

RIGHT TO RESIDE - PARENT AND PRIMARY CARER OF A CHILD IN EDUCATION

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INTRODUCTION

- 1 This memo gives guidance following 2 recent judgements of the Court of Justice of the European Union (CJEU)¹ where the Court of Appeal had referred specific questions regarding right to reside to the CJEU.

The following is a link to these 2 judgements at www.bailii.org/eu/cases/EUECJ/2010/C31008.html and www.bailii.org/eu/cases/EUECJ/2010/C48008.html.

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.

1 Ibrahim v London Borough of Harrow CJEU Case C-310/08 & Teixeira v London Borough of Lambeth CJEU Case C-480/08

- 2 Both decisions under appeal to the Court of Appeal concerned homelessness assistance, but the CJEU judgement will also apply to IS, ESA(IR), JSA(IB), and SPC.

BACKGROUND

- 3 The habitual residence test applies to IS, ESA(IR), JSA(IB) and SPC. A claimant who is not habitually resident in the Common Travel Area (CTA)
1. is a person from abroad and has an applicable amount of nil for IS, ESA(IR) and JSA(IB)¹ or
 2. is treated as not in GB for SPC².

Regulations provide that a claimant cannot be habitually resident unless they have a right to reside in the CTA³.

1 IS (Gen) Regs, reg 21(3) & 21AA; JSA Regs, reg 85(4) & 85A; ESA Regs, reg 70(1) & Sch 5, Part 1, para 11; 2 SPC Regs, reg 2(1); 3 IS Gen Regs, reg 21AA(2); ESA Regs, reg 70(2); JSA Regs, reg 85A(2); SPC Regs, reg 2(2)

- 4 The rights of EU citizens, and their family members, to travel to and reside in another EEA state were set out in the Citizens' Directive¹ which came in to force on 30.4.06. It replaced, amended, or re-enacted some 9 earlier Directives. Detailed guidance on the various rights to reside under the Directive is at DMG 071225 et seq.

1 Directive 2004/38 EEC

- 5 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 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.
- 6 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

- 7 A claimant to IS, ESA(IR), JSA(IB) or SPC 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
1. the claimant is the parent (or step parent) and primary carer of a child **and**
 2. the claimant or the child's other parent is a citizen of another EEA State or Switzerland (see para 8 below) **and**
 3. that person is working or has worked as an employed person in the UK (see para 9 below) **and**
 4. 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 para 11 below) **and**
 5. that child is still in general education in the UK and is under 18 (see para 12 below).

CITIZEN OF ANOTHER MEMBER STATE

- 8 The migrant worker must be a citizen of another EEA Member State, or Switzerland¹. A complete list of EEA States, which includes all EU Member States and EFTA countries, is at DMG para 070040. This includes A8 and A2 nationals, but see para 10 below regarding the rights of a child of an A8 or A2 migrant worker during the Accession period.

¹ EU/Swiss Agreement OJL 114/6, Annex I, Art 3(6)

MEANING OF WORK

- 9 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 DMG para 071189 regarding general and effective work). Simply registering as seeking work will not confer rights to a child under Article 12¹.

¹ Collins v Secretary of State for Work & Pensions ECJ Case C-138/02

- 10 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. See DMG paras 071275 et seq for A8 nationals and DMG paras 071301 et seq for A2 nationals. 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

- 11 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

- 12 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 5. 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

- 13 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.

- 14 However, if the child leaves the UK for other than temporary periods, the rights under Article 12 would end. Absences of less than 6 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. 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. He does not have a right to reside because the child no longer has Article 12 rights.

ACTION BY DMS

- 15 The guidance in this Memo should be applied to all new claims and to any claims still outstanding. Where there is an in-time appeal still outstanding at the FtT against a decision on a claim which, in light of this guidance, was incorrect, the DM should revise that decision under appeal¹ and the appeal will lapse². That is, of course, assuming that all other conditions of entitlement are also met.

1 SS & CS (D&A) Regs, reg 3(4A); 2 SS Act 98, s 9(6)

- 16 Where a claimant requests reconsideration of an earlier disallowance in light of the CJEU decisions in Case C-310/08 and Case C-480/08, and that earlier decision was made before 23.2.10 (the date of those decisions) the DM can supersede that decision for error of law¹, effective from the date of request for reconsideration². The DM cannot revise the decision for official error because the definition of official error³ 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 23.2.10.

1 SS & CS (D&A) Regs, reg 6(2)(b)(i); 2 SS Act 98, s 10(5); 3 SS & CS (D&A) Regs, reg 1(3)

- 17 Any disallowance decision made on or after 23.2.10, which is now shown to be wrong in law because of the CJEU decisions, should be revised for official error¹. However, the DM has no power to revise or supersede a decision of the FtT (or the higher courts) for error of law.

1 SS & CS (D&A) Regs, reg 3(5)(a)

ANNOTATIONS

Please annotate the number of this Memo (Memo DMG 30/10) against the main headings at DMG paragraphs:

071180 and 071225 in Part 3 of Chapter 7 of the DMG.

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo DMG 26/08 - Obtaining legal advice and guidance from DMA Leeds.

DMA Leeds: May 2010