

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (HABITUAL RESIDENCE) (AMENDMENT)
REGULATIONS 2012

2012 No. 2587

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

The purpose of the amending regulations is to maintain the current position on entitlement income-related benefits, following the Court of Justice of the European Union (CJEU) ruling on the case of Zambrano (C-34/09) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML>. The Home Office have a legal obligation to amend their regulations to provide a right to reside and a right to work to a non- European Economic Area (EEA) national who is a primary carer of a dependent British citizen only if the British citizen would otherwise be forced to leave the EEA and deprived of exercising their rights as an EU citizen. Most non-EEA nationals who have a right of residence in Great Britain have an immigration status that gives no recourse to public funds, which means that they are not entitled to claim income related benefits. If the social security regulations were not amended such persons would become entitled to income-related benefits.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Context

- 4.1. The ruling by the CJEU stated that a non-EEA national (Mr Zambrano), who had been living and working in Belgium without a work permit, had a right to reside and to work in Belgium so that his Belgian national children were not forced to leave the European Union (EU) and thereby prevented from exercising their rights as EU citizens.
- 4.2. The Home Office has a legal requirement to give effect to this judgment. They are therefore amending their regulations to give a non-EEA national primary carer of a dependent British citizen a right to reside if by not doing so the dependent British citizen would be forced to leave the EEA.
- 4.3. To maintain the current position on entitlement to benefits once the Home Office regulations are made, this instrument will add people with a ‘Zambrano’ right to reside to the list of those that are not treated as habitually resident. This means they will continue not to be entitled to income related benefits.

5. Territorial Extent and Application

This instrument applies to Great Britain. Similar Statutory Rules are to be introduced in respect of Northern Ireland.

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

- *What is being done and why?*

7.1. Most non-EEA nationals who have a right of residence in Great Britain have an immigration status that gives no recourse to public funds, which means that are not entitled to claim income related benefits by section 115 of the Immigration and Asylum Act 1999

<http://www.legislation.gov.uk/ukpga/1999/33/section/115>. Non-EEA nationals can claim contributory benefits if they have made sufficient national insurance contributions and meet the other entitlement conditions for the benefit.

7.2. Since the CJEU ruling 692 people (in 619 separate families) have applied for a Zambrano right to reside which contain a non-EEA national primary carer of a British child and appear to meet the criteria which would give them this right. The Home Office estimate that around 700 people a year could claim a Zambrano right to reside but this may increase given the historically high levels of migration in recent years and increased knowledge of the Zambrano ruling over time.

7.3. Therefore unless the income-related benefit regulations are changed, benefit costs could increase significantly: just on the basis of an estimated 700 cases per year

- if 40% claim income support, housing benefit and council tax benefit this would lead to an additional estimated Annually Managed Expenditure spend of £3.8 million;
- if 100% claim income support, housing benefit and council tax benefit this would lead to an additional estimated Annually Managed Expenditure spend of £9.4 million.

- *.Consolidation*

7.4. Informal consolidation of this instrument will be included in due course in the Department's "the law relating to Social Security" (the Blue Volumes) which are available at no cost to the public on the internet at:

www.dwp.gov.uk/advisers/docs/lawvols/bluevol/

8. Consultation outcome

- 8.1. Following initial conversations with the five representatives of local authorities, we conducted a formal consultation on the regulations for Housing Benefit and Council Tax Benefit. The consultation ran from 21 September to 4 October. No issues were raised.
- 8.2. We supplied the amending regulations to the Social Security Advisory Committee (SSAC) for consideration at their October meeting. SSAC has advised that they do not require the amending regulations to be formally referred.
- 8.3. No further public consultation has been conducted. This is because the amendment to income-related benefit regulations does not change the current policy on entitlement to income-related benefits by non-EEA nationals. The regulations give a right to reside and to work in line with the judgment of the CJEU. The social security regulation change prevents widening entitlement of non-EEA nationals to income-related benefits and the associated costs to the Exchequer.

9. Guidance

- 9.1. Revised guidance will be issued across the Department before the regulations come into force and made specifically available to benefit advisers, benefit processors and decision makers making it clear that the current policy position is maintained and that people with a Zambrano right do not have an entitlement to claim income-related benefits. A wide release bulletin will also highlight these messages.
- 9.2. The Decision Makers' Guidance is also available at no cost to the public on the internet at <http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide/>

10. Impact

There is no direct impact on business, charities or voluntary bodies. The impact on the public sector is negligible since the amending regulations maintain the current entitlement. Therefore, a full impact assessment has not been prepared for this instrument

11. Regulating small business

This legislation does not apply to small business

12. Monitoring & Review

These amending regulations maintain the position that non-EEA nationals are not entitled to income related benefits, even when they have a Zambrano right to reside and as such do not require further review.

13. Contact

Gareth Cooper, Department for Work and Pensions – tel. 0207 340 4635 or email: gareth.cooper@dwp.gsi.gov.uk can answer any queries on the instrument.