

**EXPLANATORY MEMORANDUM TO
THE CHILD BENEFIT AND CHILD TAX CREDIT (MISCELLANEOUS
AMENDMENTS) REGULATIONS 2012**

2012 No. 2612

1. This explanatory memorandum has been prepared by HM Revenue & Customs (HMRC) on behalf of HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to maintain the current policy position on entitlement to benefits by ensuring there is no entitlement to child benefit and the child tax credit for people who are within the scope of the ruling about the right to reside (for present purposes, in the United Kingdom) from the Court of Justice of the European Union (CJEU) dated 8 March 2011 in the case of *Gerardo Ruiz Zambrano v Office National d'Emploi (ONEm)* (C-34/09).

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

3.1 None.

4. Legislative Context

4.1 This instrument amends regulations 23 and 27 of the Child Benefit (General) Regulations 2006 (S.I. 2006 No. 223) and regulation 3 of the Tax Credits (Residence) Regulations 2003 (S.I. 2003 No. 654).

4.2 It amends these regulations for the purpose described in paragraph 2.1.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

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 To be entitled to child benefit, a person must be “in Great Britain/Northern Ireland” while to be entitled to tax credits a person must be

“in the United Kingdom”. As a first step, this means that the claimant must be both present and ordinarily resident in this country.

7.2 To be present in Great Britain/Northern Ireland/the United Kingdom, the claimant must be physically present here throughout the period of the award, although a temporary absence of up to eight or, in certain circumstances (e.g. for medical treatment abroad), twelve weeks may be ignored.

7.3 The term “ordinarily resident” is not defined in child benefit or tax credit legislation but its established meaning under case law is that a person is ordinarily resident if he or she normally resides in the United Kingdom and that residence here has been adopted voluntarily and for settled purposes as part of the regular order of that person’s life for the time being.

7.4 The residence rules for child benefit and the child tax credit were amended by the introduction of the “right to reside” condition in April 2004 as part of a cross-Government package of measures to limit access to benefits by economically inactive migrants.

7.5 Third country nationals – persons from outside the EU/EEA – have a right to stay in the United Kingdom under leave to enter or remain which is granted under the Immigration Act 1971. Many third country nationals are granted leave which is conditional on their having no recourse to “public funds” (including income-related and other non-contributory social security benefits, child benefit and tax credits), although there are limited exceptions to this general rule in social security and tax credit regulations. Third country nationals who have been granted indefinite leave to remain in the United Kingdom or who have been granted refugee status are not “persons subject to immigration control”, have a right to reside and are therefore entitled to child benefit and the child tax credit.

7.6 Some third country nationals may have a right to reside by virtue of EU law, for example third country nationals who are family members of EU/EEA nationals with their own right to reside, such as the spouse or child of an EU/EEA worker or self-employed person.

7.7 The ruling of the CJEU in the case of *Gerardo Ruiz Zambrano v Office National d’Emploi (ONEm)* (C-34/09) in March 2011 extended the category of third country nationals with a right to reside under EU law. The CJEU decided that Mr Zambrano, a Colombian national who had claimed asylum in Belgium and two of whose children had been born in Belgium and had Belgian nationality, had a right to reside in that Member State by reference to Article 20 of the Treaty on the Functioning of the EU. Article 20 provides that every person holding the nationality of a Member State shall also be a citizen of the EU with various rights and duties, including the right to move and reside freely within the territory of the Member States. The CJEU held that Article 20 precludes national measures which effectively deprive EU citizens of the genuine enjoyment of the substance of those rights. In this case, the CJEU held that the refusal to grant Mr Zambrano a right of residence in Belgium

would have resulted in his Belgian children having to leave the EU altogether and those children would thus have been deprived of the genuine enjoyment of the substance of their rights as EU citizens.

7.8 The CJEU also decided that the refusal to grant Mr Zambrano a work permit in Belgium to allow him to find legitimate employment there and thereby provide sufficient resources for himself and his family would also result in his Belgian children having to leave the territory of the EU and, again, would thus deprive the latter of the substance of their rights as EU citizens.

7.9 The Home Office is amending the Immigration (European Economic Area) Regulations 2006 (S.I. 2006 No. 1003) in order to give effect to the judgement of the CJEU in the case of *Ruiz Zambrano*. Nevertheless, the Government also takes the view that this ruling does not explicitly carry with it a right to social security benefits, only a right to reside and a right to work in the United Kingdom. Therefore, in order to maintain the Government's current position regarding third country nationals accessing child benefit and the child tax credit, this instrument amends the regulations so that those persons who are within the scope of the ruling are treated as not being in Great Britain/Northern Ireland for the purpose of eligibility to child benefit and are treated as not being in the United Kingdom for the purpose of eligibility to the child tax credit.

- **Consolidation**

7.10 HMRC publishes consolidated regulations on its website. These will be made available as soon as possible after the statutory instrument has been published.

8. Consultation outcome

8.1 There is no statutory requirement to consult on these regulations. However, the Social Security Advisory Committee (SSAC) has considered these regulatory changes under its Memorandum of Understanding with HMRC.

9. Guidance

9.1 The provisions of these amending regulations will be reflected in the Child Benefit and Tax Credits Technical Manuals. These manuals are available on the HMRC website at:

www.hmrc.gov/manuals/cbtmanual/index.htm and
www.hmrc.gov/taxcredits/manuals/tctmanual/index.htm.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is as described in paragraph 11.1.

11.3 The basis for the final decision on what action to take to assist small business is as described in paragraph 11.1

12. Monitoring and review

12.1 The changes make clear the Government's view of the scope of the CJEU ruling in the case of *Ruiz Zambrano* in relation to entitlement to child benefit and the child tax credit and do not require further review.

13. Contact

David Woodhouse at HMRC (telephone 0207-147-2477) or e-mail David.Woodhouse@hmrc.gsi.gov.uk can answer any queries regarding the instrument on behalf of HM Treasury.