



Consultation Response to the Social
Security Advisory Committee on

*The Social Security, Housing Benefit and
Council Tax Benefit (Miscellaneous
Amendments) (No XX) Regulations 2006 -
"Advance Claims for Habitual Residence"*

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Introduction

1. The Child Poverty Action Group is a registered charity which campaigns for the abolition of child poverty. Our particular area of focus is on the welfare benefits and tax credits systems administered by the Department for Work and Pensions and Her Majesty's Revenue and Customs. Over the past 25 years we have built up a great deal of expertise in the area of social security law. The CPAG plays a leading role in taking legal test cases before the social security commissioners and the higher courts concerning the rules of entitlement to benefit and aspects of the administration of the welfare benefits scheme, including appeal tribunals.
2. The focus of our test-case work is to ensure that claimants' entitlement to benefits is not diminished and, where appropriate is extended, and that the systems in place to enable claimants to check the correctness of entitlement decisions are fair, accessible and independent. Other aspects of our work are to lobby for changes to social security legislation and to make submissions to bodies when consulted on proposed changes to legislation which will affect benefit claimants.
3. As part of our test-case work CPAG acted for Mr Collins in the proceedings before the European Court of Justice, as well as the subsequent Commissioner and Court of Appeal proceedings (see R(JSA)3/06), and Mr Swaddling (see R(IS)6/99). Both cases involved challenges to the compatibility of the "habitual residence" test with the freedom of movement provisions contained in EU law. This, plus our other test-case and advice work, has given us a keen sense of how the habitual residence test operates in practice.
4. It is from the above perspectives that we welcome the opportunity of providing a consultation response to the SSAC in respect of the above amendment regulations which seek to outlaw any advance claims being made under the habitual residence (and right to reside) test.

Summary

5. CPAG is strongly opposed to the proposed amendment regulations, which in our view are unnecessary, mean-spirited and discriminatory. Moreover, the reasons put forward on behalf of the Secretary of State given as to *why* the advance claim rules cannot apply to habitual residence cases both overstate the difficulty of adjudication involved and misunderstand the nature of the advance claim test. Furthermore, some of the statements made in support the advance claim test being too difficult fit uneasily with the case made by the Government in the Collins case and the decisions in that case.
6. For all of these reasons CPAG submit that the Secretary of State has failed to put forward any meaningful, less so compelling, case for the amendment regulations, and we would invite the SSAC to advise him that they should not be proceeded with.

The Legal Test

7. It may be helpful to set out at the outset the test which has to be applied under United Kingdom domestic law to decide whether a person is habitually resident in the United Kingdom. That has been authoritatively decided by the House of Lords in *Nessa –v- Chief Adjudication Officer* (R(IS)2/2000), where it was held that, as a matter of ordinary language, a person is not habitually resident in a country unless he or she has taken up residence and lived there for a period¹. Thus, a person coming to the United Kingdom for the first time and expressing an intention to settle here cannot be accepted as habitually resident until he or she can show residence in fact for a period which shows that the residence has become habitual and will or is likely to continue to be habitual. It is a question of fact to be determined on the circumstances of each case whether and when habitual residence has been established. The House of Lords added that the requisite period is not a fixed one and may in an appropriate case be short.
8. Pausing at this point, it is suggested that looking at this test there is nothing inherently difficult (less so impossible) about applying this to a 3 month point in the future from the date of claim. On the House of Lords' formulation the intention to settle in the UK has to be established at the date of claim, or have been shown to have been established to the point when person the arrives in the UK . That is made evident by Lord Slynn's comment in *Nessa* that:

"If Parliament had intended that a person seeking to enter the United Kingdom or such a person declaring his intention to settle here is to have income support on arrival, it could have said so. It seems to me impossible to accept the argument at one time advanced that a person who has never been here before who says on landing, "I intend to settle in the United Kingdom" and who is fully believed is automatically a person who is habitually resident here".
9. If that intention is established on the basis of the evidence available at the date of claim then the *only* issue left to determine is what period the person has to remain in the UK with that intention. CPAG cannot see how that is an impossible decision to make; after all with the retrospective test all one is looking at is what period *was* enough and here all that is called for is a judgment as to what period *will* be enough.
10. Of course there may be cases where even the necessary intention to settle is not shown satisfactorily as at the date of claim, and so the advance claim rules would require an assessment of both when the necessary intention to settle would need to established at a future date as well as the period of residence with that intention. However, we would make three comments about these perhaps more difficult decisions.
 - a) Firstly, it needs to be stressed that the existing version of regulation 13 only provides the decision-maker with a *power* to decide an advance claim, he or she is not obligated to do so. Therefore, in cases where the decision-makers have a genuine doubt as to whether a person will or will not become habitually resident 3 months from the date of claim they would, in our view, be acting perfectly lawfully if they said that because of this doubt they were not

¹ Note, not an *appreciable* period, but just a period.

going to exercise the power one or way or the other. This was the course taken by Commissioner Mesher in the *Collins* case after it had been referred back by the ECJ (CJSA/4065/1999 - the Commissioner's decision is not in the R(JSA)3/06 report). In other words, the case where it is genuinely difficult to decide on an advance basis need not be decided, and the Secretary of State's submission to the SSAC fails, in our view, to attach any, or any sufficient, weight to this important point. However, CPAG would positively stress that in other cases – say a UK national who is returning to the UK with her children after a failed marriage abroad and having sold the family home abroad – we cannot see how it would be "impossible" to predict if they will in the next 3 months acquire a habitual residence.

- b) Secondly, it is the nature of the social security scheme that Secretary of State decision-makers will in certain types of case have to make difficult judgments. This is not only related to advance claim cases. A decision as to whether someone has deprived themselves of capital with intention of obtaining income support can involve a number of different factors, and a judgment as to past intention. Equally, decisions under the jointly held capitals rules as to the values of individual shares in the total capital asset can involve difficult issues of fact and law. But fairness and justice dictates that such decisions are grappled with and made so as to decide what minimum means-tested support should be. In the case of *Hourigan* (R(IS)4/03) – a case on capital jointly held - Lord Justice Brooke made the important observation that:

"Justice is not always the handmaiden of administrative convenience"

- c) However, even if the focus is on the advance claim rules, difficult decisions have been and will remain to be called for, especially in relation to DLA: see regulation 13A of the Claims and Payments Regulations 1987. That regulation is to the same effect as regulation 13, but must call for the Secretary of State decision-maker to decide not only whether the substantive conditions of entitlement will be satisfied from a point 3 months from the date of claim, but also whether those conditions were satisfied for the 3 month prior to the claim and would be likely to be satisfied for 6 months from the date entitlement accrues². This is obviously a sensible rule, but CPAG cannot see why the decisions made under it are any more difficult than deciding an advance claim for habitual residence (if the power merits exercising). Nor can we see any justification for treating advance claims for habitual residence differently, and the net impression here is that habitual residence cases are being discriminated against (for no good reason).
- d) Thirdly, even if the power is exercised under regulation 13 and a decision made that the person will be habitually resident in the United Kingdom in 3 months time from the date of claim but it turns out that that decision was wrongly made (e.g. evidence comes to light that the person has a return air ticket to where he or she arrived in the UK from and/or that he or she has sent the children back on that return ticket), then regulation 13(1)(b) and (2) provide the Secretary of state with a substantial protection. Again this matter is given no proper consideration or weight in the Secretary of State's submission to the SSAC. What regulation 13(1)(a) provides is that the advance award can only kick-in if the person satisfies the conditions of

² See, for example, section 72(5) SSCBA 1992.

entitlement at the date when benefit becomes payable under the award. Allied to this is the free-standing (i.e. *de novo* – see R(IB)2/04 and R(DLA)4/05)) revision power in regulation 13(2) of the Claims and Payments Regulations. In effect, that would allow the decision-maker to look at the decision again at the date it was decided the person would have become habitually resident and, if necessary, change that decision.

Impossibility

11. For the reasons set out above, CPAG is strongly of the view that the Secretary of State is vastly overstating the degree of difficulty inherent in deciding all habitual residence cases. However, even if his case is to be taken at face value on this point then a number of considerations need to be addressed.
12. Firstly, Commissioner Rowland did not find it **impossible** to decide the *Bhatkha* case on an advance basis nor did the Court of Appeal say he had been wrong to do so (which would have to be the case if it was truly impossible to make such a decision).
13. Secondly, and of more moment, if the Secretary of State is clueless as to when in the future any category of person might acquire habitual residence in the UK, how is a claimant supposed to assess this? If he or she cannot, then because of the terms of sections 8(2) and 12(8)(b) of the Social security Act 1998 the best course for him or her to take is to make fresh claims for benefit as often as possible (e.g. every day or every week), and appeal each refusal. This would be grossly unfair to all involved, and not just because of the amount of administrative time it will lead to being expended, but is also unnecessary for the reasons given above. Moreover, balanced against this recipe for administrative and general unfairness, the easement created by regulation 13 in its current form is a sensible and wholly justified one.
14. Thirdly, if it is the case that it is truly impossible to predict when any category of person will become habitually resident in the UK, CPAG harbours very substantial concerns as to whether this is consonant with the case made by the UK Government to the European Court of Justice in *Collins* case and the subsequent litigation. A key part of the ECJ's judgment was that the habitual residence test would be lawful if, inter alia, it was based on clear criteria known in advance. In the subsequent litigation before the Commissioner and the Court of Appeal part of the argument focused on this point and whether because the degree of unpredictability the habitual residence test failed to meet this test. Both the Commissioner and the Court of Appeal found against Mr Collins on this point, essentially because in their view there was a difference between knowing what the criteria are and when they may be satisfied. However, if it is truly the case that it is **impossible** to predict when the habitual residence test may be met in the future – and we interpolate here that this was never the Secretary of State's case before the ECJ, the Commissioner or the Court of Appeal in *Collins* – then we would contend that this must effect the clarity of the criteria. Arguably, if the criteria are literally of no use in deciding when they will be met, then they are no clear criteria at all. If that is the case then it is arguable that the decisions in *Collins* were based on a false premise and indeed may even have been wrongly made

Discrimination

15. The draft amendment regulations in stark form single out habitual residence (and right to reside) cases and are to the effect that these cases are to be treated differently from all other advance benefit claims. For the reasons put forward above CPAG does not consider that any rational or sensible justification has been put forward for this discrimination. The overall impression is of a determined effort to target persons coming from abroad and make it as difficult as possible for them to access entitlement to what is intended as minimum safety-net benefits.

Conclusion

16. For all of the above reasons we would strongly urge the SSAC to recommend to the Secretary of State that the amendment regulations not be proceeded with.

About CPAG

CPAG is the leading charity campaigning for the abolition of poverty among children and young people in the UK and for the improvement of the lives of low income families. CPAG aims to: raise awareness of the causes, extent, nature and impact of poverty and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty; and enable those eligible for income maintenance to have access to their full entitlement.

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