

# Housing Benefit and Council Tax Benefit Circular

Department for Work and Pensions

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## HB/CTB A10/2010

### ADJUDICATION AND OPERATIONS CIRCULAR

<b>WHO SHOULD READ</b>	All Housing Benefit (HB) and Council Tax Benefit (CTB) staff
<b>ACTION</b>	For information
<b>SUBJECT</b>	Right to reside – parent and primary carer of a child in education

### Guidance Manual

The information in this circular does affect the content of the HB/CTB Guidance Manual. Please annotate this circular number against *C4 paragraph 4.44*

### Queries

If you

- want **extra copies of this circular/copies of previous circulars**, they can be found on the website at <http://www.dwp.gov.uk/local-authority-staff/housing-benefit/user-communications/hbctb-circulars/>
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## Introduction

- 1 This circular gives guidance following two recent judgements of the Court of Justice of the European Union (CJEU) where the Court of Appeal had referred specific questions regarding right to reside to the CJEU. These cases were
  - [Ibrahim v London Borough of Harrow](#) and
  - [Teixeira v London Borough of Lambeth](#)
- 2 The CJEU were asked to consider whether, in certain circumstances, a person has a right to reside as the parent and primary carer of a child in education in a host Member State.
- 3 Both decisions under appeal to the Court of Appeal concerned homelessness assistance, but the CJEU judgement will also apply to Housing Benefit (HB) and Council Tax Benefit (CTB).

## Background

- 4 The Habitual Residence Test applies to HB and CTB. A claimant who is not habitually resident in the Common Travel Area (CTA) is a person from abroad. A claimant who is a 'person from abroad' is treated as not liable to pay rent or Council Tax and therefore not entitled to HB or CTB
- 5 Regulations provide that a claimant cannot be habitually resident unless they have a right to reside in the CTA.
- 6 The rights of European Union (EU) citizens, and their family members, to travel to and reside in another European Economic Area (EEA) state were set out in the Citizens' Directive 2004/38 EEC, which came in to force on 30 April 2006.
- 7 The claimants seeking homelessness assistance did not have a right to reside under the Citizens' Directive or domestic legislation. In both cases the claimant or the claimant's spouse had worked in Great Britain (GB) before their claim for homelessness assistance. It was argued that where an EU migrant worker has worked in another member state, the child or children of that migrant worker have a right to be admitted to the general education system of that Member State under Article 12 of Regulation (EEC) No 1612/68. They submitted that, consequent to that, the parent and primary carer of a child exercising that right to education under Article 12 also has a right to reside in the host Member State to enable the child to complete their education.

- 8 The CJEU ruled that, in circumstances such as those in *Ibrahim* and *Teixeira*, the children of a national of a Member State who works or has worked in the host Member State, and the parent who is their primary carer, can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation (EEC) No 1612/68. The right of the parent, who is the primary carer of a child exercising the right to pursue his or her education in accordance with Article 12 of Regulation (EEC) 1612/68, is not conditional on that parent being self sufficient and having comprehensive sickness insurance.

## Effect of the judgement

- 9 A claimant for HB or CTB will have a right to reside in GB under Article 12 of Regulation (EEC) 1612/68 if, at the date of claim to that benefit
- the claimant is the parent (or step parent) and primary carer of a child, **and**
  - the claimant or the child's other parent is a citizen of another EEA State or Switzerland (see paragraph 10), **and**
  - that person is working or has worked as an employed person in the United Kingdom (UK) (see paragraph 11), **and**
  - that child of the migrant worker was installed (or born) in the UK and had entered general education in the UK whilst the migrant worker also lived in the UK (see paragraph 13), **and**
  - that child is still in general education in the UK and is aged under 18 (see paragraph 14).

## Citizen of another Member State

- 10 The migrant worker must be a citizen of another EEA Member State, or Switzerland. This includes A8 and A2 nationals, but see paragraph 12 below regarding the rights of a child of an A8 or A2 migrant worker during the Accession period.

## Meaning of work

- 11 The rights conferred in Article 12 of Regulation (EEC) 1612/68 are to children of a national of a Member State who is or has been **employed** in another Member State. Thus work must be as an employed person and not self-employment. Work must be effective work and employment that is only marginal or of very short duration will be insufficient to trigger Article 12 rights (see the [Housing Benefit and Council Tax Guidance Manual, C4 – Annex A](#) regarding genuine and effective work). Simply registering as seeking work will not confer rights to a child under Article 12.

- 12 The child of an A8 national migrant worker or an A2 national migrant worker will not gain rights under Article 12 of Regulation (EEC) No 1612/68 during the Accession period unless and until the migrant worker has completed the necessary 12 months registered or authorised work, or the migrant worker is otherwise exempt from the requirement to register or seek authorisation to work in GB. Any work carried out by a national of another Member State before that other Member State joined the EU, cannot give rights under Article 12 of Regulation (EEC) 1612/68.

## **Child and migrant worker in the UK**

- 13 There must be some common period where both the migrant worker and the child of the migrant worker were present in the UK and the child was in general education in the UK. They do not, however, need to have lived in the same household for this common period. The migrant worker does not need to have been in employment before the child came to the UK.

## **General education**

- 14 General education can include up to and including university or similar courses, and vocational courses, but the right to education under Article 12 ends when the child reaches the age of majority, which is 18 in the UK. It can, exceptionally, continue beyond that age if the child continues to need the presence and care of that parent in order to be able to complete their education. General education does not include play school or pre-school schemes. It usually starts around age five. The migrant worker does not need to have been in employment in the UK before the child was first installed in education in the UK.

## **Breaks of residence in the UK**

- 15 Once the child of a migrant worker is resident (or born) in the UK during a period when that migrant worker is also resident in the UK and is or was employed in the UK, that child has potentially gained rights under Article 12 of Regulation EEC 1612/68 to be admitted to general education in the UK. Provided that the child enters general education when the migrant worker was also resident in the UK, it will not matter that the migrant worker might subsequently leave the UK. Provided that the child remains habitually resident in the UK, the child will retain that right and consequently the parent and primary carer will have a right to reside whilst that child is in general education in the UK.
- 16 However, if the child leaves the UK for other than temporary periods, the rights under Article 12 would end. Absences of less than six months could be considered as temporary if that was the intention at the outset, and had remained so throughout. Longer periods could still be temporary depending on the reason for absence. Where the child leaves the UK for other than temporary reasons, that absence will end Article 12 rights.

- 17 For instance, a Spanish national comes to the UK in 2004 with his child and is employed here for several protracted periods, and the child starts school. They go back to Spain in 2007, but then return to the UK in 2010 and the parent claims IS as a single parent. The parent does not have a right to reside because the child no longer has Article 12 rights.

## Action by Decision Makers

- 18 The guidance in this circular should be applied to all new claims and to any claims still outstanding. Where there is an in-time appeal still outstanding at the First-tier Tribunal (FtT) against a decision on a claim which, in light of this guidance, was incorrect, the Decision Maker (DM) should revise that decision under appeal and the appeal will lapse. That is, of course, assuming that all other conditions of entitlement are also met.
- 19 Where a claimant requests reconsideration of an earlier disallowance in light of the CJEU decisions in *Ibrahim* and *Teixeira*, and that earlier decision was made before 23 February 2010 (the date of those decisions), the DM can supersede that decision for error of law, effective from the date of request for reconsideration. The DM cannot revise the decision for official error because the definition of official error excludes any error of law which is shown to have been one by virtue of a subsequent decision of the court – in this context the CJEU decisions. The DM could not have known the true position in law until 23 February 2010.
- 20 Any disallowance decision made on or after 23 February 2010, which is now shown to be wrong in law because of the CJEU decisions, should be revised for official error. However, the DM has no power to revise or supersede a decision of the FtT (or the higher courts) for error of law.

## Queries

- 21 If you have any queries about this Circular, please contact [pfa.enquiries@dpw.gsi.gov.uk](mailto:pfa.enquiries@dpw.gsi.gov.uk)