretary of State has identified as the source of potential abuse. The size of this group must be compared with the number of Irish nationals coming to the UK and of returning UK nationals who have been overseas for some time. For each of these groups, the likelihood of their being able to satisfy an habitual residence test has to be considered. Without reliable estimates, we can only guess at their relative magnitude and the likely effect of an habitual residence test on each of them. It is clear, however, that an habitual residence test applied across the income-related benefits would impose a very considerable administrative burden. The costs of administration, and the aggravation and anxiety caused for the many claimants who would be required to face the test, and would do so successfully, but who were never the intended target of the proposals, may well turn out to be too high a price to pay in order to provide a solution to a relatively small issue. In our view, there is a very strong case for undertaking research to quantify the problem and the potential effects of the proposed test before proceeding further.

16. The present proposal may also have an impact on the mobility of labour between EEA Member States. Whilst we support measures to prevent benefit tourism, the proposed test seems to have potentially wider effects on those coming to the UK to work.

17. Several respondents expressed themselves generally in sympathy with measures to curb abuse of the benefit system, but pointed out that the Department already has other ways to address any problem of benefit tourism. As we have noted, people coming to the UK from outside the EEA, with very limited exceptions, are now ineligible for Income Support, Housing Benefit or Council Tax Benefit. With the exception of the Irish, the access of EEA nationals to these benefits is restricted to workers and work-seekers, the latter being effectively restricted to 6 months' benefit. The Department already has powers to test a person's availability for work and efforts to find it, and to withdraw benefit from people who, in the opinion of the adjudicating authorities, are not genuinely looking for employment. It was suggested, therefore, that the effective application of existing powers should provide sufficient remedy for any potential abuse from EEA nationals seeking to take advantage of benefit tourism. In principle we could agree with the line of argument that existing provisions, effectively applied, are enough. But it would be unduly harsh to apply an actively seeking work test more stringently to *everyone* at a time of high unemployment, in order to weed out a minority of benefit tourists. We believe that such a move would be unacceptable.

Compatibility with EC Law

18. The Department has taken legal opinion on the compatibility of the proposed habitual residence test with the UK's obligations under EC legislation. We understand that the advice given to the Department was that, provided it is applied in such a way as to ensure equality of treatment between nationals of different EEA states, the test would not contravene EC regulations. Accordingly, the Department intends that the test will be applied to anyone who indicates that he or she has come to live in the UK in the past 5 years, including UK and Irish nationals.

19. However, some of our respondents expressed the view that the test could be challenged on the grounds of covert discrimination between workers from different Member States. Although an habitual residence test would, on the face of it, be applied equally to UK nationals and to nationals of other EEA states, in

their opinion it would in practice screen out more EEA nationals than UK citizens. Nationals of the UK, it is suggested, would find such a test easier to satisfy.

20. The Committee is not in a position to comment on the compatibility of the proposed test with EC legislation. We therefore do no more than report the view expressed to us that the Government could be vulnerable to challenge in the European Court on the grounds that the proposed test would indirectly discriminate against other EEA nationals who come to the UK.

The Habitual Residence Test

21. Several respondents drew our attention to an amendment proposed during the passage through Parliament of the Social Security Act 1986. In Committee on 27 February 1986, the then Social Security Minister (Mr Major), rejected calls for a 12 months' residence test to be applied to claims for Income Support and Housing Benefit. The arguments used by the Minister at that time to reject the amendment seem similar to arguments put by those who responded to us on the habitual residence test—too rigid; too cumbersome; enormously disproportionate administrative costs.

22. However, on closer examination there is a great difference between the test proposed in 1986—that entitlement should in every case be conditional upon 12 months' residence in the UK—and a test of habitual residence. As the Minister said in relation to Housing Benefit: ". . . it would be unreasonable and illogical to rule that no one could be regarded as having set up home in Great Britain until that person had been here for a full 12 months. The important thing is to distinguish between genuine residents and those who have no intention of making their proper home in this country".² It will be apparent that this objective is almost identical to that which the Secretary of State is seeking to achieve with an habitual residence test. Therefore, although there may be resemblances in the arguments used by the Government against a blanket 12 months' residence test in 1986 and the points made by our respondents arguing against the introduction of an habitual residence test, there is no real comparison between the two tests. We believe therefore that it is sufficient to concentrate on the current proposal and leave aside any arguments used some eight years ago for or against a different test.

23. A recurring theme in the responses we received was concern about the complexity and subjective nature of the proposed residence test. The Department's explanatory note makes the point that a residence test is not a new concept; such a test has been in use for some time in connection with other benefits, for example, Unemployment Benefit. However, the examples given in the Department's note of just some of the many factors which may have a bearing on any particular case illustrate the difficulties inherent in such a test. If it is extended to the income-related benefits, where it has the potential to affect a much larger number of cases and will be applied by a variety of adjudicating authorities, we believe that it will be extremely difficult to ensure that the test is applied fairly and consistently.

24. A particular problem with a test of habitual residence is that much of the objective evidence is concerned with the claimant's past. It is more easily applied retrospectively, using the established facts of a person's history of residence and employment. Judgements about the weight to be given to future intentions are clearly more difficult and, as many respondents pointed out, the adjudicating authorities are likely therefore to have particular problems in dealing with claims from new or recent arrivals in the UK. It would obviously be counterproductive if a claimant, armed with the correct responses, could appear to satisfy the test by representing that he or she was genuinely committed to living and working in Britain", whether or not that ultimately proved to be the case.

²Official Report, House of Commons, Standing Committee B, 27 February 1986.

25. Some respondents who have had experience of the habitual residence test as it currently operates have emphasised that it is a very difficult test to apply, even retrospectively, requiring the adjudicating authorities to balance many competing factors. Decision-making could be very subjective and more open to challenge. The point was made to us that it may prove particularly difficult for the Housing Benefit and Council Tax Benefit review systems to deal with disputes arising from the test, which are likely to have higher degrees of complexity than usual and may require reference to aspects of EC law. It is clearly important to ensure as far as possible consistency of decision making between Review Boards and Social Security Appeal Tribunals. The adjudication system is not part of our remit, but it was suggested to us that the determination of all habitual residence questions, including those arising from Housing Benefit and Council Tax Benefit claims, should be referred to the Social Security adjudicating authorities.

26. We have already noted that the proposed test, because of its universal application, is likely to have much wider effect than is intended by the Department. We are particularly concerned that it may create anxieties and uncertainties for people from ethnic minority communities who, although well established in the UK, have roots overseas and make visits to families abroad. Such visits may well be frequent or extended and it is possible that, on return to the UK, the adjudicating authorities could decide that the habitual residence qualification had not been fulfilled. We are concerned too that such a test has the potential to raise many of the problems of discrimination identified in our report on the regulations excluding people from abroad from Housing Benefit and Council Tax Benefit³—with the attendant risks of damaging community relations and deterring genuine claims from black and Asian British citizens. Indeed, it has been suggested that the proposal contradicts recently-issued guidance to local authorities on persons from abroad, which stresses the need for sensitively-handled interviews, making clear that it is not the role of the local authority to establish why the person claiming benefit is in the country. An habitual residence test would, in practice, require local authorities to do exactly that.

27. It was also suggested to us that the emphasis in the existing case law on the importance of employment-related factors—the stability and likely duration of a person's employment—is inappropriate in the light of changing work patterns. Part-time work, temporary working and fixed-term contracts, often of short duration, have become much more common in recent years and may be the only employment that is open to many people coming to the UK. The examples from case law quoted in the Department's note would indicate that if a person has only short-term or casual employment, or is employed on a fixed-term contract, this would tend towards the conclusion that he or she remained habitually resident in the 'home' State. On this point, we understand that the Department accepts that the effect of the changing labour market is a factor that the adjudicating authorities may take into consideration, and we have been assured by the Department that it would expect this to be covered in the revised and expanded guidance on habitual residence which the Chief Adjudication Officer plans to issue in time for the implementation of the change.

28. We take the view, however, that any emphasis on stability of employment, and the inference that may be drawn by adjudicating authorities that entitlement might rest on types of employment contract, would be unhelpful in the present climate. If the Secretary of State decides to implement the proposed test, we suggest that it might be preferable to amplify the legislation to specify the criteria that the adjudicating authorities should take into account, based on selection from established case law. Any list of factors for consideration contained in regulations could be extended as case law on habitual residence develops.

29. At present, people from abroad whose immigration status has to be established in order to determine entitlement to benefit are identified by means of a question on the claim form which asks if they, or any member of their family,

³The Housing Benefit and Council Tax Benefit (Amendment) Regulations 1994, Cm 2483, HMSO.

have come to live in the UK within the previous 5 years. If the answer is that they have, they are then interviewed by benefits staff. We understand from the Department that it is proposed to collect the information on habitual residence by means of a special questionnaire, which would be issued if the claimant answers in the affirmative to the “5-years” question on the claim form.

30. In our view, the information needed for an habitual residence test is just as complex, if not more so, than that needed to establish immigration status. Collection of information by means of a lengthy questionnaire would inevitably give rise to misunderstandings, especially as English would not be the first language of many of those required to complete the form. The explanatory note from the Department suggests that in some complex cases the claimant will be asked to attend for interview. Although we appreciate that it would add to the administrative burden, if the Secretary of State decides to implement a test of habitual residence, we **recommend** that in all cases where the response to the questionnaire indicates that a claimant would fail the test for Income Support purposes, the Benefits Agency should offer a personal interview. This would ensure that claimants have the opportunity of help from an interpreter, or could bring a representative to speak for them if they so wished. We recognise that the administration of the proposed test for Housing Benefit and Council Tax Benefit purposes would be a matter for local authorities, but we hope that they would be encouraged to adopt the same procedures.

31. Since 1988, a period of 5 years has been used as the bench mark for enquiry into immigration status. It appears to us that using so long a period must inevitably generate many cases of unnecessary investigation. If this period is used to trigger additional enquiries to establish habitual residence, it would be likely to result in a great many people whose residence in the UK is clearly already well-established being subjected needlessly to further enquiries. We think that it would be reasonable to reduce the 5-year period in order to narrow the focus for enquiries into habitual residence to people who are more recent arrivals in the UK, and for this purpose we suggest that a period of 2 years would be ample. Unless the claim form were to be complicated by the addition of an entirely separate question for persons from abroad, it would follow that the period for investigation into immigration status would be similarly shortened. We **recommend** that the trigger point for generating enquiries into habitual residence should be reduced to 2 years.

32. A further potential complication is that there is a possible mismatch between the proposed habitual residence test and the “ordinarily resident” test in Family Credit and Disability Working Allowance. We appreciate that there may be only a few cases where both tests might be applied by different adjudicators, but it appears to us unreasonable that a person may be accepted as “ordinarily resident” in the UK for the purposes of eligibility to Family Credit or Disability Working Allowance, while being refused Housing or Council Tax Benefit on the grounds that he or she was not “habitually resident”. The draft regulations already provide that a person receiving Income Support should be regarded as habitually resident for the purposes of entitlement to Housing Benefit and Council Tax Benefit without the need for further enquiry by local authority staff. If the proposal to introduce an habitual residence test is implemented, it would be a small but welcome simplification if receipt of Family Credit or Disability Working Allowance were to be treated in the same way. We **recommend** therefore that the regulations are amended to provide that, where Family Credit or Disability Working Allowance is in payment, the person would be deemed to have satisfied an habitual residence test for the purposes of entitlement to Housing Benefit and Council Tax Benefit.

33. The differences between a test of “ordinarily resident” and “habitually resident” are of emphasis and we have been unable to find any uniquely distinguishing factor. We understand that the Department’s view is that habitual residence implies a stronger, more regular physical presence in the country and association with it than does “ordinarily resident”. Habitual residence is also a

term already used in European legislation, which is well understood. There is case law on both tests, but the adjudicating authorities have a considerable body of advice and case law on the meaning of ordinarily resident. Thus, although there are arguments for using either test, it is in our view a pity that the chosen test is not that with which the UK adjudicators are more familiar.

34. The basic difficulty with an habitual residence test was summed up by our correspondents very succinctly—it allows for the construction of a case for or against the claimant in almost every circumstance. We are assured by the DSS that the adjudicating authorities would have comprehensive guidance. We understand also that the Department has asked Central Adjudication Services to monitor adjudication standards closely in the first months following the implementation of the change. Nevertheless we take the view that such a complex and subjective test would inevitably lead to cases of doubtful adjudication, refusal of benefit and consequent hardship. Those refused would have the normal rights of appeal, but we note that the Department does not intend to introduce provision for interim payments of benefit while an appeal is pending, although the benefits are basic Income Support and Housing Benefit to pay rent.

Nationals of the Republic of Ireland

35. We have already noted the number of responses received to our consultation from organisations and individuals representing the interests of Irish nationals in the UK. The Department's note drew attention to the effect of the proposals on Irish nationals and, in view of their clear interest, we ensured that a representative selection of Irish organisations in the UK were included in our consultation. Their representations all made broadly the same points, but nearly all our respondents suggested that Irish nationals were almost certain to be affected more than any others by the introduction of the proposed test.

36. For reasons of history, and the continuing close ties demonstrated in the special status that Irish people enjoy in the UK, there is a large and extended Irish community in this country—our respondents estimated the number to be between 3 and 5 million people. We are informed that according to the 1991 census, over 850,000 people living in the UK were Irish born. Various enactments of the British Parliament have ensured that Irish people have a status very different from other EEA nationals. Under the British Nationality Act of 1981, Irish nationals have “settled status” without restriction on the length of stay. The 1971 Immigration Act established a “common travel area” comprising the UK, the Republic of Ireland, the Isle of Man and the Channel Islands, and travel to and from the UK within the common travel area is not subject to control. Irish nationals residing in the UK may vote in UK elections, stand as candidates in national and local elections, are eligible for jury service, and their children, if born in the UK, are entitled to British citizenship. By long tradition, many Irish people come to the UK to seek work, following the pattern established over generations and often joining members of their family already here.

37. It was suggested to us that, because of its proximity, Irish people are very likely to return to the Republic, sometimes for extended periods. Many Irish people, who would certainly regard their home as being in the UK, make frequent trips to stay with family still resident in Ireland. There was concern that those who maintain their family and cultural contacts in this way could find themselves debarred from benefit on return to the UK.

38. Our attention was also drawn to evidence from recent Labour Force Surveys showing that many Irish people are in relatively insecure jobs of a casual or temporary nature, particularly seasonal employment, for example, construction, domestic and catering work. Many respondents were concerned that new arrivals in the UK from Ireland could be refused benefit because they could not demonstrate that their employment was stable or likely to be long-term which, according to the way the test is currently applied, could tend to indicate that they were habitually resident in Ireland.

39. The Department's view is that, because of the long-standing close links between the UK and Ireland, many Irish nationals who come to the UK will have no difficulty in establishing habitual residence for the purposes of claiming income-related benefits. We accept that previous residence and employment in this country are likely to be strong factors in favour of their being regarded as habitually resident in the UK, and that, as the Department suggests, many Irish people who have history of work in both countries and travel frequently between the two may be accepted as habitually resident in both. Nevertheless, precisely because of those long-standing links the numbers of Irish people coming to the UK, particularly those seeking work, are clearly very substantial and certainly greater than those for nationals of other EEA Member States. Although we have been unable to establish a reliable estimate of the numbers involved, it is likely that the proposed test would have a disproportionate effect for Irish nationals and we are concerned that it may result in many, especially young, newly arrived Irish work-seekers being excluded from benefit with attendant consequences of hardship and homelessness. For these reasons we **recommend** that, if the Secretary of State decides to implement an habitual residence test, it should be based on criteria which allow for the maintenance of the existing traditional and long-standing arrangements on which Irish nationals currently rely.

UK nationals 40. The Department's explanatory note recognises that UK nationals returning to this country may fail an habitual residence test if they have been absent for long periods. We have already noted (in paragraph 26) the possibility that UK nationals from ethnic minorities could be particularly disadvantaged. Several of those who wrote to us cited the examples of people returning to the UK having spent years abroad with British forces, or working for British employers overseas, and of elderly people who, having retired perhaps many years ago to Southern Europe, wish to spend their declining years with families in the UK. We accept that UK nationals would be likely to have a long previous history of work and residence in this country and to have maintained close family links—factors which, the Department suggests, would weigh strongly in their favour. It is likely also that elderly people in particular would have little difficulty in establishing their future intention to make the UK their home. However, uncertainty will be created, and there will almost inevitably be cases where returning UK nationals are refused benefit, with consequent hardship. Although the numbers may be few, we share the view of our respondents that this would be a very undesirable outcome. We **recommend** therefore that, if the Secretary of State decides to implement an habitual residence test, it should be in such a way as to maintain the current level of access to benefits for UK nationals.

Position of asylum seekers and refugees 41. A number of responses expressed the view that the test would jeopardise the payment of benefit to asylum seekers, many of whom are of course fully intending to return to their former home when circumstances allow. We have been assured by the Department that asylum seekers will not be subject to an habitual residence test and will remain entitled to Income Support under the Urgent Cases provisions and to Housing and Council Tax Benefits.

42. We note, however, that people who have been granted refugee status or exceptional leave to remain in the UK who make a new or repeat claim for benefit would be subject to the test if they have been in the country for less than 5 years. We recognise that, in view of the likely circumstances of a refugee, it might be exceptional for the adjudicating authorities to decide that his or her interests were not centred in the UK. However, it is conceivable that where a refugee, or a person with exceptional leave to remain, states a firm intention of returning to his or her country of origin as soon as it is possible to do so, this might be regarded as indicating habitual residence outside the UK. The possibility may be slight, but as long as they are subject to a discretionary test it cannot be discounted. We are very concerned that benefit payments for this particularly vulnerable group of people could be put at risk. We therefore **recommend** that if an habitual residence test is introduced, people with refugee status and those who have been granted exceptional leave to remain in the UK by the Home Office should be exempted.

**Partners who are EEA
Nationals**

43. Some respondents drew our attention to the possible effect of the proposed test on foreign nationals who are dependent partners of UK nationals, or of EEA nationals who have themselves been accepted as habitually resident, should the relationship break down. We understand that where a dependant who is an EEA national claims income-related benefits in his or her own right following the ending of a relationship, if he or she has been resident in the UK for less than 5 years, eligibility would normally depend on satisfying an habitual residence test.

44. While looking at this point, however, we were left in some doubt as to whether the proposed legislation achieves the Department's intention with regard to claims from couples. We have been assured by the Department that it intends the habitual residence test to be applied only to the claimant. It appears to us that the regulation as drafted may allow for the test to be applied to the partner also. If the Secretary of State decides to proceed with the introduction of an habitual residence test, we **recommend** that the regulations may need to be clarified to put it beyond doubt that the test applies only to the claimant.

**Benefits available in other
EEA Member States**

45. At the Committee's request, an annex was added to the note which is reproduced at Appendix 2, setting out information about schemes in other EEA Member States. Whilst such comparative information is useful, we accept that making sensible cross-national comparisons is very difficult. Contexts and social structures vary considerably, as do the processes and delivery of social security. It is not surprising therefore that some of our respondents found the detail in parts of the annex to be incorrect. The Department has acknowledged that, on checking further the Irish scheme, nationals of the UK are **not** subject to the 3 months limitation that applies to other EEA nationals. It was also suggested to us that the information about repatriation in the description of the German scheme was misleading—we have been told that repatriation would not be likely to arise merely from being unable to support oneself.

46. We do not believe that these errors, which were made in good faith, undermine the general conclusion of the information that there are limitations to the social assistance which nationals from other EEA states can receive elsewhere, but which do not apply in the UK, making it more generous in this respect than other Member States.

**Costs and operational
difficulties for local
authorities**

47. The general view expressed by the local authorities who responded to us was that the proposals were an unwelcome addition to their burdens in administering the Housing Benefit and Council Tax Benefit schemes. They were concerned about the number of cases that may need further investigation from the 5-year question on the claim form. They could foresee the necessarily complex adjudication procedures leading to delay, possible wrongful refusal of benefit and consequent hardship. All emphasised the need for time to train staff before implementation of the proposed test and the primary importance of having comprehensive guidance in place in time for the change.

48. Local authorities also raised the question of funding to meet the costs of training and of making changes to claim forms. We have no doubt that these and other problems implied by the change will be addressed in the Department's own consultation exercise with local authorities.

**Treatment of Persons from
Abroad in Housing Benefit
and Council Tax Benefit**

49. The draft regulations also provide for a national of an EEA State who is required by the Home Secretary to leave the UK to be treated as a "person from abroad" and excluded from Housing Benefit and Council Tax Benefit. This mirrors the equivalent provision in the Income Support regulations. We have already reported on the main body of regulations to align the persons from abroad provisions across the income-related benefits—The Housing Benefit and Council Tax Benefit (Amendment) Regulations 1994. We accept that this further change, omitted from the earlier regulations, is necessary to complete the process of bringing the regulations governing the treatment of persons from abroad in Housing and Council Tax Benefits into line with those in Income Support, and we offer no recommendation in respect of that part of the proposals.

Conclusion and Summary 50. We are fully in sympathy with the view that, as a matter of principle, the UK taxpayer should not be expected to finance the living expenses of nationals from other EEA Member States who simply wish to stay for a few months in the UK, without intending to remain here or to look for work. It appears that it is easier to obtain help from the UK income-related benefit schemes than from equivalent schemes in some other EEA Member States, where stricter conditions of access would debar UK nationals, for example, by requiring a minimum period of residence qualification. When cases of EEA nationals living on UK benefits for substantial periods are publicised, they understandably generate widespread public criticism of the system and we appreciate that there is considerable pressure on the Secretary of State to act to curb such abuses. However, the proposed test of habitual residence is complex and would be applied universally, and there appears to be no way of gauging accurately the scale of the effects of such a change in advance of its implementation. The responses we received make it clear that, while it may provide a solution to the problem of benefit tourists, the test is likely to have adverse effects for many more people. For all these reasons, we **recommend** that the proposal in its present form should not be proceeded with, in particular because of its disproportionate effect on Irish nationals, and the potential to exclude from benefit returning UK nationals and refugees.

51. If, however, the Secretary of State decides to proceed with an habitual residence test, we **recommend** that

- * the criteria for the test should maintain the current arrangements for nationals of the Republic of Ireland (paragraph 39);
- * the current access to benefit of returning UK nationals should be preserved (paragraph 40).

52. We further **recommend** that the proposed regulations should be amended to provide exemption for people with refugee status and those granted exceptional leave to remain in the UK (paragraph 42).

53. In addition, we **recommend** that:

- * where it appears on first enquiry by questionnaire that a person is not habitually resident for the purpose of entitlement to Income Support, he or she should automatically be offered an interview, and that local authorities should be encouraged to follow suit (paragraph 30);
- * the period of residence in the UK within which enquiries are made into habitual residence should be reduced from 5 years to 2 years (paragraph 31);
- * the draft regulations should be amended so that, where a person is receiving Family Credit or Disability Working Allowance, eligibility for Housing Benefit and Council Tax Benefit is accepted without the need for the local authority to apply a test of habitual residence (paragraph 32);
- * the draft regulations should be clarified to put it beyond doubt that a test of habitual residence applies only to the claimant (paragraph 44).

Acknowledgements 54. We are, as always, very grateful to the people who took the time and trouble to respond to our consultation. We also wish to thank officials of the DSS for their help in the preparation of this report.

Mike Bett
28 April

Responses to the Income-Related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 1994 (in order of receipt)

1. Professor A W Bradley
2. Irish Centre Hostels Ltd
3. Sturtivant & Co
4. (Fr) J McKnight, St Peter's, Archdiocese of Cardiff
5. An Teach Irish Housing Association
6. New Horizon Youth Centre
7. Council On Tribunals
8. Haringey Irish Cultural and Community Centre
9. Child Poverty Action Group (Manchester) & Greater Manchester
Immigration Aid Unit
10. Irish In Britain Representation Group (London)
11. Mr J Mahon
12. London Irish Youth Forum
13. Irish In Britain Representation Group (Coventry)
14. Irish Community Care Merseyside
15. Action Group For Irish Youth
16. National Association of Racial Equality Councils
17. London City YMCA
18. Mr D Mawson/Ms J Muncaster
19. Suffolk County Council Social Services
20. Southwark Irish Forum
21. Ms E Smith/Mr A Murphy
22. Irish in Greenwich Project
23. Manchester City Council Welfare Rights Unit
24. Oxford Citizens Advice Bureau
25. Greater Manchester Low Pay Unit
26. Mr N Wikeley, Faculty of Law, University of Birmingham
27. Threshold Housing Advice
28. Federation Of Irish Societies
29. Immigration Law Practitioners' Association
30. Irish Support and Advice Centre
31. Leicester City Council
32. Mental Health Team for Single Homeless People
33. London Irish Centre Charity
34. North Lambeth Day Centre Limited
35. Haringey Irish Community Care Centre Ltd
36. Islington Women's Counselling Centre
37. Southwark Irish Staff Group
38. Ms E Jones
39. British Association of Social Workers
40. The Association of Charity Officers
41. Central London Housing Advisory Service
42. Anon
43. London Irish Women's Centre
44. The Irish Chaplaincy In Britain
45. Cara Irish Housing Association
46. South Manchester Law Centre
47. Roger Casement Irish Centre
48. Merseyside Irish In Britain Representation Group
49. The London Connection
50. Joint Council for the Welfare of Immigrants
51. Shelter

52. Lancashire County Council Welfare Rights Service
53. Shac Head Office
54. London Borough of Greenwich Welfare Rights
55. Positively Irish Action on Aids
56. UK Council for Overseas Student Affairs
57. Islington Council Welfare Rights Unit
58. Bristol Citizens Advice Bureau
59. The Refugee Council
60. National Association of Citizens Advice Bureaux—London Division
61. St Mungo Association
62. Southwark Homeless Information Project
63. Wandsworth Borough Council Welfare Rights Unit
64. Irish Community Care, Manchester
65. London Boroughs Association
66. Society Of St Vincent de Paul
67. Lewisham Irish Centre
68. Earl Russell
69. Commission for Racial Equality
70. Councillor George Meehan, Haringey Council
71. Mr M O'Driscoll
72. The Luton Day Centre For The Homeless
73. Child Poverty Action Group
74. Age Concern
75. Mr P A Doherty
76. Belfast Law Centre
77. London Borough of Camden Welfare Rights Unit
78. Convention of Scottish Local Authorities
79. Trades Union Congress

Note for the Social Security Advisory Committee from the Department of Social Security

THE INCOME-RELATED BENEFITS SCHEMES (MISCELLANEOUS AMENDMENTS) (No. 2) REGULATIONS 1994

Introduction 1. The Government proposes to introduce an habitual residence test into Income Support, Housing Benefit and Council Tax Benefit. The test will be applied to all claimants including UK nationals and other EEA nationals, that is nationals of signatory states to the European Economic Area Agreement. This new condition will only apply to new and repeat claims for benefit which are made on or after the date on which the change becomes effective.

2. This note briefly outlines the current arrangements and describes the proposed test in some detail.

The Proposal 3. The proposal is part of a process of narrowing access to benefit for people the taxpayer should not be asked to support. This is particularly relevant now as the Government takes measures to ensure that the burden of Social Security expenditure does not outstrip the taxpayer's ability to provide funding. In part, the proposal is also designed to deal with the well documented abuses of these income-related benefits by some non-UK nationals, which have caused public anxiety.

4. The test seeks to place the conditions of entitlement to these benefits on a similar footing to the eligibility conditions for state benefits of other EEA Member States. For instance, the social assistance schemes in some European countries incorporate tests of length of residence and/or nationality. In most EC Member States non-nationals claiming social assistance will also be required to be in possession of a residence permit as the primary test of entitlement is legal residence. A work-seeker holding such a permit will generally have a work history in that Member State and be granted equality of treatment with nationals of that state. The requirement to hold a permit fits naturally into many European countries where there is a tradition requiring nationals to register with local authorities or to carry identity cards. Further, some European countries are more ready to deport non-nationals who claim benefit, or to restrict benefit to the payment of fares to their country of origin. Annex A gives some examples of arrangements in other European countries.

Background to Income Support, Housing Benefit and Council Tax Benefit 5. Income Support is an income related benefit which is intended to help people who are out of work and whose resources are insufficient to meet their requirements. These requirements are calculated with reference to personal allowances, according to age and family status, and flat-rate premiums for groups recognised as having special needs, such as disabled and elderly people and families, and certain housing costs.

6. Help with housing costs for people who live in rented accommodation comes from the Housing Benefit scheme while people who are liable to pay the council tax can receive help through the Council Tax Benefit scheme. These two benefits are available to people who are in or out of work. The maximum amount of help is payable to those people receiving Income Support or having an equivalent level of income, with lesser amounts of benefit payable as income rises above Income Support level. Both benefit schemes are administered by local authorities.

Current Restrictions on Eligibility to these Benefits

Non-EEA Nationals

7. Most persons from abroad who enter the UK do so on the understanding that they do not have recourse to public funds. Public funds are currently defined by the Home Office as including Income Support and Housing Benefit. Council Tax Benefit is to be added to the list before April 1994. Such persons, with the exception of asylum seekers and certain other groups, already have no eligibility to Income Support. It is planned to bring Housing Benefit and Council Tax Benefit into line with Income Support rules from April. Persons from abroad will remain precluded from receiving these income-related benefits even if they satisfy the habitual residence test conditions.

EEA Nationals

8. EEA nationals currently have immediate access to income related benefits. However, for the majority of these nationals access to Income Support is not unconditional and there are restrictions subject to their status :

- EEA nationals who reside in the UK under one of the three recent EC Rights of Residence Directives (students, pensioners or the non-economically active), do so on the condition that they do not become a burden on the public finances of the host Member State. Any claim for Income Support could lead to the Home Office declaring them “no longer lawfully present”, and requiring them to leave the UK. If so, payment of Income Support would then cease;
- EEA work-seekers (unemployed EEA nationals with no contributions record in the UK) under present arrangements have a limited eligibility to Income Support (up to six months in general). At the end of that period, if they are not actively seeking work or have no genuine chance of finding employment, and subject to the Home Office declaring them “no longer lawfully present” and requiring them to leave the UK, Income Support is no longer payable. The six month limit on eligibility will cease to have effect on the introduction of the habitual residence test; such a limit would be incompatible with satisfaction of the test.

9. The one remaining category of EEA national, a worker (an EEA national who has worked in the UK and has paid national insurance contributions) has unfettered eligibility to income related benefits. The proposed residence test would aim to affect all EEA nationals including workers.

The Habitual Residence Test

10. The term habitual residence arises in European legislation, in particular EEC Regulation 1408/71 dealing with Social Security for migrant workers, as well as in certain areas of UK law (eg family law, Child Support law). The British adjudication authorities have been working with this concept in relation to Unemployment Benefit for some considerable time. It is possible to be habitually resident in more than one country, equally it is possible to be habitually resident in none.

11. The following points are examples of those explored in the case law and are crucial elements for the adjudication authorities to consider when determining habitual residence. A combination of factors will need to be considered to fit the circumstances of each case.

i. *Where is the person's centre of interests?*

Where the claimant has only recently arrived here, has had no steady job here, has no immediate family here nor any ties with the UK and has lived most of his/her life in another country, the centre of the claimant's interests is likely to be his/her “home” country—generally the one from which he/she has just come. The fact that he/she may have arranged accommodation here and may have had casual employment does not necessarily mean the centre of interest will be adjudged to be the UK.

ii. *Stable employment*

Stable employment means that the claimant should have either had a steady or permanent job. A short term or casual job, or a succession of

such jobs, would not necessarily be regarded as stable employment. The nature of the employment, that is whether it is permanent or casual, is a factor which may outweigh considerations such as the claimant having left his/her family in another State. For example, the Social Security Commissioner has decided that a person who went to work in Germany, originally for 3 years but later extended to 4, had stable employment and was habitually resident in Germany. The claimant had not kept a home in Great Britain, although he had links with the UK through some bank and building societies and retained his membership of societies.

iii. *Nature of the occupation*

The nature of the occupation in the UK may sometimes clarify the issue. For example, an au pair or a teacher on a year's exchange is likely to remain habitually resident in the State from which he/she came. A person on a fixed term contract is also likely to remain habitually resident in the State from which he/she came, but a long succession of such contracts may change this. Work of a seasonal nature, particularly in agriculture or tourism, would also tend to show retention of habitual residence in the State from which a claimant came.

iv. *Why did the claimant come to the UK?*

A person claiming Income Support may not say that he/she is in the UK for a holiday or that he/she is student, but if this demonstrably the case he/she will clearly not be habitually resident. Nationals of other member states have a right to enter and remain in the UK to seek work, but exercise of this right does not equate to habitual residence. When considering the length and purpose of a claimant's presence in this country, the adjudicating authorities will generally consider that a presence of up to say 3 years is less likely than a longer presence to lead to a finding habitual residence. Account would be taken of the frequency of, and reasons for, returns to another State during the stay in this country. The more frequent the returns, the more likely it is that the claimant may be considered to be habitually resident in that other country. The retention of a home in the other State while employed in Great Britain would normally suggest habitual residence in that other State; while the purchase or long term lease of accommodation in this country would point to the opposite. Ownership of a house in Great Britain is not conclusive proof of habitual residence in this country. A claimant who goes to another State where there are family connections would point towards the centre of interests being there. Similarly, the arrival of the claimant's family in this country would suggest a more permanent residence here.

v. *Length and continuity of residence elsewhere.*

The adjudication authorities will need to establish how long the claimant has lived elsewhere and whether he/she has a home or family there. The claimant's employment record in the "home" country will also have a bearing on habitual residence. Short or sporadic absences from the normal country of residence are not likely to deprive him/her of habitual residence in that country. For example, the adjudicating authorities may look at whether the claimant initially had the centre of his/her interests in another country when considering the length and continuity of residence before moving to the UK. A person who had lived all his life in Great Britain before going to work or to seek work in another EEA State may be more likely to have his interests in Great Britain than a person who came from another State to work in this country for 6 months before returning to the State from which he came.

vi. *What are the claimant's intentions?*

The fact that a claimant may intend to reside in the UK and may regard his/her future as being here are not the only factors to be taken into account when considering questions of habitual residence. When considering the claimant's original intention the adjudicating authorities

will take some account of changes of circumstances which were not foreseeable before departure. For example, a stated intention to take up permanent employment or an offer of permanent employment and residence would normally be accepted, but an intention to take temporary employment, or employment for a limited period, may be overtaken by events. A person with such an intention who, in practice, remains in another State for a number of years may become habitually resident there, in spite of his original intention. In some circumstances, for instance returning UK nationals, it will be possible to become habitually resident from the moment of entry. Intentions will need to be considered alongside the other criteria set out above.

Operation of the Test 12. The key operational requirement in order to make such a test effective is the need to be able to identify easily claims to Income Support, Housing Benefit, and Council Tax Benefit from people who have recently arrived in the UK. The Income Support claim form has asked, since the inception of the scheme, whether the claimant entered the UK in the last five years and, if so, the person's nationality. Local Authorities will be invited to include similar questions in the Housing Benefit and Council Tax Benefit claim forms.

13. The Benefits Agency envisages that an enquiry form will be issued to all claimants who indicate that they have entered the UK in the last five years. The form will be designed to obtain enough information for the adjudication authorities to make a decision on eligibility. It is inevitable that in some complex cases, claimants will be asked to attend for interview. Local Authorities may decide to introduce similar procedures.

14. It will be for the independent and Local Authority adjudication authorities to decide on whether the habitual residence condition is satisfied. Disallowed claimants will have recourse to the normal appeal processes.

Numbers Affected by Proposals 15. The Department does not have reliable estimates of the number of people who will be affected by these proposals. Whilst records collated by the Home Office indicate that about 5,000 EEA nationals claim Income Support a year and could be adversely affected, the estimate does not include UK nationals or citizens of the Irish Republic. Undoubtedly some UK nationals returning to the UK after a long period of absence may be held to be not habitually resident. Similarly, some Irish nationals, regardless of the strong historical and family links between the Irish Republic and the United Kingdom, would also be excluded from these benefits because they could not satisfy the test. As a matter of routine the Department monitors and evaluates policy changes.

Timetable 16. The Government propose to introduce this change before this Summer.

Department of Social Security
February 1994

Examples of Social Assistance Benefits

- Belgium** An EC national who has never worked in Belgium may be entitled to means-tested help from the Minimex scheme for up to three months while he is seeking work.
- Denmark** A claimant to Social Bistand has to have a residence permit. These are normally issued to people who can prove they are employed and must also provide evidence of income.
- France** The French authorities require proof of residence before a person is eligible for Revenu Minimum d'Insertion. Residence permits are issued to people who have sufficient means of support. The conditions of entitlement also include a requirement that the claimant be at least 25 years old and resident for a minimum period of 3 years.
- Germany** Residence permits are granted to migrant EEA nationals with sufficient means to support themselves. EEA nationals from other States are able to claim some restricted help from the means-tested Sozialhilfe scheme, but are liable to be repatriated if they are not able to support themselves.
- Greece** There is no national social assistance scheme but what does exist is available to people with a residence permit, which is only granted to those in employment.
- Irish Republic** Access to Social Welfare is limited to three months. After that period a residence permit is required, and is only issued on the condition that the applicant is not a burden on public funds.
- Italy** The social assistance scheme is administered on a regional basis and so there are wide differences. It is possible for an EC work-seeker to be entitled to a means-tested one-off payment in certain areas. Work-seekers have to report to the local police headquarters within 7 days of arrival to apply for a residence permit which allows them to stay in Italy and look for work after 3 months.
- Luxembourg** Revenue Minimum Garantie is only payable to people aged over 30 provided they have held a residence permit for 10 out of the previous 20 years. Residence permits are only granted to people who have a job or a contract for work in the Grand Duchy.
- Netherlands** EEA nationals who go to the Netherlands to seek work cannot claim any form of national assistance.
- Portugal** The Portuguese do not have a national social assistance scheme.
- Spain** There is no national social assistance scheme.

Supplementary Note for the Social Security Advisory Committee from the Department of Social Security

THE INCOME RELATED BENEFITS SCHEMES (MISCELLANEOUS AMENDMENTS) (No. 2) REGULATIONS 1994

Introduction 1. The Government proposes to amend the Housing Benefit (HB) and Council Tax Benefit regulations by providing that a national of a European Economic Area State (EEA) who is required by the Home Secretary to leave the United Kingdom (UK) is to be treated as a “person from abroad” and not entitled to these benefits.

Background on EEA Nationals 2. Currently, Directive 68/360/EEC enables nationals of a EEA State to enter the UK in order to take up work and to remain here whilst in employment without restriction: they are known as workers. EEA nationals who come here as work-seekers have a right to reside here in that capacity but generally for no longer than 6 months (unless there is evidence that the work-seeker is continuing to look for work and has a genuine chance of being employed). The subsequent EC Rights of Residence Directives 90/364EEC, 90/365EEC and 93/96EEC (formerly 90/366EEC) enable EEA nationals who are not economically active, for example, pensioners, students or non-workers to reside in the UK provided that they do not become a burden on public funds.

3. In all instances, EEA nationals are currently eligible to claim IS, HB and CTB. However, the Benefits Agency will inform the Home Office in the event of a claim for IS by a work-seeker who has been in receipt of benefit for 6 months or immediately if the claim is from a national admitted under a Rights of Residence Directive.

4. In these circumstances, the Home Office may decide to require such a person to leave the UK. This will normally result in the Benefits Agency’s independent adjudication authority reviewing the IS claim and treating the person as a “person from abroad”. Under existing IS legislation a “person from abroad” is not entitled to IS. This contrasts with the present position in HB and CTB both of which may continue to be paid. Although a person may be disallowed IS, the Home Office will not normally enforce his or her departure from the UK.

The Proposal 5. The proposal is to bring HB and CTB into line with IS so that an EEA national who is required to leave the UK by the Home Secretary is treated as a “person from abroad” and not entitled to HB and CTB. It will apply to all claimants, but not to members of their family, who make a new or repeat claim for HB or CTB on or after the date the change comes into effect.

Numbers Affected 6. The Department has no reliable estimate of the number of people likely to be affected by this proposal. Home Office estimates suggest that about 5,000 EEA nationals, who come within these Directives, claim IS each year. It is likely that a similar number of affected persons will claim HB and CTB. It is also expected that in some cases the same person may not satisfy the habitual residence test.

Timetable The Government propose to introduce this change before this summer.

1994 No.

SOCIAL SECURITY

**The Income-related Benefits Schemes (Miscellaneous
Amendments) (No. 2) Regulations 1994**

<i>Made</i>	1994
<i>Laid before Parliament</i>	1994
<i>Coming into force</i>	1994

The secretary of State for Social Security, in exercise of the powers conferred upon him by sections 131(3)(b), 135(1), 137(1) and (2)(i) and 175(1) to (4) of the Social Security Contributions and Benefits Act 1992(a) and of all other powers enabling him in that behalf, after consultation with organisations appearing to him to be representative of the authorities concerned(b) and after reference to the Social Security Advisory Committee(c), hereby makes the following Regulations:

Citation, commencement

1. These Regulations may be cited as the Income-related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 1994 and shall come into force on 1994.

Amendment of the Council Tax Benefit (General) Regulations

2.—(1) In regulation 4A of the Council Tax Benefit (General) Regulations 1992(d), in paragraph (4), at the end, there shall be added—

“or

- (d) is a national of a European Economic Area State and is required by the Secretary of State to leave the United Kingdom; or
- (e) is not habitually resident in the United Kingdom.”.

(2) In the case of a person who was entitled to council tax benefit in respect of [] 1994, paragraph (1) above shall only apply to him—

- (a) on the first day after that date in respect of which a new claim for council tax benefits is required; and
- (b) on any day thereafter.

(a) 1992 c.4; section 131(3)(b) was substituted by the Local Government Finance Act 1992 (c.14), Schedule 9, paragraph 4; section 137(1) is an interpretation provision and is cited because of the meaning assigned to the word “prescribed”.

(b) See section 176(1) of the Social Security Administration Act 1992 (c.5).

(c) See section 172 of the Social Security Administration Act 1992.

(d) S.I. 1992/1814; regulation 4A was inserted by S.I. 1994

Amendment of the Housing Benefit (General) Regulations 1987

3.—(1) In regulation 7A of the Housing Benefit (General) Regulations 1987^(a), in paragraph (4), at the end, there shall be added—

- (d) is a national of a European Economic Area State and is required by the Secretary of State to leave the United Kingdom; or
- (e) is not habitually resident in the United Kingdom.”.

(2) In the case of a person who was entitled to housing benefit in respect of [] 1994, paragraph (1) above shall only apply to him—

- (a) on the first day after that date in respect of which a new claim for council tax benefit is required; and
- (b) on any day thereafter.

Amendment of the Income Support (General) Regulations 1987

4.—(1) In paragraph (3) of regulation 21 of the Income Support (General) Regulations 1987^(b) in the definition of “person from abroad”, at the end, there shall be added—

“or

- (i) is not habitually resident in the United Kingdom.”.

(2) The provisions of this regulation shall only apply in the case of a person who was entitled to income support on [] 1994 where a claim for income support is made or treated as made, by or in respect of him after that date; and where those provisions do apply they shall apply as from the first day of the period in respect of which that claim is made.

Signed by authority of the Secretary of State for Social Security

Department of Social Security

^(a) S.I. 1987/1971; regulation 7A was inserted by S.I. 1994 .

^(b) S.I. 1987/1967; the relevant amending instruments are S.I. 1990/547, 1991/236 and 1993/315.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide that a person who is not habitually resident in the United Kingdom has a nil applicable amount for the purposes of income support (regulation 4) and is not entitled to council tax benefit (regulation 2) and housing benefit (regulation 3).

They also provide, in the case of housing benefit and council tax benefit, that a person who is a national of a European Economic Area State and is required to leave the United Kingdom is not to qualify for those benefits.

These Regulations do not impose a charge on business.



HMSO publications are available from:

HMSO Publications Centre

(Mail, fax and telephone orders only)

PO Box 276, London SW8 5DT

Telephone orders 071-873 9090

General enquiries 071-873 0011

(queuing system in operation for both numbers)

Fax orders 071-873 8200

HMSO Bookshops

49 High Holborn, London WC1V 6HB

071-873 0011 Fax 071-873 8200 (counter service only)

258 Broad Street, Birmingham B1 2HE

021-643 3740 Fax 021-643 6510

33 Wine Street, Bristol BS1 2BQ

0272 264306 Fax 0272 294515

9-21 Princess Street, Manchester M60 8AS

061-834 7201 Fax 061-833 0634

16 Arthur Street, Belfast BT1 4GD

0232 238451 Fax 0232 235401

71 Lothian Road, Edinburgh EH3 9AZ

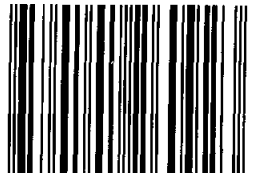
031-228 4181 Fax 031-229 2734

HMSO's Accredited Agents

(see Yellow Pages)

and through good booksellers

ISBN 0-10-126092-X



9 780101 260923