

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY, HOUSING BENEFIT AND COUNCIL TAX BENEFIT
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2007

2007 No. 1331

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. **Description**
 - 2.1 To be eligible for an income-related benefit a person must have a right to reside and be habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland (known as the Common Travel Area). The test (known as the habitual residence test) is applied to all claimants, including UK nationals. Claimants who do not satisfy the habitual residence test are classed as persons from abroad or, in the case of state pension credit, persons treated as not in Great Britain and as such are not eligible for income-related benefits.

 - 2.2 These regulations amend relevant provisions which affect the administration of income-related benefits – namely income support, income-based jobseeker's allowance, state pension credit, housing benefit and council tax benefit. The purpose of these amendments is to prevent persons from abroad or, in the case of state pension credit, persons treated as not in Great Britain from making a claim for an income-related benefit in advance on the basis that the habitual residence test, in addition to meeting the other conditions of entitlement, will be satisfied from a predicted future date.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.

4. **Legislative Background**
 - 4.1 The advance claim provisions allow persons who have no present entitlement to benefit to make a claim in respect of a future period where, based on their existing circumstances, an entitlement will arise on a fixed date within three months of the date of claim (or four months in respect of some benefits such as retirement pension and state pension credit).

 - 4.2 Following the recent Court of Appeal judgment in *Bhakta* the Court held that the Secretary of State could not automatically exclude a claim from being treated as made in advance by virtue of the fact that the claimant did not satisfy the habitual residence test at the date of claim. The judgment has meant that

the Secretary of State is now obliged to exercise his discretion as to whether or not a claim for an income-related benefit from a person from abroad or a person treated as not in Great Britain can be treated as made in respect of a future period beginning on a fixed date. The effect has been to require the Secretary of State, in cases where he wishes to employ his discretion in the claimant's favour, to determine a future date from when the habitual residence test will be satisfied.

- 4.3 The habitual residence test was introduced into the regulations which make provision for the income-related benefits by the Income-related Benefits Schemes (Miscellaneous Amendments) (No.3) Regulations 1994. There have been a number of modifications to the test over time.
- 4.4 These amendments amend the advance claims provisions in the Social Security (Claims and Payments) Regulations 1987, the Housing Benefit Regulations 2006, Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, the Council Tax Benefit Regulations 2006 and the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006. The amendments insert a provision that will exclude persons from abroad or, in the case of state pension credit, persons treated as not in Great Britain from making an advance claim for income support, income-based jobseeker's allowance, state pension credit, housing benefit and council tax benefit.

5. Extent

- 5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The habitual residence test was introduced in 1994 to ensure that benefit was only awarded to those with a settled and demonstrated intention to stay in the UK. From 1 May 2004, the test was strengthened so that a person had also to have a right to reside in the Common Travel Area. The test was further amended from the 30 April 2006 in the light of a European Directive on rights of residence. These measures have served to safeguard the test from exploitation by people with no right to reside here, irrespective of nationality.
- 7.2 There are a number of categories of person who are exempted from the test and who thus become able to access benefit immediately if they meet the other conditions of entitlement. Claimants who are exempt include those who are workers under EC law and refugees. People who do not fall into any of these categories are subject to the habitual residence test.

- 7.3 A claimant who fails the test is classed as a person from abroad and is not entitled to receive an income-related benefit. The effect of the Court of Appeal judgment is to allow claims, although made in respect of a present period and destined to fail under the habitual residence rules, to be treated as made in respect of a future period, beginning with the date from which a decision maker in the Department determines the test will be satisfied. Subject to all the other conditions of entitlement being satisfied, benefit will then be awarded in respect of that future period. Unless there is relevant change of circumstances, payment of benefit under that award will then fall to be made at the appropriate time.
- 7.4 It is not the policy intention that claims which would otherwise fail the habitual residence test should be treated as made in respect of a future period. The purpose of allowing claims to be treated as made in advance is to prevent a repeat claim having to be made in circumstances where relevant objective facts are known and changes in those facts can be predicted with certainty. Examples would be where the claimant will, at a future date, reach pension age, or cease to be a student or as final earnings fall to be taken into account over a calculated period of time. Such examples are qualitatively different from the exercise of judgment and degree of speculation required of a decision maker to determine the date at which a claimant may satisfy the habitual residence test.
- 7.5 This amendment is necessary in order to protect the benefit system from being obliged to pay benefit under awards which, although made in good faith, may ultimately prove to be ill-judged or hasty, and where, because there is no objective and specific change in circumstance, there is no clear onus upon the claimant to notify the Department before the award of benefit comes into effect.
- 7.6 This instrument restores the policy intention by inserting a provision to exclude claims for income support, income-based jobseeker's allowance, state pension credit, housing benefit and council tax benefit from persons from abroad or, in the case of state pension credit, persons treated as not in Great Britain from being treated as made for a period in advance.

Guidance

- 7.7 Guidance will be issued to decision-makers to ensure they are aware of this exception and how to apply it.

Consolidation

- 7.8 Informal consolidation of the instrument will be included in due course in the Department's "The Law Relating to Social Security" (the Blue Volumes) which are available on the internet at http://www.dwp.gsi.gov.uk/advisers/docs/lawvols/bluevol/pdf/c_0031.pdf at no cost to the public.

Consultation

- 7.9 The Social Security Advisory Committee referred the regulations for public consultation. The consultation period lasted from the 9 August to 15 September 2006. Views on the proposed amendments to the regulations were requested from organisations and members of the public.
- 7.10 Responses were received from the following organisations: Harrow Citizens Advice Bureau; London Advice Services Alliance; Hounslow Social Inclusion, Welfare Rights and Money advice Unit; Child Poverty Action Group; Stockport Advice; Immigration Law Practitioners Association and Law Centre (Northern Ireland). No responses were received from members of the public.
- 7.11 Following the consultation period the Social Security Advisory Committee sent their report to the Secretary of State on 6 October 2006. Their report recommended that the Government should not proceed with the proposed amendments to the income-related benefit regulations. It questions the Department's view that determination of an advance claim would involve the decision-maker speculating about a future date from which the habitual residence test could be satisfied. It also expressed the view that excluding the test from advance claims provisions could increase the number of repeat claims to benefit and appeals thereby placing greater administrative burdens upon claimants and the Department alike. The Committee was also concerned that people who initially failed the test were not advised to make a further claim to benefit pending the outcome of an appeal being heard
- 7.12 The Government has considered the Committee's report but believes that the case for including the habitual residence test within the advance claims provisions is not compelling. The Government's response to the report explains the practical impact there would be upon the administrative process if the Committee's recommendations were adopted in full. In particular, it would have the effect of increasing the complexity of decision making and in some cases, unnecessarily adding to the burden upon the Secretary of State to gather evidence.
- 7.13 The Government also considers, even though it cannot quantify the precise amount of benefit at stake, that there is a risk of exploitation against which the Government needs to safeguard the benefit system. The Government, however, has accepted that there should be a review of the information which is supplied to claimants who are refused benefit after failing the habitual residence test. This information should make clear that such claimants can appeal against adverse decisions and can make a further claim for benefit, at a later date when they consider they are habitually resident. Copies of the Committee's report and the Government's response (Cm 7073) are available from the Vote Office and the Printed Paper Office.
- 7.14 The local authority associations have also been consulted in relation to Housing Benefit and Council Tax Benefit. They have confirmed that they are content with the instrument as it relates to those benefits.

8. Impact

- 8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.
- 8.2 There is no impact on the public sector as there are no costs associated with the changes.

9. Contact

Mary Baines at the Department for Work and Pensions can answer any queries regarding the instrument. Tel:0207-712-2289 or e-mail Mary.Baines@dwp.gsi.gov.uk