

The Habitual Residence Test

Research Paper 95/25

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Since 1 August 1994 claimants of Income Support, Housing Benefit and Council Tax Benefit have had to satisfy a test of habitual residence to be entitled to benefit. The regulations which introduced this test are *The Income-related Benefits Schemes (Miscellaneous Amendments) (No. 3) Regulations 1994* and these are to be debated on 28 February 1995.

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I Introduction: What is the habitual residence test?

From 1 August 1994 new claimants of Income Support, Housing Benefit and Council Tax Benefit have had to satisfy a test of 'habitual residence' to be awarded benefit. A person who does not satisfy the test will be classed as a 'person from abroad' and will not normally be entitled to income support and will not qualify for housing or council tax benefit.

The Income Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994 introduced the test by amending general regulations governing Council Tax Benefit, Housing and Income Support. They contain no definition of 'habitual residence', according the DSS, the concept "is well established in United Kingdom and European Union law"¹.

II Background

Before these regulations were implemented, entitlement to Income Support, and its predecessors, Supplementary Benefit and National Assistance, was generally given to persons in the UK irrespective of residency or nationality. In 1985 the Green Paper on the *Reform of Social Security*² proposed there should be a 'presence test' for the receipt of Income Support. This would have made eligibility for benefit dependent on the claimant having been in the country for a set period prior to claiming. Following consultation, the Government did not proceed with this proposal, although an (unsuccessful) attempt was made to re-introduce the idea during the Committee stage of the Social Security Bill in 1986³. Some tightening-up occurred in 1993, when those whose immigration status was dependent on them having no recourse to public funds were made ineligible for Income Support⁴.

The first public announcement that the government intended to introduce a residence test came when Peter Lilley announced his intention to curb spending on 'benefit tourists' in his 1993 speech to the Conservative Party Conference⁵:

"Community rules have opened up a new abuse: 'Benefit Tourism'. People travelling around pretending to look for work, but really looking for the best benefits. Not so much a Cook's tour as a Crooks tour. Gordon Brown claims our system is less generous than elsewhere in Europe. Then why do they come and scrounge off us? They certainly don't come here for the climate.

¹HC Deb 2 November 1994 c1133-4W

²Cmnd 9518 June 1985

³SC Deb (B) 27 February 1986 cc 525-542

⁴*Income Support (General) Amendment No. 3 Regulations 1993*

⁵Peter Lilley at 110th Conservative Party Conference, 6 October 1993

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Just imagine the advice you might find in a European Phrasebook for Benefit Tourists.

Wo ist das Hotel? - Where is the Housing Department?

Ou est le bureau de change? - Where do I cash my benefit cheque?

Mio bambino e in Italia - Send child benefit to my family in Italy.

Je suis un citoyen de l'Europe - Give me benefits or I'll take you to the European Court.

But next year's edition will have just one phrase -

"Ou est la societe de something for nothing?" - Sorry Jacques, Britain's branch is closed.

In many European countries you would not be entitled to their benefits until you had lived there some time. I don't blame them for that. I want to see a similar requirement here to stop Benefit Tourism in its tracks."

III Introduction of the Regulations

Announcing firm plans for a residence test to stop abuse by 'benefit tourists' in February 1994, Peter Lilley said⁶:

"Most countries in the European Economic Area do not make their safety net benefits available to people from other member countries unless they first fulfil a residence test. Yet the UK does make Income Support, Housing Benefit and Council Tax Benefit available, with no test of residence, to work-seekers from qualifying countries.

There is a growing recognition that the UK system is open to abuse. I share the concern about the potential growth of benefit tourism if this loophole is left open.

I therefore propose to introduce a residence test to establish whether people are genuinely committed to living and working in Britain. It will apply to all new claimants of Income Support and to all new and repeat Housing Benefit and Council Tax Benefit customers. It will help target assistance on those who have paid their contributions, paid their taxes and who intend to pay their own way in the future by finding work.

Habitual residence is a concept recognised in UK and European law. It will mean that a person will have to demonstrate one or more of a number of factors before being able to claim benefit. These might include showing a genuine commitment to living and working in the UK, a previous record of work or contributions in the UK, why they came to the UK, whether they have a home elsewhere and what is their future intention as to residence.

This proposal is part of a process of concentrating benefits on those who genuinely need support. The Government will stop abuse of benefits by a minority and ensure social security expenditure does not outstrip the taxpayer's ability to fund it."

⁶DSS Press Release 4 February 1994

Draft regulations⁷ introducing a habitual residence test as a condition for entitlement to income support, housing benefit and council tax benefit were put to the Social Security Advisory Committee (SSAC) for consideration.

IV SSAC consideration

The Social Security Advisory Committee did not agree with these plans and recommended the draft proposal should not be proceeded with⁸. In the event of the Government choosing not to abandon the regulations, the SSAC proposed a number of further recommendations, including the exemption from the new test of returning UK nationals (eg. people who have worked abroad) and nationals of the Republic of Ireland. The Government accepted the need to broaden the regulations so that people resident within the Common Travel Area (the UK, Republic of Ireland, the Channel Islands, and the Isle of Man) would be treated in the same way as people resident in the UK. However it was unable to accept the recommendation to exempt returning UK nationals from the test as it was deemed to be contrary to European law to discriminate on the basis of nationality - all EEA nationals have to be treated on an equal basis.

V The Regulations

The final version of the regulations, *The Income Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994*⁹, was laid on 11 July 1994. The test was introduced on 1 August 1994.

The regulations provide that a person who is not 'habitually resident' in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man has a nil applicable amount for Income Support (ie. zero benefit) and is not entitled to Housing Benefit or Council Tax Benefit. They also disqualify from housing and council tax benefits nationals of European Economic Area States who are required to leave the UK.

The term 'habitually resident' is not defined in the regulations, but guidance has been issued to Adjudication Officers¹⁰ (AOs). AOs are told to reach a conclusion on the basis of all available evidence. Factors to be considered include claimants' intentions, their centre of

⁷*Income-Related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 1994*

⁸Cm 2609

⁹SI 1994/1807

¹⁰Memo AOG 3/69 *Income Support: habitual residence test*

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interests (a home, job, friends, relatives and membership of clubs, for example), reasons for coming to the UK, occupation and employment record and length and continuity of residence in another country. The burden of proof lies with the claimant.

VI Who is habitually resident?

According to the *Guidance for Adjudication Officers*, claimants who are to be treated as habitually resident include:

- a person who is a "worker"¹¹ for the purposes of EC law;
- a person who has the right to reside in the UK under one of the EC worker Directives (this encompasses non-UK EEA Nationals who work for an employer or are self employed in the UK - the right of residence can continue if the person becomes **involuntarily** unemployed);
- refugees;
- a person who has been granted exceptional leave to remain in the UK (mostly people whose application for asylum has failed but have been given leave to stay on humanitarian grounds).

Adjudication Officers have to consider whether claimants not in one of these categories are actually habitually resident in the UK, Republic of Ireland, Channel Islands or Isle of Man. Guidance issued lists the following factors to be given consideration in this assessment¹²:

- "1. **the claimant's intentions.** The fact that a claimant may intend to live in the UK for the foreseeable future does not, of itself, mean that the habitual residence test is satisfied. However, the claimant's intention along with other factors, for example the purchase of a home in the UK and the disposal of property abroad may indicate that the claimant is habitually resident in the UK. A claimant who intends to reside in the UK for only a short period, for example a claimant who is on holiday or visiting friends or relatives, is unlikely to be habitually resident in the UK
2. **the reasons for coming to the UK.** Work seekers and EEA Nationals who have rights of

¹¹Just who is a "worker" and is covered by the directives on freedom of movement under EU law is a matter of some contention. There are a number of on-going test cases which may result in clarification of the law in this area. The DSS regards an EEA national who is in employment in the UK as a worker for the purposes of EC law, however, worker status can be retained after employment ends - for instance after reaching pension age or because work has to cease for reason of permanent incapacity for work. Also it is argued that those unemployed and genuinely seeking work should be treated as a "worker", although their status may be downgraded to "workseeker" and, it is argued, they may not enjoy the right to equal treatment that is given to "workers".

¹²Adjudication Officers Guidance para 23

residence have lawful right to be present in the UK but this does not mean that they are habitually resident

3. **the claimant's employment record**, in particular the nature of any previous occupation and plans for the future. A person with the offer of genuine and effective work in the UK, whether full-time or PT, is likely to be habitually resident here
4. **the length and continuity of residence in another country**. A person who has a home or close family in another country would normally retain habitual residence in that country. A person who has previously lived in several different countries but has now moved to the UK on a permanent basis may be habitually resident here
5. **the person's centre of interest**. People who maintain their centre of interest in the UK (for example a home, a job, friends and relatives, membership of clubs) but spend frequent periods in another country are likely to be habitually resident in the UK. People who have retained their centre of interest in another country and have no particular ties here are unlikely to be habitually resident in the UK."

The Guidance goes on to state that this list is neither exhaustive nor conclusive and that claimants are to be judged as habitually resident after taking into account **all** the circumstances of each individual case.

Examples of situations given to Adjudication Officers where it would be reasonable to conclude the test would and would not be satisfied are contained in Appendix 1.

VII Parliamentary discussion

The regulations were prayed against¹³ but were not debated in the House prior to implementation. A debate did take place in the Lords in October 1994¹⁴ following which a motion not to proceed with the regulations was defeated. Two subsequent Early Day Motions praying against the regulations have appeared in the Commons¹⁵.

VIII Numbers affected and benefit savings

When the regulations were introduced, the SSAC commented that the proposed test was being introduced without a reliable estimate of the number and circumstances of the people who would be affected. The DSS stated about 5,000 EEA nationals could be adversely affected,

¹³Early Day Motion 1486 1993/4 (11 July 1994)

¹⁴HL Deb 20 October 1994 c384-398

¹⁵Early Day Motions 1696 of 1993/4 (1 Nov 94) & 49 of 1994/5 (17 Nov 1994)

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but did not give an estimate of the impact on UK, Irish or other nationals¹⁶.

Provisional data for Income Support for the six months from 1 August 1994 to the end of January 1995 show that of 43,320 claimants subjected to the test, 15,564 failed to satisfy it¹⁷. The following table shows how these breakdown by nationality:

Income Support claimants: Habitual residence status
August 1994 - January 1995

Nationality	Habitually resident	Not habitually resident	% of total not habitually resident
European Economic Area ^(a)	4,071	6,026	60
UK	19,414	2,599	12
Others	4,271	6,939	62
<i>All</i>	<i>27,756</i>	<i>15,564</i>	<i>36</i>

Note: (a) Non-UK

Figures for Housing and Council Tax Benefits will not be available until late 1996¹⁸.

In 1994/5, the estimated annual cost to the Benefits Agency of administering the habitual residence test is £368,000. The estimated saving of income support is put in excess of £7 million¹⁹.

IX Benefits for people judged not habitually resident

People who adjudication officers judge not habitually resident will not receive benefit. They can appeal against the decision to a social security appeals tribunal. However, even if they win their appeals, social security benefits may be withheld pending a decision to refer their case to a social security commissioner.

British citizens who fail the test may apply to the Social Fund for a crisis loan if, in an emergency or as a consequence of a disaster, they face serious risk to health and safety, and the payment of a crisis loan is the only way of alleviating the situation. In only very specific

¹⁶Cm 2609

¹⁷Source: Department of Social Security

¹⁸HC Deb 10 January 1995 c56W

¹⁹HC Deb 3 November 1994 c1369W

circumstances it may be possible for non-UK nationals to get an urgent cases payment of Income Support.

X Reactions

The Child Poverty Action Group (CPAG) has been concerned about the test since the introduction of draft regulations. It argues the test contravenes the long-established principle of income support providing a safety net for persons in the country without other means of support. Also it believes the different treatment of Irish Nationals from other non-UK EEA Nationals may indirectly discriminate against the latter. Article 6 of the Treaty of Rome prohibits any discrimination on the grounds of nationality.

In its monitoring of the application of the test, CPAG has expressed concern that decisions have been made that claimants are not habitually resident without taking all the relevant criteria into account. They are also worried that the test may be more strictly applied where cases involving ethnic minorities and, especially if the UK is forced to treat all EEA nationals in the same manner as those from Ireland, the racist implications this may have.

The National Association of Citizens Advice Bureau (NACAB) has been monitoring cases failing the test being brought to the attention of Citizens Advice Bureaux (CABx). NACAB states that "Benefit Agency staff seem to be struggling with the concept of habitual residence. There appears to be clear evidence that people are caught up in the test (and thus denied benefit) who are clearly eligible²⁰".

The following summarises cases reported to NACAB by individual CABx²¹:

"British nationals who have lived or worked abroad appear to be being caught by the test. Some are young people who were taken abroad by their parents to countries such as New Zealand, South Africa, and Nigeria as children and who have now decided as adults to return to Britain. Others are returning following marriage breakdown. For example, one bureau reported the case of a British woman who had constantly lived abroad because of her American husband's international job. He then announced his intention to divorce her, and she returned to her family in Britain. Another group are people who have been working abroad. For example, a bureau reported the case of an ex-soldier who had stayed on in Germany after completing his army service to set up a business. The business failed after two years and he returned to England. Benefit has been refused. Another group are elderly people from the Indian sub-continent or the West Indies who have worked in Britain for many years and become British citizens. Following retirement, some have returned to their country of origin for a period. A typical case was where an elderly couple who had worked in Britain for thirty years and were receiving retirement pension went to Pakistan for two years. On

²⁰NACAB *Social Policy Bulletin* March 1995

²¹NACAB *Social Policy Bulletin* January 1995, March 1995

their return, they were refused income support to top up their state pension on the basis that they were not habitually resident here.

CABx also reported a number of cases involving EC nationals. A bureau in Wales reported the case of a German citizen who worked in the merchant navy. His wife is British, and their home is in Wales. The man returned to his wife and home when on leave. When the company he worked for collapsed, he claimed benefit but was refused on the basis that he was not habitually resident. Another bureau reported the case of the German wife of a British citizen living in army quarters, who was refused housing benefit and council tax, when her marriage ended and she claimed benefit. She had been offered council accommodation for herself and her young son, but was concerned that she would now have to return to Germany thus denying her son's access to his father.

A South London CAB reported the case of a British Overseas citizen, who had worked full-time in a sub post-office for eleven months before becoming unemployed. He was refused benefit under the habitual residence test, and was left with no money to support himself, his wife and three young children. A Berkshire CAB reported a widow who had been on income support for many years and had a council flat. She was given a ticket to travel to the USA to visit her son who was seriously ill. When she returned two months later, the Benefits Agency refused to reinstate her benefit until she had completed forms concerning habitual residence. Three weeks later, she had still not been paid benefit, and when she visited the CAB had not eaten for several days."

The Joint Council for the Welfare of Immigrants (JCWI) describes the habitual residence test regulations as having had a serious impact on the welfare rights of hundreds of people who have had a period of residence abroad within the last five years. Commenting on the regulations the JCWI made the following observations²²:

"The Social Security Minister's complaints against alleged 'benefit tourists' as the target of the rules change suggested that the major impact would fall on EEA national work seekers. However, reports from citizens' advice bureaux and local authority advice workers suggest that more often the victims are British citizens with a period of residence abroad and returning residents who are not EEA national. Many of the decisions in these cases appear to be in clear violation of the Minister Peter Lilley's statement press released on 4 February 1994 that the purpose of the residence test was:

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

Social security appeal rights are being exercised in a large number of these cases, though there is concern amongst claimants' representatives that undue delays on the part of the DSS are preventing Tribunals from assessing the reasonableness of these decisions."

²²JCWI Winter Bulletin 1995

Appendix 1 - Adjudication Officer examples:

Situations where reasonable to conclude habitual residence satisfied

1. A man has lived and worked abroad. He previously lived and worked in Scotland. He has been made redundant and has sold his house abroad. He has brought his family to the UK with him. Because he has had previous ties with the UK he intends to pursue his search for work here. He has contacts and family in the UK who can help him re-integrate into UK society by arranging accommodation or enquiring about job prospects.
2. A woman has spend the last 5 years moving from country to country to gain work experience. Whilst abroad she lived in various rented properties but has now bought a house in Wales as she intends to stay here. She is a qualified doctor and has applied for several jobs in the UK but is still awaiting the offer of an interview. Her boyfriend is trying to sell his flat in Spain so that he can join her in the UK.
3. A woman works in Birmingham but takes several trips abroad each year. She rents a flat in Spain but stays in hotels when she visits other countries. After each trip she returns to her home in the UK where she has lived with her family for the last 10 years.
4. A man lives in the Isle of Man with his family. He comes to the UK looking for work during the week returning home at weekends. He intends to continue living in the Isle of Man when he has found work.

Situations where reasonable to conclude habitual residence not satisfied

1. A man has recently arrived in the UK. He has no immediate family here. He has only been to the UK before as a student. He has not made any prior enquiries about employment. He has no particular qualifications or experience that may lead to realistic job prospects in the UK. He has not arranged accommodation and has only the promise of a few nights accommodation. He has no other ties with the UK.
2. A woman arrives in the UK with the intention of staying for a few weeks. She hopes to find some casual work for a few hours a day so that she can improve her English and, if she can earn enough money, she hopes to go to English classes. She has arranged temporary accommodation in the UK and at the end of her stay she intends to go back to live with her parents in her own country.
3. A woman has been in the UK for a few weeks. She has spent the last 18 months travelling around the world and has had some short term casual jobs which cannot be regarded as genuine and effective employment. She has no particular qualifications or experience that may lead to good job prospects. She is staying with friends. She has no immediate family here. She has no other ties with the UK.

Social Security