For the attention of Jan Jesson

Dear Madam,

RE: MRS [Redacted] — INCOME SUPPORT AND HABITUAL RESIDENCE TEST

[Paragraph discusses issues raised about the DWP's reliance on Section 25 of the Social Security Act 1998."

You suggest that because Bhakta in your opinion focuses on a specific point of law, then the DWP's decision to exercise section 25 of the Social Security Act 1998 takes "insufficient care to identify cases in which the Bhakta decision is a relevant issue under dispute, from other cases".

We disagree with this. Due to the importance of Bhakta to: (i) knowing from when a decision maker (DM) can begin to take habitual residence as starting and (ii) whether regulation 13 of the Claims and Payments Regulations 1987 can be used in a creative manner which the DWP has never envisaged it to be used to determine this, Bhakta represents an important opportunity to definitively clarify the law.

This is a matter of principle, not only for the habitual residence test (HRT) in the context of Income Support but also in the context of income-based jobseeker's allowance and state pension credit (and housing benefit and council tax benefit). Therefore, even though the case ostensibly regards a discrete point, it is the Department's view that the case is such an important one for Income Support and benefits in general that it is important that it is definitively clarified by the Court of...
Appeal before the Department can properly instruct its DMs to take decisions where habitual residence is an issue. This is so that DMs can make decisions safe in the knowledge that the HRT is being properly applied.

As such, we disagree that we have effectively removed the right to challenge determinations of habitual residence. Rather, we have simply put on hold our consideration of whether or not a person qualifies for a benefit until the law is definitively clarified, which is quite different.

You further suggest that the issues raised in Bhakta "do not alter the interpretation of 'habitual residence' itself". Whilst we agree that this is a reasonable view to take of the case, for the reasons stated above, we are nevertheless of the view that the case's importance goes beyond a discrete issue and is of importance to the application of the HRT, which is of as much importance as the substantive HRT test itself. As such, we remain of the view that section 25 of the Social Security Act 1998 has been correctly and reasonably exercised and that there has not been a breach of Article 6 ECHR.

We should also add that the staying of the decision in one claim does not prevent a claimant from making a further claim. The determination on HRT for the claim which has been stayed would not be binding on any further claim, by which time a claimant may well satisfy the HRT.

We have been made aware that some decision makers might not be applying the guidance in DMC Letter 08/05 in the way in which it was intended, and we are urgently looking again at our guidance to see whether further clarification is needed. We will publish any further advice to decision makers on the Internet in the usual way.

Yours faithfully,

ANNE MIHAHOVIC
for the Solicitor