

Benefits for Migrants Handbook

5th edition

Pamela Fitzpatrick, Timothy Lawrence and Colin McCloskey

Child Poverty Action Group

CPAG promotes action for the prevention and relief of poverty among children and families with children. To achieve this, CPAG aims to raise awareness of the causes, extent, nature and impact of poverty, and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty; and enable those eligible for income maintenance to have access to their full entitlement. If you are not already supporting us, please consider making a donation, or ask for details of our membership schemes, training courses and publications.

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The law covered in this book was correct on 1 October 2010 and includes regulations laid up to this date.

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About this *Handbook*

This *Handbook* is intended to bridge the gap between guides on welfare rights and those on immigration. It is designed to be used by migrants and their advisers wanting advice on benefit entitlement. By ‘migrants’ we mean people, including British citizens, who have come or returned to Great Britain from abroad and people who have left Great Britain to live abroad or are temporarily abroad.

The *Handbook* covers the benefit rules that are most likely to affect migrant claimants and their families, and the practical problems they are likely to face. It is not a complete guide to the benefit rules and should be used together with general guides, such as CPAG’s *Welfare Benefits and Tax Credits Handbook*.

How to use this book

Your benefit rights may depend on your immigration status.

In **Part 1** we provide a brief outline of the immigration system and explain the terms used in immigration law which appear in the rest of the book. Part 1 aims to provide welfare rights advisers with a general framework of immigration law. In some cases, it may contain enough information for you to use the rest of the *Handbook* to work out your benefit entitlement. However, if you are unclear about your immigration status or the effects of claiming benefit, you should obtain advice from a specialist immigration adviser.

Part 2 provides information on the general rules that apply to migrants claiming benefits.

Part 3 covers European Union law and how it applies to social security benefits.

Part 4 provides information on the support available to asylum seekers.

Abbreviations

AA	attendance allowance	IB	incapacity benefit
ASAP	Asylum Support Appeals Project	IND	Immigration and Nationality Department
ARC	application registration card	IOM	International Organization for Migration
BIA	Border and Immigration Agency	IS	income support
CA	carer's allowance	JSA	jobseeker's allowance
CAB	Citizens Advice Bureau	MA	maternity allowance
CRD	Case Resolution Directorate	MP	Member of Parliament
CTC	child tax credit	NASS	National Asylum Support Service
CTB	council tax benefit	NAM	New Asylum Model
DCI	Departmental Central Index	NI	national insurance
DLA	disability living allowance	PC	pension credit
DWP	Department for Work and Pensions	REA	reduced earnings allowance
EC	European Community	SAL	standard acknowledgement letter
ECHR	European Convention on Human Rights	SAP	statutory adoption pay
ECSMA	European Convention on Social and Medical Assistance	SDA	severe disablement allowance
ECtHR	European Court of Human Rights	SMP	statutory maternity pay
ECJ	European Court of Justice	SPP	statutory paternity pay
EEA	European Economic Area	SSP	statutory sick pay
ESA	employment and support allowance	The Revenue	HM Revenue and Customs
EU	European Union	UK	United Kingdom
HB	housing benefit	UKBA	UK Border Agency
		WTC	working tax credit

Chapter 7

Immigration control and benefits

This chapter covers:

1. People subject to immigration control (below)
3. Public funds (p62)
4. Family members with different immigration statuses (p64)
5. Refugees (p67)

Chapter 8 provides information on the various residence tests and Chapter 14 covers the various international agreements that exist between the United Kingdom and other countries. Chapters 10 to 13 contain detailed information on European Union law and how it affects social security.

1. People subject to immigration control

The term ‘**person subject to immigration control**’ is used both in immigration and social security law. This section deals with the definition of a ‘person subject to immigration control’ for benefits purposes. However there is considerable overlap between the two areas of law and, in order to work out whether you are a ‘person subject to immigration control for benefit purposes, you need to know your immigration status. For full details on who is subject to immigration control for immigration purposes, see Chapter 2.

A ‘person subject to immigration control’ for benefit purposes is excluded from entitlement to most benefits. However, there are limited exceptions to this general rule which allow some ‘persons subject to immigration control’ for benefit purposes to claim certain benefits. Note, however, that if you can claim benefits which are classed as public funds (see p62) under these or other rules, but you have leave to enter or remain with a condition that you do not have recourse to public funds, this could affect your immigration position.

There are special rules for families in which one (or more) person is subject to immigration control and others are not (see p64).

In order to work out whether or not you are a ‘person subject to immigration control’ for benefit purposes and, if so, whether or not you can obtain the benefit you want to claim, you need to do the following.

- Check whether you are a ‘person subject to immigration control’ for benefit purposes (see below). If you are not, you can claim the benefits you want, provided you meet the other conditions of entitlement.
- If you are a ‘person subject to immigration control’, you should check whether the benefit you want to claim is covered by the rules that exclude you from entitlement (see p59).
- Even if you are a ‘person subject to immigration control’ and the benefit you want to claim is one from which people subject to immigration control are generally excluded, you should check whether you fall within any of the limited exceptions to this rule (see p60).
- If you cannot claim the benefit you want, but you have a partner who is not a ‘person subject to immigration control’, or if you can but other members of your family are subject to immigration control, check the special rules on p64.
- If you, or a member of your family, have leave to enter or remain in the United Kingdom (UK) subject to the condition that you do not have recourse to public funds, but you (or another member of your family) can claim benefits, check whether this could affect your/their immigration status (see p62).

In addition, there are some special rules that only apply to refugees (see p67).

Note: even if you are not excluded from entitlement to a benefit because you are a ‘person subject to immigration control’ you may still not be entitled if you do not satisfy the relevant residence or presence rules (see Chapter 8).

Who is a ‘person subject to immigration control’

If you are defined as a ‘**person subject to immigration control**’ under the benefit rules, you are not eligible for most UK benefits.

Only a non-European Economic Area (EEA) national can be a ‘person subject to immigration control’ for benefit purposes. So a British citizen or a citizen of another EEA state is never a ‘person subject to immigration control’ for benefit purposes.

If you are not an EEA national, you count as a ‘person subject to immigration control’ if you:

- require leave to enter or remain in the UK, but do not have it (see p57);
- have leave to enter or remain with a public funds restriction (see p62);
- have leave to enter or remain given as a result of a maintenance undertaking (see p58).

Only people falling within one of the above categories can be refused benefit as a ‘person subject to immigration control’. Therefore, if you do not fall within the

above definition, you cannot be refused benefit on this basis, although you may still be refused for other reasons – eg, if you fail certain residence tests (see p71).

However, even if you come within the above definition, benefit regulations specifically exempt certain groups of people from the restrictions to benefit (see p60). The exemptions vary according to the type of benefit concerned. There are also some transitional regulations that give benefit entitlement to some people.

You require leave to enter or remain, but do not have it

If you are not an EEA national and require leave to enter or remain in the UK and do not have it, you are a ‘person subject to immigration control’ for benefit purposes.¹

The following non-EEA nationals do not require leave to enter or remain:

- a family member of an EEA national who has a right to reside on that basis in the UK (see p27);
- a person with the right of abode/certificate of patriality (see p6);
- a British national with a right of readmission to the UK.

All other non-EEA nationals require leave to enter or remain in the UK. If you are not an EEA national and not in any of the above three groups, you will be a ‘person subject to immigration control’ if you do not have leave to enter or remain. See p8 for more information on when leave to enter or remain is granted.

In practice, you are a ‘person subject to immigration control’ for benefit purposes if you:

- are an asylum seeker with temporary admission;
- have overstayed your limited leave to remain;
- have entered the UK illegally;
- are subject to a deportation order.

Note: if you are an overstayer or an illegal entrant and, therefore, a ‘person subject to immigration control’, a claim for benefit made by you or a family member may mean that the Home Office is alerted to your presence and status in the UK.

You have leave to enter or remain with a public funds restriction

If you are not an EEA national and you have leave to remain, but it was granted on condition that you do not have recourse to public funds, you are a ‘person subject to immigration control’ for benefit purposes.²

Most forms of time-limited leave are granted subject to such a condition, except people granted asylum for a time-limited period, people with humanitarian protection and people with leave granted outside the Immigration Rules (see p10). People with some form of indefinite leave (see p10) never have that leave on the basis that they have no recourse to public funds, although they may be subject to a sponsorship agreement (see p14). If you have leave to enter or remain

with a condition that you do not have recourse to public funds and you receive them, this can affect your immigration status (see pp11 and 62).

You have leave to enter or remain given as a result of a maintenance undertaking

A 'maintenance undertaking' is sometimes referred to as a 'sponsorship agreement'. Generally, such undertakings are only requested for elderly relatives, children aged 16 to 18, or other more distant relatives of people with settled status, who are themselves seeking indefinite leave to remain. An undertaking is not usually required for a spouse or for younger children.

See p14 for more information about sponsors and sponsorship arrangements.

You count as having leave to enter or remain given as a result of a maintenance undertaking if:

- there is a written document, signed by your sponsor and given to the Home Office, which contains a promise by that sponsor that s/he will maintain and accommodate you in the future.³ It does not matter if this written promise is not on an official form⁴ (such as Form RON 112 or Form SET(F)), provided it is clear that a promise about the future conduct of the sponsor has been given. An example of a document that does *not* amount to a promise would be if the sponsor has said 'I am able and willing to support X'. This is not a promise to support you, but a statement saying s/he is able to;⁵ *and*
- the maintenance undertaking played some role in the decision to grant you leave to enter or remain.⁶ This will generally be the case if you were required to show that you would not be a burden on public funds to get your leave.

Confusion sometimes arises when a person has been granted indefinite leave to remain under the family reunion rules for refugees. In these cases, the refugee whose family member(s) is joining her/him in the UK is often described on the family member's travel document as a 'sponsor'. However, immigration law does not require that a refugee's family member should not be a burden on public funds and so, in these cases, generally there will not be a written undertaking. Even if there is, this will not have played a role in the decision to grant the family member leave.

If it is unclear whether or not your leave was granted because of a maintenance undertaking, the onus is on the Department for Work and Pensions (DWP), or other benefit authority, to prove that it was.⁷ If you are in this situation, you should get immigration advice (see Appendix 2). If you have leave to remain because of a maintenance undertaking, you may still be able to claim benefits – in particular, if more than five years have elapsed since you came to the UK or since the maintenance undertaking was given, whichever is later (see p60).

Liabilities of sponsors

If you are the sponsor of a person who claims benefit, it is possible that you will be asked to repay any income support (IS), income-based jobseeker's allowance (JSA)

or employment and support allowance (ESA) paid to the person you have sponsored.⁸ However, this provision is rarely used because benefit rules usually exclude sponsored migrants from claiming these benefits during the period of sponsorship.

The DWP can recover any IS, income-based JSA or income-related ESA paid to a sponsored immigrant from the person who gave the undertaking.⁹ Recovery is through the magistrates' court (in Scotland, the sheriff's court). It also has a power to prosecute for failure to maintain the claimant.¹⁰ In the past, the DWP has used the threat of court action to persuade sponsors to provide some financial support to claimants. In practice, if the sponsor could not support the claimant, the DWP usually took no further steps. Court action has been rare in the past and is not likely to be considered if the sponsor is in receipt of benefits her/himself.

Note: the definition of 'sponsored immigrant' for the purpose of the rules on liability to maintain is different from the definition used to define a 'person subject to immigration control'. Under the liability-to-maintain rules, a sponsored immigrant is a person for whom a sponsorship undertaking has been given after 22 May 1980.¹¹ There is no five-year rule, so there is no cut-off point, and a sponsor would, in theory at least, remain liable indefinitely.

As the DWP has the power to recover benefit or to take court action, if the DWP approaches you about an undertaking you have made, you should seek independent advice. Any liability to maintain should not delay an award of benefit to which the claimant is entitled.

People subject to immigration control and benefits

If you are a 'person subject to immigration control', in general, you cannot get the following benefits:¹²

- IS;
- income-based JSA;
- income-related ESA;
- pension credit (PC);
- housing benefit (HB);
- council tax benefit (CTB);
- child benefit;
- attendance allowance (AA);
- disability living allowance (DLA);
- severe disablement allowance;
- social fund payments;
- child tax credit (CTC);
- working tax credit (WTC).

You can get any benefit not listed above, provided you meet the normal rules of entitlement. Most of the benefits not listed are those which are paid on the basis of past employment or payment of contributions.

You may be able to get the above benefits even if you are a 'person subject to immigration control', provided you meet certain conditions (see below). Even if cannot claim benefits yourself, a family member might be able to claim a benefit, which includes an amount for you (see p64).

Who is not excluded from claiming benefits

Means-tested benefits

You are not excluded from getting any of the means-tested benefits listed below, even if you are a 'person subject to immigration control, if:¹³

- you are a national of a country that has ratified the European Convention on Social and Medical Assistance or the Council of Europe Social Charter (1961) (this includes all EEA countries, Croatia, Macedonia and Turkey) and you are lawfully present in the UK. An asylum seeker with temporary admission is lawfully present and consequently is not excluded from the benefits listed below. However, you will still need to satisfy the residence tests for benefits;¹⁴
- you have leave to remain given as a result of an undertaking (see p58) and you have been resident in the UK for at least five years since either since the date the undertaking was given or the date when you came to the UK, whichever is later.¹⁵ If there are gaps in your residence (eg, because you go to live in another country for a period), you can add together periods of residency to meet the five-year rule.¹⁶ You can still count as resident in the UK during short periods of absence abroad if your circumstances show that you have remained resident in the UK during your absence;¹⁷
- you have leave to remain given as a result of an undertaking (see p58), but the person (or all the people) who gave the undertaking has died;
- you have time-limited leave on condition that you do not have recourse to public funds (see p62) and your income from abroad has been temporarily disrupted.¹⁸ In this situation, you can get the benefits listed below for up to 42 days in that period of leave;¹⁹
- you are an asylum seeker who has transitional protection. In some cases, this can include a separated partner or adult children of an asylum seeker. See CPAG's *Welfare Benefits and Tax Credits Handbook 2005/06* for details. It is unlikely, however, that anyone still falls within this category.

The relevant means-tested benefits are:

- CTB;
- health in pregnancy grants;²⁰
- HB;
- income-based JSA;
- income-related ESA;²¹
- IS;

- PC;
- social fund payments.

Note: if you are a family member of an EEA national who has the right to reside on that basis in the UK, you do not require leave to enter or remain in the UK. You are not a 'person subject to immigration control' and cannot be excluded from benefits.

In addition, you are not excluded from claiming a payment from the social fund if you are lawfully working in Great Britain and are a national of Algeria, Israel, Morocco, San Marino, Tunisia or Turkey.

A 'person subject to immigration control' (see p56) who is not excluded from claiming a crisis loan may still not be entitled if s/he fails the habitual residence test for IS, income-based JSA, income-related ESA or PC (see p110).²² It will be necessary to show the social fund officer that you are able to repay the loan.²³

Non-contributory benefits

You are not excluded from getting any of the non-contributory benefits listed below, even if you are a 'person subject to immigration control', if:²⁴

- you are a person with leave to remain, given as a result of a maintenance undertaking (see p58) **Note:** there is no five-year rule;
- you are a family member of an EEA national.²⁵ The EEA national does not need leave to remain in the UK, but a social security commissioner has held that s/he must have a right of residence in European Union (EU) law (see p241);²⁶
- you, or (if you are living with her/him) a member of your family, are lawfully working in Great Britain and are a citizen of a state with which the EU has an agreement concerning equal treatment in social security. This applies to citizens of Algeria, Morocco, San Marino, Tunisia and Turkey (see Chapter 14). A social security commissioner has held that an asylum seeker who had worked in the UK was able to fulfil the condition of 'lawfully working' and was therefore eligible for benefit;²⁷
- for AA, DLA and child benefit, you are covered by a reciprocal arrangement;
- you are protected by the transitional rules on asylum seekers and others with limited leave.

The relevant non-contributory benefits are:

- AA;
- carer's allowance;
- child benefit;
- DLA;
- ESA in youth;²⁸
- incapacity benefit for incapacity in youth;²⁹
- severe disablement allowance.

Tax credits

You are not excluded from WTC and CTC, even if you are a ‘person subject to immigration control’, if either:³⁰

- you have leave because of a maintenance undertaking, but the person who sponsored you has died or you have been resident in the UK for a period of at least five years from the date of the undertaking or the date you arrived, whichever is later; *or*
- you have limited leave with a public funds restriction (see p11) and you are temporarily without funds because money from abroad has been disrupted and there is a reasonable expectation that your funds will resume. In this case, you can get tax credits for 42 days.

For CTC only, there is a further exemption if you are lawfully working in Great Britain and are a citizen of a state with which the EU has an agreement on equal treatment in social security. This applies to Algeria, Israel, Morocco, San Marino, Tunisia and Turkey.

For WTC only, there is a further exemption if you are lawfully present in the UK and are a national of a state which has ratified the European Convention on Social and Medical Assistance or a state which has ratified the Council of Europe Social Charter 1961. This includes all EEA countries, Croatia, Macedonia and Turkey.

2. Public funds

If you have leave to enter or remain in the United Kingdom (UK) subject to a requirement that you do not have recourse to public funds, you are a ‘person subject to immigration control’ for benefit purposes. Similarly, if this applies to a member of your family, s/he is a ‘person subject to immigration control’ for benefit purposes.

It is the fact that you (or s/he) are a ‘person subject to immigration control’ that generally prevents you from getting benefits under benefit law. However, you (or your family member) may still be able to claim benefits under the exceptions to these rules discussed on p60, or someone may be able to claim an increase in benefits in respect of you under the rules about family members with different immigration statuses. If you (or a family member) claim under these rules, however, you may break the conditions under which you (or s/he) were given leave to enter or remain in the UK – eg, by having recourse to public funds. It is therefore important to check the rules in this section to see whether this is the case.

‘Public funds’ are:

- attendance allowance (AA);
- carer’s allowance (CA);

- child benefit;
- child tax credit (CTC);
- council tax benefit (CTB);
- disability living allowance (DLA);
- health in pregnancy grants (but see note below);
- housing benefit (HB);
- income-related employment and support allowance (ESA);
- income-based jobseekers's allowance (JSA);
- income support (IS);
- pension credit (PC);
- severe disablement allowance;
- social fund payments;
- working tax credit (WTC).

Housing and homelessness assistance are also public funds (see p32 for more information).

Note: although not yet included in the Immigration Rules, the Immigration Directorate Instructions include health in pregnancy grants in the definition of public funds.³¹ It is, therefore, probably best to treat this benefit as though it were public funds.

The Immigration Rules do now make clear that a person is not to be treated as having (or potentially having) recourse to public funds merely because s/he is (or will be) reliant on any public funds provided to her/his sponsor, unless, as a result, the sponsor is (or would be) entitled to increased or additional public funds. The exception is if a couple would be entitled to increased or additional public funds as a result of a their joint entitlement to benefits.

Note, however, that while such 'indirect recourse' does not breach a public funds restriction, future entitlement to, for example, IS or income-based JSA cannot be used to satisfy the maintenance and accommodation requirements that often apply when relatives apply to come to the UK (see p32).

The Immigration Rules also make clear that you will not be regarded as having recourse to public funds if you are entitled to any of the above benefits under the rules described on pp60–62.³² Problems can arise for HB and CTB. Even if a family member of the claimant is a 'person subject to immigration control' for benefit purposes, the claimant's applicable amount still includes amounts for her/him. Similarly, the maximum amount of HB payable may be greater under the size rules than it would otherwise have been because of the inclusion of such a family member(s). If the HB/CTB payable as a result is more than it would have been had the family member(s) not been included in the claim, it may count as additional recourse to public funds and could be a breach of the immigration conditions attached to the leave of the person with the public funds restriction.

From 31 March 2009, the Immigration Rules were changed to confirm that people applying for entry clearance (see p8) cannot rely on additional

benefits that they or their sponsor would become entitled to after their arrival. A person making an application from outside the UK will be regarded as having recourse to public funds if s/he relies on any future entitlement to any public funds that would be payable. This is an immigration control measure rather than a benefits restriction. See p11 for more information.

If you have a public funds restriction and you try to claim any benefits listed as public funds, it may come to the attention of the Home Office. Therefore, a claim may affect your right to remain in the UK or get an extension of your stay. In practice, however, under social security law a person with limited leave is unlikely to be eligible for any of the above benefits.

Contributory benefits are *not* public funds. Therefore, it is theoretically possible for a person who is defined as a 'person subject to immigration control' (see p55) to claim a contribution-based benefit. However, in order to be entitled, most contributory benefits require you to have paid sufficient national insurance contributions (see p131).

It is clear from the definition of public funds that receipt of publicly provided services, such as National Health Service treatment, does not constitute having recourse to public funds, although access to health treatment by those without a benefit entitlement is becoming more restrictive.

If the stamp giving you leave to enter or remain states that you must not have recourse to public funds, you will break the terms of your leave and commit a criminal offence if you claim one of the benefits that count as public funds (see p62) even if that condition should not have been attached to your category of permission.³³ If this condition has been attached in error, you may want to ask the Home Office to remove it, but you should seek expert advice before making such a request.

3. Family members with different immigration statuses

Sometimes, members of the same family may have different immigration statuses. For example, a husband may be a British citizen or have indefinite leave to remain, while his wife may have limited leave to remain as a spouse with a public funds restriction and so be a 'person subject to immigration control' for benefit purposes.

Couples with different statuses often have difficulties with benefit claims. One of the couple may be eligible for benefit, but s/he may have difficulty convincing the benefit authorities that s/he is eligible and, in particular, that s/he satisfies the national insurance number requirement (see p126).

A major consideration is often whether or not a claim will jeopardise the immigration position of the partner who wishes to settle in the United Kingdom

(UK) (see p62). If a couple are refugees, one of the couple may have been granted leave to remain or full refugee status while her/his partner waits for a decision on her/his asylum claim and, therefore, remains an asylum seeker. Some benefits have rules that deal with this type of situation. For example, the income support (IS), income-related employment and support allowance (ESA) and income-based jobseeker's allowance (JSA) rules all allow a couple with 'mixed' immigration statuses to claim benefit at the single person's rate (see below). However, the couple is still treated as a couple and any income or capital available to the 'person subject to immigration control' (see p55) will impact on the benefit entitlement of the other member of the couple. Pension credit (PC) has a similar rule, but treats the 'person subject to immigration control' as not being a member of the same household (see p66). The effect of this is that her/his income and capital are not taken into account in the benefit assessment.³⁴

Income support, income-based jobseeker's allowance and income-related employment and support allowance

If your partner is not a 'person subject to immigration control' (see p56) but you are, s/he can claim IS, income-related ESA and income-based JSA under the normal rules, but s/he will not receive any benefit for you or any other family member who is a 'person subject to immigration control'. Full housing costs are payable.³⁵ You are still treated as a couple, so your joint resources are taken into account. Full entitlement to benefit arises once indefinite leave has been granted, except if you are subject to a formal undertaking and it is five years or less since either this was given or you entered the UK, and your sponsor is not dead.

Both partners in a couple who are not 'persons subject to immigration control' and lone parents who are not 'persons subject to immigration control' can claim IS for children who are.³⁶ If you are a 'person subject to immigration control', however, you cannot claim benefit for your children even if they are not subject to immigration control.

The additional amounts paid for children in these benefits have now been largely abolished and replaced with tax credits. However, the child may mean that the claimant is entitled to claim IS as a lone parent, and there may be some people who remain entitled to additional amounts for children under transitional provisions. See CPAG's *Welfare Benefits and Tax Credits Handbook* for further details.

A person can qualify for JSA without having to satisfy the joint-claim rules if her/his partner is a 'person subject to immigration control'. For more information about joint-claim JSA, see CPAG's *Welfare Benefits and Tax Credits Handbook*.

Pension credit

The rules for PC are similar to those for IS, JSA and ESA, with one important difference. Although a single-person rate is paid to couples with different immigration statuses, you are not treated as a couple for calculating your resources.³⁷ Therefore, any income the 'person subject to immigration control' has and/or any work s/he does do not affect the other person's entitlement.

Housing benefit and council tax benefit

If one partner in a couple is not a 'person subject to immigration control', that person can claim full benefit. However, there is no provision to pay benefit at a single person's rate. Housing benefit and council tax benefit are both paid at the couple rate. This may be a potential problem for the partner who is a 'person subject to immigration control' as it is possible there could be recourse to public funds (see p11) if a claim is made (see p63).

Health in pregnancy grants

A 'person subject to immigration control' is not entitled to a health in pregnancy grant and only the person who has given birth can be the claimant. If a couple have different immigration statuses and the woman who has given birth is the 'person subject to immigration control', the couple are not entitled.

Tax credits

If members of a couple have different immigration statuses, one of which allows that person to claim tax credits, the claim is determined as follows.

If the couple have responsibility for a child, the claim is treated as though both members of the couple were *not* subject to immigration control.³⁸ This means that a claim can be made. From March 2005, a person who is entitled to tax credits is not regarded as having recourse to public funds (see p62).³⁹ Therefore, a couple with children who have different immigration statuses do not put their immigration position at risk by making a claim for tax credits.

If the couple do not have responsibility for a child, the second adult element in working tax credit is not paid unless the 'person subject to immigration control' is a national of Croatia, Macedonia or Turkey and is lawfully working in the UK.⁴⁰

Children

For most benefits, the immigration status of a child is irrelevant. The only differences are as follows.

Income support, income-based jobseeker's allowance and income-related employment and support allowance

A child's immigration status only affects entitlement to these benefits if the claimant is not a 'person subject to immigration control', but her/his partner is.

Disability living allowance

If a child is born in the UK to parents who are both 'persons subject to immigration control', the child is not a 'person subject to immigration control' until such a time as an application to regularise her/his status is made to the UK Border Agency. S/he may qualify for disability living allowance if s/he meets the usual disability conditions for the benefit.

4. Refugees

A refugee cannot be a 'person subject to immigration control', nor can her/his family members who have joined her/him under the family reunion rules.

Refugees

If you have been granted refugee status (see p19), you are not a 'person subject to immigration control' and you are not affected by the public funds rules. You can generally claim all benefits subject to meeting the general rules of entitlement. Benefit rules often give equal treatment to refugees. This is in line with the 1951 United Nations Convention on refugees, which obliges the United Kingdom (UK) authorities to provide refugees who are here lawfully with 'the same treatment with respect to public relief and assistance as is accorded to their nationals'.⁴¹

Backdated tax credits and child benefit

You can make a backdated claim for the child benefit and child tax credit that you were not entitled to while waiting for a decision on your asylum application to the date on which you claimed asylum. This backdating provision only applies to refugees. Therefore, if you claimed asylum but were granted humanitarian protection or discretionary leave, you cannot ask for this backdating.⁴²

Note: it is not possible to backdate payments of means-tested benefits in this way.

The claim for backdated tax credits or child benefit must be made within three months of your being notified that refugee status has been granted.⁴³ There is no extension of this period, even if you have good reasons for a delay or you are given the wrong advice by your solicitor or other adviser.

If you have a solicitor acting for you in this matter and s/he receives notification of your grant of refugee status, the three-month time limit starts from the date your solicitor is notified.

If you claim within the three-month time limit, your claim for tax credits or child benefit can be treated as though it was made on the day you applied for asylum, even if this is several years ago. Generally with tax credits you are required to reclaim each year. However, under the special backdating rules for refugees, the claim is treated as having been renewed each April.⁴⁴

When calculating your entitlement to backdated tax credits, HM Revenue and Customs will take into account any income to which you were entitled and you must provide information about your income and work during the relevant period. The amount of any asylum support you received is deducted from the arrears of tax credits you are paid.⁴⁵ No amounts are deducted from child benefit.

Claiming income support while studying

One of the categories of people who are entitled to income support are refugees who are studying English. If you have been granted refugee status, you can claim income support while you are studying if:

- you are attending an English course for more than 15 hours a week; *and*
- on the date the course began, you had not been in the UK for more than 12 months.

This rule only applies to those with refugee status, not to people who claimed asylum but have been granted humanitarian protection or discretionary leave.⁴⁶

Notes

1. People subject to immigration control

- | | |
|--|---|
| 1 s115(9)(a) IAA 1999 | 18 Reg 2(1) and Part 1, para 1 Sch SS(IA)(CA) Regs |
| 2 s115(9)(b) IAA 1999 | 19 Reg 2(8) SS(IA)(CA) Regs |
| 3 s115(10) IAA 1999 | 20 Reg 9 HPG(EA) Regs |
| 4 <i>R (Begum) v Social Security Commissioner</i> [2003] EWHC 3380 (Admin); CIS/2474/1999; CIS/2816/2001 and CIS/47/2002 | 21 Sch 3 para 19 WRA 2007 |
| 5 <i>Ahmed v SSWP</i> [2005] EWCA Civ 535 | 22 SF Dir 16(b) |
| 6 CIS/3508/2001 | 23 SF Dir 22 |
| 7 R(PC) 1/09 | 24 s115(9) IAA 1999; regs 2, 12 and Sch Part II SS(IA)CA Regs; reg 16(1)(b) Social Security (Incapacity Benefit) Miscellaneous Amendments Regulations 2000, No.3120; reg 11(3) ESA Regs |
| 8 ss78 and 104 SSCBA 1992 | 25 s7(1) IA 1988 |
| 9 s106 SSAA 1992 | 26 CDLA/708/2007 |
| 10 s105 SSAA 1992 | 27 CFC/2613/1997(*25/00). In order for this to apply, the asylum seeker is likely to need permission from the Home Office to work. |
| 11 ss78(6)(c) and 105(3) SSAA 1992 | 28 Sch 1 para 4(1)(c) WRA 2007; reg 11 ESA Regs |
| 12 s115(1) IAA 1999; TCA 2002 | 29 Reg 16 SS(IB) Regs |
| 13 s115(9) IAA 1999; regs 2 and 12 and Sch Part I SS(IA)CA Regs | 30 Reg 3(1) TC(Imm) Regs |
| 14 <i>Szoma v SSWP</i> , reported as R(IS) 2/06 and see <i>Yesiloz v London Borough of Camden</i> [2009] EWCA Civ 415 | |
| 15 Reg 2(1) and Part 1, para 1 Sch SS(IA)(CA) Regs | |
| 16 R(IS) 2/02 | |
| 17 CPC/1035/2005 | |

2. **Public funds**

- 31 Ch 1 s7 IDI
- 32 The Immigration Rules make specific reference to entitlement to benefits under s115 IAA 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or s42 TCA 2002.
- 33 s24(1)(b)(ii) IA 1971

3. **Family members with different immigration statuses**

- 34 Reg 5(1)(h) SPC Regs
- 35 **IS** Sch 7 para 16A IS Regs
JSA Sch 5 para 13A JSA Regs
ESA Sch 5 para 10 ESA Regs
- 36 **IS** Regs 21(3), 70, 71 and Sch 7 para 16A IS Regs
JSA Reg 85 and Sch 5 JSA Regs
ESA Reg 70 and Sch 5 ESA Regs
- 37 Reg 5(1)(h) SPC Regs
- 38 Reg 3(2) TC(Imm) Regs
- 39 para 6B IR, HC 395
- 40 Reg 11(4)(b) WTC(EMR) Regs

4. **Refugees**

- 41 Art 23 United Nations Convention Relating to the Status of Refugees 1951
- 42 Such claims must be made within three months of notification of refugee status; reg 3(5) TC(Imm) Regs; reg 6(d) CB&GA(AA) Regs. Similar rules for IS, HB and CTB were abolished in June 2007.
- 43 Reg 3 TC(Imm) Regs
- 44 Reg 3(6)(b) TC(Imm) Regs
- 45 Reg 3(9) TC(Imm) Regs
- 46 Sch 1B para 18 IS Regs