



The Habitual Residence Test

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The Habitual Residence Test was introduced by the Conservative Government in 1994 in response to concerns about “benefit tourism”. The test is applied to people (unless they fall into one of the exempt categories) who have recently arrived in the country and who make a claim for certain means-tested social security benefits, or seek housing assistance from a local authority.

The Habitual Residence Test has evolved since its introduction in response to case law and government reviews, but successive governments have acknowledged a continuing need for measures to safeguard against possible abuse of the benefits system by those with no real links to the United Kingdom. The previous Labour Government stated that the purpose of the test was to ensure that benefits were paid to people with reasonably close ties to the UK and who intended to settle here, and that its underlying principle was that the taxpayer should not have to subsidise people with very tenuous links to this country.

From 1 May 2004 people have had to satisfy an additional test – the “right to reside” test – in order to be considered habitually resident.

This note gives a brief overview of the Habitual Residence Test and links to further sources. Further information on the “right to reside” requirement is given in a separate standard note, *EEA nationals: the ‘right to reside’ requirement for benefits*.

The Habitual Residence Test has been described as “notoriously opaque”. Anyone coming up against the Test would be best advised to seek professional advice.

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1 A brief overview of the test

The Habitual Residence Test was introduced on 1 August 1994. The test is applied to all people (unless they fall into one of the exempt categories), including returning British nationals¹, who have recently arrived in the country and who claim certain means-tested social security benefits, or seek housing assistance from a local authority. For benefit purposes, a person who fails the Habitual Residence Test is treated as a 'person from abroad' and is therefore ineligible for benefit.²

Those exempt from the test include:³

- European Economic Area (EEA) nationals who are classed as 'workers' or 'self-employed persons' under EC Directive 2004/38/EC, and family members of such persons;
- EEA nationals with a permanent right of residence in the UK, and their family members;
- Nationals of A2 states (Bulgaria and Romania) in authorised employment;
- Refugees;
- Those with exceptional leave to enter or remain in the UK;
- Those not classed as a 'person subject to immigration control' who were deported, expelled or otherwise removed by compulsion from another country to the UK;
- People who left Montserrat after 1 November 1995 because of the volcanic eruption there; and
- People coming to the UK from Zimbabwe between 28 February 2009 and 18 March 2011 who have accepted the UK Government's offer of help for vulnerable British Nationals to return to settle in the UK.

The exemption for certain people coming from the UK from Zimbabwe was introduced by the *Social Security (Habitual Residence) (Amendment) Regulations 2009*.⁴ It applies only to people who have accepted an offer of assistance from the UK Government, and immediately before arriving in the UK the person must have been resident in Zimbabwe.⁵

The term 'habitually resident' is not defined in legislation, but there is now quite a substantial body of (sometimes confusing) domestic and EC case law on what it means. Factors which may be taken into account by DWP and local authority 'decision makers' may include:

- The length and continuity of residence

¹ In the twelve months to the end of November 2008, 2,948 British nationals failed the test; HC Deb 15 January 2009 cc969-970

² The rules are slightly different for Pension Credit purposes – those who fail the test are treated as not in Great Britain and are therefore not eligible for benefit for this reason

³ From 25 July 2006 regulations added to the list of exceptions 'a person in Great Britain who left Lebanon on or after 12 July 2006 because of the armed conflict there'. The regulations were however time limited and ceased to have effect on 31 January 2007. See *The Social Security (Lebanon) Amendment Regulations SI 2006/1981*

⁴ [SI 2009/263](#)

⁵ Further background can be found in the DWP's [Explanatory Memorandum](#) on the regulations

- The person's future intentions
- Their employment prospects
- Their reasons for coming to the UK
- Where the person's 'centre of interest' lies

Case law has established that the main factors in deciding whether someone is habitually resident are whether they have a 'settled intention' to reside, and whether they have actually been resident here for an 'appreciable period of time'. The case law gives some guidance on what constitutes a 'settled intention' and an 'appreciable period of time', but ultimately decisions will depend on the circumstances of each individual case. People who were previously habitually resident in the 'Common Travel Area'⁶ and who return to resume their habitual residence may be accepted as habitually resident from the date of their return. EEA nationals who have worked in an EEA state may also, depending on their circumstances, be accepted as habitually resident immediately on arrival. For others, a period of actual residence is likely to be required, but this may be relatively short. There is not set minimum period for establishing habitual residence; it could even be a matter of weeks. In a Social Security Commissioner's decision in February 2004, it was suggested that, in general, a period of one to three months is likely to be appropriate to demonstrate that a person's residence is habitual, and that cogent reasons should be given for requiring a person to serve a longer period of residence.⁷ Ultimately however it will depend on the individual circumstances in each case.

Any decision on habitual residence must be based upon the claimant's circumstances at the time of the claim.⁸ Circumstances may however change, so a decision that someone is not habitually resident does not necessarily mean that this will always be the case. A repeat claim for benefit, even if only shortly after an initial negative decision, may therefore be successful.

From 1 May 2004, in response to concerns about the impact of the enlargement of the European Union, legislation governing entitlement to benefits was amended to ensure that no person can be habitually resident in the Common Travel Area unless they also have a right to reside there. The 'right to reside' requirement is considered in a separate standard note. The changes in 2004 mean that there are now two stages to the Habitual Residence Test:

- An initial test to determine whether the person has a 'right to reside'; and
- The original Habitual Residence Test

Any person who does not have a right to reside automatically fails the Habitual Residence Test.

There were further changes to the Habitual Residence Test from 30 April 2006 to take account of the new Rights of Residence Directive 2004/38/EC. The new Directive brought together existing EC directives on free movement as well as introducing new rights of residence for EEA nationals. The most significant change was the introduction of a right of

⁶ This covers the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland

⁷ CIS/4474/2003

⁸ But see the discussion below on the *Bhakta* case

residence for the first three months for everyone, including economically inactive people. Amendments to the Habitual Residence Test from 30 April ensured however that persons who have a right to reside solely on the basis of the new three-month right of residence will not satisfy the first stage of the test. The amendments retained the basic structure of the Habitual Residence Test post 1 May 2004.

2 Background

2.1 Introduction of the Habitual Residence Test

Before the introduction of the Habitual Residence Test, people could get Income Support in the United Kingdom no matter how short a time they had been resident here.

Peter Lilley, then Secretary of State for Social Security, announced that he wanted to curb spending on 'benefit tourists' in a speech to the Conservative Party Conference in 1993⁹. He set out firmer plans for a residence test in February 1994.¹⁰ Draft regulations¹¹ 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. The SSAC is the official body, which advises the Government on social security matters.

The SSAC said that the Conservative Government should not go ahead with its plans¹². If the test was to be brought in, the SSAC made several further recommendations. One of these was that returning UK nationals should not be subject to the test. Nationals from the Republic of Ireland should also be exempt. The Government of the day broadened its proposals so that people 'habitually resident' in the Republic of Ireland, the Channel Islands and the Isle of Man as well as the UK could get benefit. However, it would not exempt returning UK nationals from the test. This was because it said it would be contrary to European law to discriminate on the basis of nationality.¹³

2.2 Review of the Habitual Residence Test

The Labour Government had announced in June 1997 that the Habitual Residence Test would be included in its wide-ranging review of the social security system.¹⁴ The Social Security Minister, Baroness Hollis, later explained that the review was needed particularly to see whether the test was affecting returning UK nationals rather than foreign "benefit tourists".¹⁵

On 3 March 1999 the then Junior Social Security Minister Angela Eagle said that the Government would bring forward proposals on the Habitual Residence Test once it had considered the implications of the Judgment in the Swaddling case (for further details of this case see below).¹⁶ The proposed changes were announced on 14 June 1999. They were as follows:

⁹ Peter Lilley at 110th Conservative Party Conference, 6 October 1993

¹⁰ DSS Press Release 4 February 1994

¹¹ The draft *Income-Related Benefits Schemes (Miscellaneous Amendments) (No. 2) Regulations 1994*

¹² *The Income Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994*, Report by the Social Security Advisory Committee, Cm 2609, July 1994

¹³ See Cm 2609 p3

¹⁴ HC Deb 2 June 1997 c15-6

¹⁵ HL Deb 20 April 1998 c189W

¹⁶ HC Deb 3 March 1999 c804w

- People coming back to the UK from any country and re-establishing their ties here should be treated as habitually resident as soon as they return.
- People deported to the UK would be treated as habitually resident. So would people brought here from a place of civil unrest.
- Otherwise, the Benefits Agency would still apply the test to people without 'appropriate' UK ties.
- The Benefits Agency would only apply the test during the first two years a person was in the UK, instead of the first five years.
- The Government would make further administrative changes.

Details were given in a Written Answer:

Ms Oona King: To ask the Secretary of State for Social Security if he will make a statement on the future of the habitual residence test. [87147]

Angela Eagle: We have now concluded the review of the habitual residence test and have identified a package of measures to produce a fairer and more efficient test. The test was introduced by the previous Government to tackle the perceived phenomenon of 'benefit tourism'. However, to date the majority of people adversely affected have been UK nationals.

It is right that our Social Security system should be safeguarded from abuse by people with little or no connection to the UK and we will continue to do this. Clearly though it is also important to ensure that income-related benefits are available to UK nationals and other nationals who have strong and legitimate links to this country.

We believe that the package will address these two concerns. We have accepted a recent judgment of the European Court of Justice which has made it clear that people returning to the UK from an EU member state and re-establishing their ties here should be treated as habitually resident immediately upon their return.

However we believe it would be wrong to limit this important principle to people returning from a member state of the EU and have issued guidance to staff administering the test advising them to extend the effect of the judgment to people returning from any country overseas and re-establishing their ties here.

We also propose to legislate to add to the categories of people who are to be treated as habitually resident those people who are brought here from an area of civil unrest or who are deported to the UK. Otherwise, subject to any guidance which may be given by the House of Lords in *Nessa v The Chief Adjudication Officer (1) The Secretary of State for Social Security (2)*, a decision on which is awaited, the habitual residence test will continue to apply to seek to prevent abuse by those who do not have the appropriate ties to this country.

We intend also to reduce the period when habitual residence inquiries are made from five years to two years and to introduce administrative improvements.

We will trial a standard proforma, with a view to national implementation, to facilitate a more consistent approach to information gathering and decision making on cases requiring habitual residence action. We will also monitor the effects of how the test now operates.

Taken together we believe these measures will result in fairer access to income-related benefits and will streamline the administrative process, while ensuring security against possible abuse of the benefits system by those with no real links to the UK.¹⁷

Prior to the Government's review, the guidance advised decision makers that the Habitual Residence Test should be applied where a person has come to the UK from abroad within the five years before making a claim for Income Support. From 1 July 1999, new guidance changed this period to two years.¹⁸

Regulations were laid to exempt people who have been deported, expelled or removed to the UK from the Habitual Residence Test.¹⁹ These came into force on 2 May 2000.

Also from 2 May 2000, new administrative procedures were introduced.²⁰

3 How the test is applied

The Habitual Residence Test is applied to people (unless they fall into one of the exempt categories), including British citizens, who have been resident in the Common Travel Area²¹ for two years or less, and who claim any one of the following benefits/services:²²

- Income Support
- income-based Jobseeker's Allowance
- Income-related Employment and Support Allowance
- Pension Credit
- Housing Benefit
- Council Tax Benefit
- access to local authority housing

The test only applies to the claimant, not their partner or dependants.

There is no statutory definition of 'habitual residence', but its meaning has been clarified to an extent by case law. There is however no definitive list of factors which determines whether a person is habitually resident; the Department for Work and Pensions (DWP) or local authority will look at each case individually and consider all the relevant facts in the light of the case law before coming to a decision. The decision about whether or not someone is habitually resident has to be made on the balance of probabilities, and the onus of proof lies with the DWP or local authority decision maker.²³

¹⁷ HC Deb 14 June 1999 cc36-37w

¹⁸ Benefits Agency, *Income Support Bulletin*, 54/99, 24 June 1999

¹⁹ *The Income Related Benefits and Jobseeker's Allowance (Amendment) Regulations* SI 2000/979

²⁰ Benefits Agency *Income Support Bulletin*, 22/00, 27 March 2000

²¹ This is the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland

²² The Government has also said that the Habitual Residence Test will apply to claims for the Personal Independence Payment, which is to replace Disability Living Allowance (DLA) for people of working age, starting from 2013-14 (Welfare Reform Bill PBC Deb 10 May 2011 c780). DLA is currently payable to people who are present and 'ordinarily resident' in Great Britain.

²³ CIS/1067/1995

In a letter to Tim Boswell during the parliamentary stages of the *State Pension Credit Bill [H.L.] 2001/02*, the Parliamentary Under-Secretary of State at the DWP, Maria Eagle, summarised how the Habitual Residence Test operates:

The habitual residence test is a condition for receiving certain income-related benefits. Since 1 August 1994, all people (except ‘workers’ for the purposes of EU law, refugees, people given exceptional leave to remain, and people from Montserrat) who claim income Support, Housing Benefit or Council Tax Benefit, including UK citizens who either return to or come for the first time to the UK, have to be habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland (the Common Travel Area) or be treated as being habitually resident in the United Kingdom, before they qualify for payment of these benefits. The test was carried forward to income-based Jobseeker’s Allowance (JSA(IB)) on 7 October 1996.

In practice, it is only people who are identified from their benefit claim details as having come/returned to the UK within the last two years immediately prior to their claim who are actively subjected to the habitual residence test. (Originally the period was five years, but this was reduced as one of the outcomes following the Government’s review of the habitual residence test – 14 June 1999).

The term “habitual residence” is not defined in regulations, so in order to determine whether a person is habitually resident, a Decision Making Officer considers a variety of factors about the person’s circumstances. European caselaw has established that factors to be considered include:

- the length, continuity and general nature of actual residence
- reasons for coming to the UK
- The claimant’s future intentions.

This information is usually gathered by interviewing the customer.

In addition, UK caselaw has previously set out that an appreciable period of actual residence, together with a settled intention, are necessary to establish actual residence. What counts as an “appreciable period” though will depend upon the facts of each individual case.

This is not an exhaustive or conclusive list. There may be other factors that are important in deciding whether a person is habitually resident in an individual case.²⁴

As the letter indicates, for the purposes of EC law ‘habitual residence’ has a different meaning from that which applies to the domestic legislation. Where other EEA states use the term “habitual residence” as a condition of entitlement to benefit, the term should be used in accordance with their domestic law and EC case law.²⁵

Training literature for local authority Housing and Council Tax Benefit decision makers emphasises some of the main points arising from judgments of European Courts relating to Habitual Residence:

4.80 Here are some of the key points from existing European case law:

- There is no set definition of habitual residence;

²⁴ DEP 02/1278

²⁵ HC Deb 8 October 2007 cc151-152w

- Each case must be looked at on its own merits;
- The facts and nature of a person's residence are what should be considered; not their legal rights;
- Habitual residence implies someone has made or is making a settled home;
- There is no requirement for someone to only have one home but the home you are considering must be genuine for the time being;
- The length, continuity and general nature of where someone lives is more important than his or her future intentions;
- A person should have lived somewhere for an appreciable period of time but how long this is must not be defined. It might have a different meaning in different cases;
- The claimant should be able to show a stable pattern of residence.²⁶

Where the Department for Work and Pensions has already decided, when considering a claim for Income Support, income-based JSA, income-related ESA or Pension Credit, that a person is habitually resident, then a local authority is obliged to accept that decision if the same person makes a claim for Housing/Council Tax Benefit or housing assistance.²⁷ However, if the DWP decides a person is not habitually resident, the local authority must apply the Habitual Residence Test separately, taking all information into account and not simply following the DWP's determination.²⁸

The Housing and Council Tax Benefit training module outlines the areas decision makers would need to explore when interviewing claimants to determine whether they are habitually resident:²⁹

4.88 These are the areas you will need to ask about:

Length and continuity of residence

- Where have you lived during the last 5 years?
- If you have lived in more than one country, how long did you spend in the different countries?
- Have you ever lived in the UK before? If so, how long for and how did you support yourself?

Employment

When the claimant has a job, find out:

- their job title;
- how long they have been employed;

²⁶ Department for Work and Pensions, *HB & CTB Training Module 3.4*, Version 3.0

²⁷ *ibid.* paras 4.84-4.86. If the local authority has information that leads it to believe the DWP decision is wrong, the guidance states it should inform the DWP but take no action itself, since it is up to the DWP to revise its opinion.

²⁸ *Ibid.* para 4.85

²⁹ *ibid.*

- if there is fixed-term contract; and
- the pattern of a normal working week.

When the claimant has worked in the past, find out:

- how many different jobs they have had;
- how long each lasted;
- their reasons for leaving; and
- what steps they are taking to find new employment.

When the claimant is a work seeker, find out:

- if they have been offered a job;
- what enquiries they made about job availability in the UK;
- if their job prospects are better in the UK than the country just left;
- what steps they have taken to find work;
- if they have registered with a Job Centre; and
- what qualifications they have appropriate to working in the UK.

When the claimant worked before coming to the UK find out:

- what their last job was;
- why they left;
- if the job is still available; and
- what prospect there is of finding similar work in the UK.

Reasons for coming to the UK

If the claimant came to the UK to look for work, find out:

- what preparations were made before coming to the UK;
- if they had established that work would be available here;
- their intentions for financial support in the meantime.

If the claimant came to the UK for another reason then find out as much information as possible.

For example it might be for a holiday, to visit friends/ relatives, or to study.

Future Intentions

- How long are they intending to stay?
- Will they still have links with any other countries?
- If so, how often and for how long are they planning to visit that country?

Centre of Interest

- Where are all their belongings/personal possessions?
- If not in the UK, how do they plan to transport them over?
- Do they have family already living in the UK? (If the claimant has a partner or children who aren't living with them get details)
- Do they have relatives in the UK?
- Do they own property anywhere?
- Have they made any substantial purchases since arriving in the UK?

As noted above, people who were previously habitually resident in the Common Travel Area and who return to resume their habitual residence may be accepted as habitually resident from the date of their return. This does not mean, however, that all those returning to the UK after a period abroad will be considered habitually resident from the date they return. The decision maker will have to decide whether the person is in fact resuming a previous residence. The Department for Communities and Local Government has recently published a *Homelessness Code of Guidance for Local Authorities*³⁰ which gives the following guidance to decision makers on this question:

Why has the applicant come to the UK?

7. If the applicant is returning to the UK after a period spent abroad, and it can be established that the applicant was previously habitually resident in the UK and is returning to resume his or her former period of habitual residence, **he or she will be immediately habitually resident.**

8. In determining whether an applicant is returning to resume a former period of habitual residence authorities should consider:

- when did the applicant leave the UK?
- how long did the applicant live in the UK before leaving?
- why did the applicant leave the UK?
- how long did the applicant intend to remain abroad?
- why did the applicant return?
- did the applicant's partner and children, if any, also leave the UK?
- did the applicant keep accommodation in the UK?
- if the applicant owned property, was it let, and was the lease timed to coincide with the applicant's return to the UK?
- what links did the applicant keep with the UK?
- have there been other brief absences? If yes, obtain details
- why has the applicant come to the UK?

³⁰ July 2006: <http://www.communities.gov.uk/publications/housing/homelessnesscode>

9. If the applicant has arrived in the UK within the previous two years and is not resuming a period of habitual residence, consideration should be given to his or her reasons for coming to the UK, and in particular to the factors set out below.³¹

The *Code* goes on to mention factors such as whether the applicant is joining family or friends, his or her plans, their length of time in the other country, and their 'centre of interest'.³²

4 Case law

The term 'habitually resident' has been the subject of a substantial body of case law. This has clarified to an extent the meaning of the term but new Commissioners' decisions and court judgments mean that the case law is constantly evolving and, with it, the guidance issued to Department for Work and Pensions decision makers who apply the rules. Some of the more significant cases are outlined below. This should not however be taken to be a comprehensive survey of the current case law on the Habitual Residence Test. The annual Child Poverty Action Group *Welfare benefits and tax credits handbook* contains a chapter which summarises the case law to date.³³

4.1 Commissioner's decision CIS/1067/1995

In this decision the Commissioner's said that the most important factors for habitual residence are the general nature of actual residence rather than intention. The Commissioner also said that "an appreciable period of time" together with a settled intention will be necessary to establish habitual residence. There is no definition of what constitutes an "appreciable period of time". The Commissioner said this would have to be considered in each individual case. The question should be whether, in view of all the circumstances, including the person's intentions as to residence, the residence has continued for a sufficient period for it to be said to be habitual. He suggested that for a British citizen, three to six months' residence might be adequate to demonstrate habitual residence but for someone "whose main roots and family ties are overseas" twelve months or more might be required.³⁴

4.2 The Swaddling case

On 25 February 1999 the European Court of Justice found in favour of Robin Swaddling.³⁵ Mr Swaddling had been working in France before he returned to look for work in the UK. He was refused benefit. The Judgment concerned people who have exercised their rights under EC law to work in another Member State. It found that such people should not necessarily have to complete an "appreciable period of residence" to claim certain benefits. These benefits are those, such as Income Support, which are covered by EC Regulation 1408/71. This Regulation deals with the co-ordination of European social security systems.³⁶

In July 1999, a Commissioner's decision considered the effect of the Swaddling Judgment on the UK habitual residence test.³⁷ Commissioner Mesher stated that it could only be relied on directly in cases where the claimant's circumstances are very similar to those of Mr Swaddling. However, the principles have to be applied to other claimants who fall within the scope of EC Regulations 1408/71, because they have worked or been insured under national

³¹ *ibid.* p197

³² *ibid.* pp198-199

³³ See pp 1420-1424 of the 2011-2012 edition

³⁴ CIS/1067/1995 para 28.

³⁵ European Court of Justice, Case C-90/97, 25 February 1999

³⁶ European Community Regulation 1408/71

³⁷ CIS/15484/1996, 20 July 1999

insurance legislation in any EU Member State. Commissioner Mesher confirmed that such people couldn't be refused benefit just because they have not completed an "appreciable period" of residence. The length of residence remains a "relevant factor", but other circumstances may mean the person should be taken as habitually resident on arrival in the state concerned.

4.3 The Nessa case

This case concerned a woman who had lived all her life in Bangladesh. Her husband had lived in the UK from 1962 until his death in 1975, and she had right of abode in the UK. When she arrived in 1994, she was refused Income Support because she was not habitually resident. She appealed, and the tribunal found that she was habitually resident because she had come voluntarily for the sole purpose of being habitually resident. However the Adjudication Officer appealed successfully to the Commissioners on the grounds that the tribunal had not asked whether there had been an appreciable period of residence. The Court of Appeal dismissed her appeal against this, and in October 1999 the House of Lords also dismissed her appeal.³⁸ It decided that a person cannot be habitually resident in any country unless he has taken up residence and lived there for a period.

A useful discussion of the case law since *Swaddling* and *Nessa* is given in Commissioner's decision from February 2004.³⁹ The most detailed discussion of the case law on habitual residence is however in pp 322-332 of Volume II of the 2009/10 edition of *Social Security Legislation*, published by Sweet and Maxwell. This is available in the Library.

4.4 The Bhakta case

In its judgment in *Secretary of State for Work and Pensions v Bhakta* on 15 February 2006⁴⁰, the Court of Appeal held that provisions allowing advance claims for social security benefits extended to people who had yet to satisfy the Habitual Residence Test. The Court upheld a Commissioner's decision that the mere passage of time might be enough to enable a person to satisfy the Habitual Residence Test so that it was possible for the DWP to determine in advance when a person would satisfy the test. The Secretary of State therefore had the power (but was not *obliged*) to make an advance award of benefit where the only factor preventing the person from satisfying the Habitual Residence Test was that they had not been resident in the UK for long enough, and they satisfied (and were likely to continue to satisfy) all the other conditions of entitlement for benefit.

The Government subsequently presented to the Social Security Advisory Committee (SSAC) for their consideration draft regulations to reverse the effect of the judgment. The draft regulations amended regulation 13 of the *Social Security (Claims and Payments) Regulations 1987*⁴¹ to remove the power to make advance claims in respect of both the right to reside and actual habitual residence aspects of the Habitual Residence Test. The DWP's memorandum submitted to the SSAC stated:

10. The Secretary of State's view is that when considering the habitual residence test a decision maker needs to take into account such a variety of factors that it is impossible to predict a point in time in the future when a person becomes habitually resident. By

³⁸ *Nessa c CAO* [1999] 4 All ER 677 21 October 1999 (HL)

³⁹ CIS/4474/2003

⁴⁰ [2006] EWCA Civ 65

⁴¹ SI 1987/1968

contrast the advance claim provisions are ostensibly aimed at more easily predictable future events.⁴²

The memorandum explained:

14. The Court of Appeal judgment effectively transfers the responsibility away from the claimant to the decision-maker. This could lead to far more decisions to make an advance award of benefit or, at least, require decision makers to consider making an advance award in a greater number of circumstances. This will lead to additional complexity in the already overtaxed area of social security decision making. An increase in the number of advance claims could also lead to a greater occurrence of fraud or error. Although regulation 13(2) of the Claims and Payments Regulations makes provision for changes in circumstances, the onus is on the claimant to report the change. Further complexity could arise where the claimant disagrees with the future date decided by the decision-maker and could appeal the decision because he/she thinks the decision is unreasonable.

15. Therefore, Secretary of State's view is that his decision-makers should look at the habitual residence part of the test as it applies to an individual at the date of decision on their claim. They should look for an appreciable period of actual residence in the UK at that point in time as evidence to support a genuine intention to settle here.

16. The Secretary of State's further intention is that the amendment should apply to exclude both the right to reside aspect and the actual habitual residence aspect of the habitual residence test from the scope of Regulation 13. In other words at the date of decision the decision-maker should first of all consider whether a claimant has a right to reside in the Common Travel Area and then whether they are habitually resident there. Significantly he does not want his decision-makers to face the prospect of having to speculate about the future in relation to any aspect of the test. For this reason he is not prepared to let the decision of the Commissioner and the judgment of the Court stand.

None of the seven organisations that responded to the SSAC's subsequent consultation supported the Government's proposed amendments. In its report submitted to the Secretary of State on 6 October 2006, the SSAC noted:

5.1 We were struck by the consistency of the messages and evidence that were presented to us by respondents. Without exception, they pointed to the discretionary nature of the advance claims provision and the lack of evidence that the exercise of discretion in habitual residence cases would present either exceptional difficulties for DMs [Decision Makers] or be particularly open to abuse. A number of respondents offered examples of equally challenging cases that DMs routinely have to deal with. Likewise, the general 'usefulness' of the provision – in terms of reducing the administrative burden of repeat claims and appeals, the stress and uncertainty of this cycle upon claimants, and the potential to reduce complexity was identified.⁴³

The Committee recommended that the Government should not proceed with the proposed amendments. It concluded:

6.1 We do not think that the Department has made either a convincing or compelling case for change. Rather than closing a potential loophole, and avoiding complexity for DMs, an opportunity is being missed to allow DMs to exercise reasonable judgement

⁴² DWP memorandum in SSAC press release, 9 August 2006:

http://www.ssac.org.uk/pdf/HabRes_EMwithPN.pdf

⁴³ Cm 7073 p11

where the facts of the case merit the exercise of discretion, and avoid some of the administrative and procedural 'log jams' that follow from repeated claims and appeals.⁴⁴

The Government rejected the Committee's recommendation not to proceed with the amendments. Responding to the Committee's report, the Secretary of State said that, while the Government believed the advance claims provisions were a highly useful tool that operated to the benefit of individual claimants and the DWP alike in some circumstances, bringing the Habitual Residence Test within the scope of the advance claims provisions had served to weaken the test and had introduced an inappropriate level of complexity and speculation into the decision making process.⁴⁵ The Government also claimed that there was evidence suggesting that some decision makers were having difficulty applying guidance relating to the *Bhakta* judgment in a proper and constituent manner. It rejected the option of amending the guidance because, although it could not be quantified precisely, there was a 'risk of exploitation against which the Government needs to safeguard the benefit system'.⁴⁶

The regulations which reversed the *Bhakta* judgment - *Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) Regulations 2007*⁴⁷ - were prayed against in the House of Lords by the Liberal Democrats.⁴⁸ Echoing the Social Security Advisory Committee, Lord Kirkwood of Kirkhope argued that the Government had failed to make a convincing case for disapplying the advance claims provisions in habitual residence cases. He added:

At the end of the day, the Child Poverty Action Group, which has studied these matters more closely than the rest of us, says that welfare rights advice will change if this Motion is not accepted and the Government stick to their proposal. The advice to people will be, "If you do not have access to the advance claim provisions in future, we advise you to claim every week; and every time that claim is rejected, appeal until a significant period has passed". There will be weekly claims and, when they are rejected, weekly appeals. How that would help anyone in terms of the bureaucracy within the DWP defeats me completely. This is a counterproductive regulation. I can see no substance in the Government's argument and I look forward to what they say in their defence.⁴⁹

Speaking for the Opposition, Lord Taylor of Holbeach argued that the Government's responses to the points raised by the SSAC seemed to be based on "very little evidence of any sort".⁵⁰ Replying for the Government, Lord Mackenzie of Luton reiterated the Government's position. He added:

We believe that the advance claim provisions relating to income-related benefits should be applied on the basis of predictable events. The amendment restored that intention by removing the habitual residence test from the scope of the advance claims provisions. However, the Government are concerned that some claimants who initially fail the test are not informed to make a fresh claim to benefit. We intend to carry out a review of customer information and communications to ensure that claimants are made

⁴⁴ *Ibid.* p12

⁴⁵ *Ibid.* p2

⁴⁶ *Ibid.* p4

⁴⁷ SI 2007/1331

⁴⁸ HL Deb 18 June 2007 cc75-86

⁴⁹ *Ibid.* c79

⁵⁰ *Ibid.* c80

aware of the implications of failing the test. It is against that background and the Court of Appeal decision that these regulations have been laid before Parliament.⁵¹

The regulations came into force on 23 May 2007.

5 Further information

The Habitual Residence Test has been described as 'notoriously opaque'.⁵² Anyone coming up against the Test would be best advised to seek professional advice. This is not something the Library can provide. This note should not be relied upon as legal advice or a substitute for legal advice. A CAB, Law Centre or local welfare rights organisation may be the best first port of call when seeking advice.

The annual Child Poverty Action Group *Welfare benefits and tax credits handbook* contains a section which describes how the Habitual Residence Test (and the new 'right to reside' test) operates and summarises the relevant case law (See pp 1420-1424 of the 2011-2012 edition)

CPAG also publishes the *Benefits for migrants handbook*, which contains a chapter on the right to reside test. The most recent edition was published in January 2011.

An article by David Thomas, 'Habitual residence now', appeared in the CPAG *Welfare Rights Bulletin* in 2000. The article, which looked at the meaning of 'habitual residence' following the *Swaddling* and *Nessa* cases, is available in full at the CPAG website here:

<http://www.cpag.org.uk/cro/wrb/wrb155/habitual.htm>

CPAG is also developing an advice section for its website on right to reside queries as a way of assisting advisers in front line advice agencies who deal with such cases. A guide, *Challenging 'Right to Reside' decisions*, has been produced but this is currently being updated and it is not at present available at the CPAG website.⁵³ In the meantime, CPAG suggests welfare rights advisers new to this area consult their Group *Welfare benefits and tax credits handbook* or *Benefits for migrants handbook*.

The guidance for DWP staff on the application of both the Habitual Residence Test and the right to reside test is in Volume 2, Chapter 7, Part 3 of the *Decision Maker's Guide* (DMG), which is available at the Department's website here:

<http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide/>

The DMG does not in itself have any force in law, but it summarises the relevant case law.

⁵¹ *Ibid.* c83

⁵² Wikeley, Ogus and Barendt, *The Law of Social Security*, 5th edition, 2002, p 282

⁵³ <http://www.cpag.org.uk/righttoreside/reside.htm>