

Department for Work and Pensions

DECISION MAKING AND APPEALS (PART OF STRATEGIC COMMUNICATIONS)

Decision Makers Guide

Volume 2

Amendment 36 – February 2017

1. This letter provides details on Amendment 36; the changes have already been incorporated in to the Intranet and Internet versions of the DMG.
2. PDF amendment packages are also available. These can be printed with the amended pages being reproduced in full. Each page will contain the amendment number in the footer

PDF amendment packages can be found on the **Intranet** at:

<http://intranet/1/lq/acileeds/guidance/decision%20makers%20guide/index.asp>

or on the **Internet** at the 'Amdt Packages' tab on the following link:

<http://www.dwp.gov.uk/publications/specialist-guides/decision-makers-guide/>

Note: When printing PDF packages set the print properties to Duplex/Long Edge in order to produce double sided prints.

Amendment 36 affects Chapter 7 Part 02 and Part 03. The changes are

- DMG Memos 26 & 27/15 and 20/16 incorporate in Part 02.
- the following amend Part 03 -
- Memo DMG 24/16 incorporated
- 072846 – clarification of para. content
- 073038 – cross ref. added and earnings limit updated
- 073080 – amendments to cross-refs
- 073096 – cross refs added
- 073097 – reported decision added as legal ref
- 073258 – 073261 due to the introduction of the Imm (EEA) regs 2016, there has been an amendment to the regulation providing for Family members of British citizens – amended & additional DMG guidance
- 073265 – Transitory provisions have been added for guidance at 073258 to 073261
- 073293 – amended guidance with regard to extended family members. From 1.2.17, an extended family member is defined with reference to deriving a right to reside from an EEA national directly, rather than from their spouse or civil partner.
- 073294 – cross ref added
- 073361 – additional para added to guidance relating to “Temporary absences that do not break continuity”
- 073387 – Derivative Rights to Reside – amendments to guidance due to change in regulation 16 of the Imm (EEA) regs 2016
- 073405 – definition of education is clarified.
- 073466 – amendment to guidance for primary carers of British citizen children

- 073530 – savings and modifications of Imm (EEA) Regs 2006 relating to A8 / A2 nationals
 - 073551 – Note added re 073530 above
 - 073729 – note added of reminder to consider three month residence requirement from 1.1.14
4. The last two amendment packages amending Volume 2 were
- Amendment 35 [October 2016]
- Amendment 34 [June 2016]
5. **For reference purposes Decision Makers may find it useful to retain deleted pages for a short period after the introduction of this package.**
6. If using a PDF amendment package remove the sheets as stated in the left hand column of the Remove and Insert table below and insert the new sheets as stated in the right hand column (note the record of amendments at the back of the Volume).

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Agreements referred to in Chapter 07 - Part 2

Country description	Full title	Short
Barbados	The Social Security (Barbados) Order 1992 No. 812	SS (Barbados) Order 92
Bermuda	The National Insurance and Industrial Injuries (Bermuda) Order 1969 No. 1686	NI and II (Bermuda) Order 69
Cyprus	The Social Security (Cyprus) Order 1983 No. 1698	SS (Cyprus) Order 83
Isle of Man	The Social Security (Isle of Man) Order 1977 No. 2150	SS (I of M) Order 77
Israel	The National Insurance and Industrial Injuries (Israel) Order 1957 No. 1879	NI and II (Israel) Order 57
Jamaica	The Social Security (Jamaica) Order 1997 No. 871	SS (Jamaica) Order 97
Jersey and Guernsey	The Social Security (Jersey and Guernsey) Order 1994 No. 2802	SS (Jersey and Guernsey) Order 94
Malta	The Social Security (Malta) Order 1996	SS (Malta) Order 96
Mauritius	The Social Security (Mauritius) Order 1981 No. 1542	SS (Mauritius) Order 81
New Zealand	The Social Security (New Zealand) Order 1983 No. 1894	SS (New Zealand) Order 83
Northern Ireland	The Social Security (Northern Ireland Reciprocal Arrangements) Regulations 2016 No. 0287	SS (N Ireland Reciprocal Arrangements) Regs
Philippines	The Social Security (Philippines) Order 1989 No. 2002	SS (Philippines) Order 89
Switzerland	The Family Allowances, National Insurance and Industrial Injuries (Switzerland) Order 1969 No. 384	FA, NI and II (Switzerland) Order 1969
Turkey	The National Insurance and Industrial Injuries (Turkey) Order 1961 No. 584	NI and II (Turkey) Order 61
United States of America	The Social Security (United States of America) Order 1984 No. 1817	SS (USA) Order 84

Yugoslavia

The Family Allowances, National
Insurance and Industrial Injuries
(Yugoslavia) Order 1958 No.
1263

FA, NI and II
(Yugoslavia)
Order 58

AA, DLA, and CA

Introduction

071700 This section contains guidance on the residence and presence conditions, and competency conditions, for AA, DLA and CA. The guidance covers

1. residence and presence conditions under UK law
2. periods of temporary absence from GB under UK law
3. export of benefit to other countries, under EU law
4. new and repeat claims from abroad under EU law
5. claims made by “incomers” (i.e. EEA nationals who have recently moved to the UK)
6. reciprocal agreements on residence and presence.

Note: See appendices 3 and 4 for further guidance on competency.

071701 If a claimant does not satisfy the residence and presence conditions in UK law, the DM should consider whether the claimant is helped by EU law and, if not, by any reciprocal agreements.

071702 How EU law interacts with domestic legislation regarding residence and presence conditions for AA, DLA, and CA has changed over the years. The main relevant developments are set out below in historical order

1. Prior to 1.6.92, AA, DLA (both Care and Mobility), and CA were treated as invalidity benefits in light of a decision by the ECJ¹. Under EU law² an invalidity benefit cannot be withdrawn solely because the recipient goes to live in another EEA country.
2. From 1.6.92, AA, DLA (Care and Mobility Components), and CA were listed in Reg (EC) 1408/71 as special non-contributory benefits (SNCBs)³. Such benefits are payable only in, and at the expense of, the country of habitual residence⁴. They could not be exported when someone moved permanently to live in another EEA Member State.
3. A number of judgments were made⁵ which indicated that listing as an SNCB was conclusive as to a particular benefit's status.
4. On 18.10.07⁶ the ECJ ruled that AA, DLA (Care Component), and CA are sickness benefits for the purposes of European legislation⁷ but that DLA (Mobility Component) remains a special non-contributory benefit (SNCB)⁸. Although this ruling was made on 18.10.07, it relied heavily on an earlier judgement of the ECJ on 8.3.01⁹ concerning an Austrian care benefit. In that judgement the ECJ first ruled that the fact that certain benefits were listed as

SNCBs in European legislation was not conclusive, and that the Austrian benefit was a sickness benefit.

5. In a subsequent judgement on 5.5.11, the CJEU confirmed that DLA (Mobility Component) is an SNCB¹⁰.
6. On 21.7.11 the CJEU made a decision relating to a claim made for IB(Y) for a person who had been residing in Spain for 5 years. The CJEU held¹¹ that it is legitimate for the UK (as a member state) to make rules intended to ensure that there is a genuine and sufficient link between a claimant of a non-contributory benefit and the social security system of the UK. However, the past presence test, applied without reference to other factors, was too narrow and was not necessarily representative of the real and effective degree of the connection between the claimant and the UK's social security system. The CJEU then listed the factors which applied in the case before it and held that, taken together, these demonstrated that there was a genuine and sufficient link.

1 R(M) 1/92, Newton v CAO, Case C-356/89; 2 Reg (EEC) 1408/71, Art 10, Reg (EEC) 883/04, Art 7; 3 Reg (EEC) 1408/71, Art 4(2a) & Annex IIa entry Y(d), (e), & (f); 4 R (DLA) 5/99 & R(A) 1/99 (Case C-20/96 & C-90/97); 5 ECJ Cases C-20/96 (Snare) & C-297/96 (Partridge), R(DLA) 5/99 & R(A) 1/99; 6 ECJ Judgement Case C 299/05; 7 Reg (EEC) 1408/71 & Reg (EC) 883/04; 8 Reg (EEC) 1408/71 Annex IIa & Reg (EC) 883/04 Annex X; 9 ECJ Case C-215/99 (Jauch); 10 CJEU Judgement case C-537/09; 11 Case C-503/09 LS v Secretary of State for Work and Pensions

071703 The CJEU decision referred to in DMG 071702.6 means that, from 21.7.11, new considerations applied in relation to

1. Decisions about whether an award of AA, CA or DLA (Care Component) which has been made to a person residing in the UK can be exported when the claimant moves to reside permanently in another EEA State **and**
2. New and repeat claims for AA, CA or DLA (Care Component) made by persons residing in an EEA State other than the UK **and**
3. Claims for AA, CA or DLA (Care Component) made by EEA nationals who have recently moved to the UK.

Meaning of “EEA State”

071704 For the sake of simplicity, for the purposes of the guidance below, references to an “EEA State” means any Member State of the EU, plus Iceland, Liechtenstein, Norway **and Switzerland** and “EEA national” means a national of any of those countries.

The Past Presence Test

071715 It is a condition of entitlement to AA, DLA and CA that, in respect of any day of potential entitlement, the claimant must have been present in GB for a specified period in the past (“the past presence test”).

071716 From 17.3.16 PPT is no longer to be applied to claims submitted by refugees and their family members or to people with Humanitarian Protection status and their families¹. All claimants must satisfy the other conditions of entitlement.

1 [2016] UKUT 149 {AAC}

071717 Subject to the rules relating to DLA (Care Component) for those aged 3 and under described in DMG 071718 to 071720 below, the requirement is¹ that in respect of any day for which benefit is claimed, the claimant must have been present in GB for a period of (or periods totalling) 104 weeks in the 156 weeks immediately preceding that day.

Note: the past presence test was changed from a requirement that a claimant be present for 26 weeks out of the previous 52 by amending regulations made in April 2013. See DMG 071721 for details of when this change takes effect.

1 SS (AA) Regs, reg 2(1) (a) (iii); SS (DLA) Regs, reg 2(1) (a) (iii); SS (ICA) Regs, reg 9(1)(c)

Example 1

On 15.4.13, Margaret claimed CA. She reported that she had lived and worked in the USA from 1999 until 21.5.11 when she returned to reside in the UK. The DM calculated that the 156 weeks immediately preceding 15.4.13 ran from 19.4.10 to 14.4.13. The DM calculated that, during that period, Margaret had been present in GB for 99 weeks and 2 days. The DM decided that, as at the first day of entitlement in relation to the claim, Margaret did not satisfy the past presence test. However he decided to treat the claim as being made in advance for a period starting on 18.5.13 (the first day immediately following the completion of 104 weeks residence in the UK). Accordingly, the DM made an award of CA starting from 21.5.13 (the beginning of the 7 days ending on Monday 27.5.12)

Example 2

Howard made a claim for AA on and from 12.6.13. He reported that, during the previous three years, he had resided in GB from May 2010 to 7.9.12 and since 31.1.13. The rest of the time he had lived in Australia. The DM calculated that the 156 weeks immediately preceding 12.6.13 ran from 16.6.10 to 11.6.13 and that during that period Howard had been in GB for a total of 136 weeks and 2 days (116 weeks and 3 days in the first period and then 19 weeks and 6 days from 31.3.13 to 11.6.13). He therefore decided that Howard satisfied the past presence test as at the date of claim.

Terminally Ill

071718 In the case of a claim for AA or DLA from a person who is terminally ill, the past presence test does not apply¹.

1 SS (AA) Regs, reg 2(3); SS (DLA) Regs, reg 2(4)

DLA (Care) - Application of the Past Presence Test to Certain Children

Child aged less than 6 months

071719 The past presence test in relation to any day of potential entitlement to DLA (Care Component) in the case of a claimant who is child under the age of 6 months is that they must have been present in GB for a period of (or periods totalling) 13 weeks¹.

Note: This rule has applied since DLA began in 1992.

1 SS (DLA) Regs, reg 2 (5)

Continuation up to the age of 12 months

071720 Where, immediately before they attain the age of 6 months, a child is entitled to DLA by virtue of having satisfied the past presence test described in DMG 071718, then the past presence test will be that, in respect of any day, that child must have been present in GB for a period of (or periods totalling) 13 weeks¹. This test will continue to apply until that child attains the age of 12 months¹.

Note: This rule has applied since DLA began in 1992.

SS (DLA) Regs, reg 2 (6)

Child aged over 6 months but less than 36 months

071721 Except where, and to the extent that DMG 071719 applies, the past presence test for a child who is aged of 6 months or over but under the age of 36 months is that for any day of potential entitlement the child must have been present in GB for a period of (or periods totalling) 26 weeks in the 156 weeks immediately preceding that day¹.

1 SS (DLA) Regs, reg 2 (7)

Note: This rule was brought in by amending regulations in April 2013.

Date the changes to the Past Presence Test Period apply from

071722 The changes described in DMG 071716 & 071720 above take effect from¹

1. in the case of a person who has an existing award of AA, DLA, or CA on 7.4.13, whichever is the earlier of¹
 - 1.1 the day immediately following the day that the existing award terminates (i.e. when a fixed period award comes to an end) **or**
 - 1.2 104 weeks after 8.4.13 (i.e. from 6.4.15) **or**
2. in any other case, 8.4.13².

1 SS (DLA, AA & CA) (Amend) Regs 2013, reg 1(3) & (5); 2 reg 1(2)

Example

Alice claimed DLA on 13.9.12. In making her claim, Alice said that she had lived in Canada until 9.6.11 when she moved to reside in GB. The DM was satisfied that Alice satisfied the past presence test because she had been in GB for 26 weeks in the 52 weeks ending on 12.9.12. The DM made an award of DLA for a fixed term of 52 weeks. The first day of entitlement was 13.9.12. At the end of the fixed period the DM decided that the amended past presence test came into force in Alice's case on 12.9.13. He decided that the 156 week period ran from 16.9.10 to 11.9.13. During this period, Alice had been in GB for 104 weeks and 6 days and therefore she satisfied the amended past presence test.

Effect of EU Law

071723 The past presence test remains in force in UK domestic law but its application is modified where EU law applies: that is to say where the person concerned is within the personal scope of the EU regulations concerning the co-ordination of social security systems¹ **and** the UK is the competent state for the payment of the benefits concerned. Details are given (starting at DMG 071750 below) in respect of the three situations where this will be a consideration

1. Exportability of an award of AA, CA or DLA (Care Component)
2. New and repeat claims for AA, CA and DLA (Care Component) made by persons residing in an EEA state other than the UK.
3. Claims for AA, CA and DLA (Care and Mobility Components) made by EEA nationals who have recently come to reside permanently in the UK

1 Reg (EEC) 1408/71 & Reg (EC) 883/04

071724

Workers posted abroad

071764 Where persons whose employer normally carries out its activities in the UK are posted by that employer to another EEA state, the legislation of the UK will continue to apply provided¹

1. they are not sent to replace another person **and**
2. the posting is not expected to last more than 24 months¹.

1 Reg (EC) 883/04, art 12(1)

Competent state for the payment of cash sickness benefits

071765 The circumstances in which a state is required to export or award a sickness benefit to a claimant living in another EEA Member State are prescribed in EU law¹. However, for third country nationals, these rules only apply when the claimant moves to certain of the EEA Member States (see DMG 071757-8 above).

Note 1: With effect from 31.10.11 the Act² was amended so as to confirm that, under GB law, EEA citizens who have moved within the EEA are only entitled to AA, CA, or DLA (Care Component) where the UK is the competent state for the payment of sickness benefits in cash under EU law³.

Note 2: See appendices 3 and 4 for further guidance on competency.

1 Reg (EEC) 1408/71 Art 1(q) & Chapter 1 Title 111 & Reg (EC) 883/04 Title III Chapter 1;

2 SSCB Act s 65(7), s 70(4A) & s 72(7B);

3 Reg (EEC) 1408/71, Chapter 1 of Title III & Reg (EC) 883/04, Chapter 1 of Title III

071766 There are two main rules for deciding competency for sickness benefits in cash depending upon whether the claimant is an “insured person” or a person receiving a pension.

Insured persons

071767 In relation to sickness benefits, “insured person” means¹ any person who satisfies the conditions of entitlement for a sickness benefit.

1 Reg (EC) 883/04, Art 1(c)

071768 An “insured person” (and members of that person's family - see DMG 071759) who is residing or staying in a Member State (A) other than the Member State (B) in which they are insured, is entitled to sickness benefits in cash from Member State B¹.

1 Reg (EC) 883/04, Art 21

071769 The following persons should be regarded as persons insured in the UK for cash sickness benefits -

1. those covered by GB contributions in the relevant income tax years that would enable them to claim ESA(Cont) (RITY cover) **provided** they have not been

insured for sickness benefits in an EEA State other than the UK since they worked and paid NI contributions in respect of that work in the UK

2. posted workers (see DMG 071777) and frontier workers (see DMG 071778) who work in GB **and**
3. claimants who retain worker status whilst in receipt of JSA(CB), IBST, ESA(Cont) in the assessment phase, and MA,
4. workers who are currently living and working in the UK and their family members.

Note: DMs are reminded of the need to consider which EEA State's legislation applies (see DMG 071761 to 071763). In general, where a person is living and working in an EEA State other than the UK, it is the legislation of that EEA State which will apply.

Pensioners

071770 A person (and any member of that pensioner's family) receiving a pension under the legislation of one or more Member States is to be paid cash sickness benefits by the Member State responsible for the cost of sickness benefits in kind¹.

1 Reg (EC) 883/04, Art 29

071771 In receipt of a **pension** (under GB legislation) means entitled to and actually in receipt of

1. state RP of any category **or**
2. main phase ESA(Cont), long-term IB, SDA, **or**
3. a bereavement benefit, including widows' benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**
4. a pension for Industrial Injuries Disablement Benefit (including REA and RA).
5. Transitionally protected DLA (Mobility Component)

Note: This definition of "pension" derives from the EU co-ordination regulations.

Meaning of sickness "benefits in kind"

071772 For the purposes of the EU rules about sickness and maternity benefits "benefits in kind" means¹ benefits in kind provided for under the legislation of a Member State which are intended to

1. supply
2. make available

New and Repeat Claims from abroad for AA, DLA (Care) or CA under EU law

Introduction

071785 Provided the claimant is within the personal scope of the EU co-ordination regulations and provided the UK is the competent state for the payment of sickness benefits, where a new claim for AA, CA or DLA (Care Component) is made by a person who is habitually resident in another EEA state in respect of any period on or after 21.7.11, DMs cannot apply the past presence test and the claimant will not have to satisfy the conditions that they be present “in GB” nor the condition that they be “habitually resident” in GB¹. However the claimant will have to show a genuine and sufficient link to the UK’s social security system¹.

1 SS (AA) Regs, reg 2B; SS (DLA) Regs, reg 2B; SS (ICA) Regs, reg 9B

Genuine and sufficient link

071786 Except where DMG 071796 applies, DMs must determine whether the claimant has a “genuine and sufficient link” with the UK.

071787 DMs will need to make a balanced judgement based on all the facts of the case. Among the relevant elements that may be considered are -

1. Personal factors, for example whether the claimant is receiving a UK benefit for example, a pension

Note: where the claimant has a spouse’s or survivors pension, that will be a relevant factor but is not sufficient in itself where the claimant has never lived in the UK or been a UK worker **and**

2. Periods of residence or work in the UK, for example

2.1 whether the claimant has spent a significant part of their life in the UK

2.2 whether the claimant has worked and paid UK NI contributions as result of that work

and, if the claimant is a family member (within the meaning given in DMG 071775 i.e. including adult children who are dependant on their parents)

3. Family factors, for example where the claimant is a dependent child of someone who is receiving a pension from the UK. Where the claimant is the spouse or civil partner of a person with a genuine and sufficient link with the UK that will be a relevant but not exclusive factor in deciding whether the claimant has a genuine and sufficient link.

Note: This is not a checklist and it will be for the DM to give the appropriate weight to each relevant fact in coming to an overall determination of whether there is a genuine and sufficient link to the UK.

Example 1

Harry moved to Spain in 2005 after having lived and worked all his life in the UK. He receives a full UK state Retirement Pension in Spain. On 12.9.11 he claimed AA. The DM decided that the UK was the competent state for sickness benefits and that Harry had a genuine and sufficient link to the UK.

Example 2

Susan, a UK worker retires early and moves to France. She marries her French neighbour, Henri. At 60 she claims her UK pension. Henri does not work due to disability and has no income. He is not yet old enough to receive his French pension and does not meet the conditions for any French benefits. Henri claims DLA (Care Component). The DM decided that the UK was the competent state for the payment of sickness benefits. However he decided that Henri did not have a genuine and sufficient link to the UK: the only link was that he was married to a UK pensioner. He had never lived nor worked in the UK and had no UK benefits payable to him.

071788 Subject to the other conditions of entitlement, if all the EU law conditions above are satisfied, AA, CA or DLA (Care Component) can be paid to the claimant in their country of residence.

071789

DLA (Mobility Component) - Effect of EU law

Claims from abroad and exportability

071800 The Mobility Component of DLA, is a SNCB¹, It cannot be claimed from abroad and where an award has been made to a person residing in the UK under UK domestic law provisions DLA (Mob) that award cannot be exported when the claimant moves to reside permanently abroad but see DMG 071743 et seq regarding certain claimants with transitional protection.

1 Reg (EEC) 1408/71 Art 4(2a), Art 10a, & Annex IIA & Reg (EC) 883/04 Art 3(3) & Art 70 & Annex X & CJEU Judgement case C-537/09.

Claims by incomers

071801 On any day when a claimant

1. is habitually resident in GB **and**
2. a relevant EU regulation applies (see DMG 071792) to them **and**
3. can demonstrate a genuine and sufficient link to the UK's social security system

for the purposes of establishing entitlement to DLA (Mobility Component) for that day, that claimant **does not** have to satisfy the past presence test¹.

1 SS (DLA) Regs, reg 2A

071802 In these cases the question of whether the UK is the competent state is not at issue, but DMs will need to establish whether the claimant is within the personal scope of the EU co-ordination regs¹.

1 Reg (EC) 883/04, Art 2

071803 Where a person satisfies the conditions in DMG 071801.1. & 2. but cannot demonstrate a genuine and sufficient link to the UK's social security system, the past presence test will apply. However the claimant may be able to gain assistance from EU law.

071804 Firstly the past presence test may be deemed to be satisfied because the claimant is a worker or self-employed person who satisfies the conditions in DMG 071796. Secondly they may be able to satisfy the past presence test by virtue of aggregation (see DMG 071805).

Aggregation and the Past Presence Test - DLA (Mob)

071805 As the Mobility Component is to be treated as an SNCB, it is only payable in the UK. However, for the purpose of satisfying the past presence test, periods of insurance for social security benefits arising from periods of employment, self-employment or

residence in another EEA State qualify to be aggregated with residence in the UK when considering whether the past presence test is met.

071806 - 071809

Residence and presence and reciprocal agreements

General

071810 Where general UK law is not helped by EU law, the DM should consider whether the claim is helped by any reciprocal agreements with other countries. See DMG 070320 which gives guidance on when reciprocal agreements can be used.

071811 AA and DLA (both Care and Mob) are covered in the reciprocal agreements with

1. Jersey and Guernsey¹ (including Alderney, Herm, and Jethou) **and**
2. Isle of Man² **and**
3. Northern Ireland³.

*1 SS (Jersey and Guernsey) Order 94; 2 SS (I of M) Order 77;
3 SS (N. Ireland Reciprocal Arrangements) Regs 76*

Habitually resident test

071812 The agreements do not help a claimant to satisfy the habitually resident test. A claimant must be habitually resident in GB before benefit can be awarded, but residence and presence in Northern Ireland can be treated as residence and presence in GB¹.

1 SS (N. Ireland Reciprocal Arrangements) Regs Sch Art 2

Subject to immigration control

071813 Nationals of the countries in DMG 071811 will always satisfy the test in DMG 071705 2.. Other claimants who come to live in GB from one of these countries are treated as if they do not have a limitation on their right to reside in GB¹ and will also satisfy the test.

1 SS (DLA) Regs, reg 2(1A)(e)

Presence tests

071814 The agreements allow periods of presence in the other country to be taken into account for the presence tests in DMG 071705¹.

*1 SS (Jersey and Guernsey) Order 94, Sch, Art 29; SS (I of M) Order 77, Sch 1, Art 2;
SS (N. Ireland Reciprocal Arrangements) Regs 76, Sch 1, Art 2*

Example

An Australian national who has lived in the Isle of Man for 15 years comes to live in GB on 2.9.96 and claims DLA immediately on arrival. The past presence condition is satisfied by using the periods of presence in the Isle of Man. However, the decision maker will also have to consider whether the claimant is habitually resident here before an award of benefit can be considered.

071815 - 071819

Note: The reciprocal agreement between the UK and former Yugoslavia should be treated as separate agreements between the UK and

1. the State Union of Serbia and Montenegro
2. Bosnia-Herzegovina
3. Croatia
4. the former Yugoslav republic of Macedonia
5. Slovenia.

*1 SS (Barbados) Order 92, Sch, Art 5(7);
SS (Bermuda) Order 69, Sch, Art 9(4) & 10(3); SS (Cyprus) Order 83, Sch, Art 4(2);
SS (I of M) Order 77, Sch 1, Art 2(1); NI and II (Israel) Order 57, Sch, Art 9;
SS (Jamaica) Order 97, Sch 1, Art 5; SS (Jersey and Guernsey) Order 94, Sch, Art 5(5);
SS (Malta) Order 96, Sch, Art 4(4); SS (Mauritius) Order 81, Sch 1, Art 4(3);
SS (New Zealand) Order 83, Sch, Art 3; SS (N Ireland Reciprocal Arrangement)s Regs , Sch Art 2
SS (Philippines) Order 89, Sch, Art 4(3); FA, NI and II (Switzerland) Order 69, Sch 1, Art 16(3);
NI and II (Turkey) Order 61, Sch, Art 28(1); SS (USA) Order 84, Sch 1, Art 7(4);
FA, NI and II (Yugoslavia) Order 58, Sch, Art 26(1)*

Spouse or civil partner in Great Britain but claimant absent

071844 An ADI is payable if the claimant is absent from GB **and**

1. resides in a country covered by a reciprocal agreement (see DMG 070333)
2. remains entitled to personal benefit because of that agreement **and**
3. other general conditions for entitlement to the ADI are satisfied (see DMG Volume 3, Subjects Common to all Benefits).

Claimant and spouse or civil partner both absent from Great Britain

071845 An ADI is payable if the claimant and spouse, civil partner or person caring for a child

1. reside in a country covered by a reciprocal agreement (see DMG 070333) **and**
2. the claimant remains entitled to personal benefit because of that agreement **and**
3. all other general conditions for entitlement to the ADI are satisfied (see DMG Volume 3, Subjects Common to all Benefits).

071846 - 071849

Mauritius

071895 The agreement allows

1. where a claimant is entitled to RP only under the UK scheme, CDI to be paid by the UK **or**
2. where a claimant is entitled to RP only under the Mauritius scheme, an increase for a child to be paid by Mauritius **or**
3. where a claimant is entitled to RP under both the UK and Mauritius schemes, an increase for a child to be paid by the country in which the claimant is ordinarily resident **and**
4. if a child is in Mauritius, entitlement to CDI to continue if the claimant is entitled to a UK personal benefit covered by the agreement **and** there would be entitlement to CDI if the child had been in the UK **and** the claimant is residing with, or would be residing with if not temporarily absent from, the child and is responsible for the child¹.

1 SS (Mauritius) Order 81, Sch 1, Art 4(3) & 15

New Zealand

071896 If a child is in New Zealand, the claimant will be entitled to CDI if

1. the claimant is entitled to a UK personal benefit covered by the agreement **and**
2. there would be entitlement to CDI if the child had been in the UK **and**
3. the child is **not** usually resident in New Zealand **or** the eldest, elder or only child in a WMA claim¹.

1 SS (New Zealand) Order 83, Sch, Art 3

Northern Ireland

071897 The agreement allows periods of presence in Northern Ireland to be treated as periods of presence in the UK. This means that a claimant who is entitled to a UK personal benefit will continue to be entitled to CDI during any absences, or the child's absences, in Northern Ireland¹.

1 SS (N. Ireland Reciprocal Arrangements) Regs, Sch, Art 2

Philippines

071898 The agreement allows

1. where a claimant is entitled to RP only under the UK scheme, CDI to be paid by the UK **or**
2. where a claimant is entitled to RP only under the Philippines scheme, an increase for a child to be paid by the Philippines **or**
3. where a claimant is entitled to RP under both the UK and Philippines schemes, an increase for a child to be paid by the country in which the claimant is ordinarily resident **and**
4. if a child is in the Philippines, entitlement to CDI to continue if the claimant is entitled to a UK personal benefit covered by the agreement **and** there would be entitlement to CDI if the child had been in the UK¹.

1 SS (Philippines) Order 89, Sch, Art 4(3) & 14

Switzerland

071899 A claimant who is entitled to a UK personal benefit will continue to be entitled to CDI if the child is absent in Switzerland¹.

1 FA, NI and II (Switzerland) Order 69, Sch 1, Art 16(3)

Turkey

071900 If a child is in Turkey, the claimant will be entitled to CDI if

1. the claimant is entitled to a UK personal benefit covered by the agreement **and**
2. there would be entitlement to CDI if the child had been in the UK¹.

1 NI and II (Turkey) Order, 61, Sch, Art 28(1)

United States of America

071901 If a child is in the United States of America, the claimant will be entitled to CDI if

1. the claimant is entitled to a UK personal benefit covered by the agreement **and**
2. there would be entitlement to CDI if the child had been in the UK¹.

1 SS (USA) Order 84, Sch 1, Art 7(4)

3. living with a serving member of the armed forces³ (see DMG 078087 and 078182) and are that person's spouse or civil partner, son, daughter, father, father-in-law, mother or mother in law⁴.

Note: References to 'in-laws' are to be read as including relationships arising through civil partnerships.

1 ESA Regs, reg 11(2)(b); 2 reg 11(2)(c); 3 reg 2 & Sch 1; 4 reg 11(2)(a)

071921 - 071929

ESA(IR) - habitual residence

- 071930 The habitual residence test applies to ESA(IR) in the same way as to IS and JSA(IB). A claimant who is not habitually resident in the CTA is a person from abroad¹ and has an ESA(IR) applicable amount of nil².

1 ESA Regs, reg 70(1); 2 Sch 5 Part 1 para 11

- 071931 Regulations provide that a claimant cannot be habitually resident unless he has the right to reside in the CTA¹. The CTA is the UK, the Channel Islands, the Isle of Man, and the Republic of Ireland

1 ESA Regs, reg 70(2)

- 071932 Detailed guidance on habitual residence and the right to reside is in Part 3 of Chapter 7 of the DMG.

- 071933 Apart from certain temporary absences from GB (see DMG 071940 below), a claimant is not entitled to ESA(IR) unless he is present in GB¹. In European law, ESA(IR) is a special non-contributory benefit², and thus only payable in GB³.

1 WR Act 07, s 1(3)(d); 2 Reg EEC 1408/71 Arts 4(2)(a) & 10a & Annex IIA entry Y(c), Reg (EC) 883/04, art 70 & para (e) of the UK entry in Annex X, 3 Reg (EC) No 883/04

071934 - 071939

Temporary absence abroad - ESA(Cont) and ESA(IR)

Short absence

- 071940 A claimant will continue to be entitled to ESA(Cont) and (IR) for the first four weeks of any absence from GB if

1. the absence is temporary **and**
2. the absence is unlikely to exceed 52 weeks **and**
3. he continues to satisfy the other conditions of entitlement to ESA¹.

1 ESA Regs, reg 152

Absence to receive medical treatment

071941 A claimant will continue to be entitled to ESA(Cont) and (IR) for the first 26 weeks of absence from GB¹ if

1. the absence is temporary **and**
2. the absence is unlikely to exceed 52 weeks **and**
3. he continues to satisfy the other conditions of entitlement to ESA **and either**
 - 3.1 the absence is solely to receive treatment for a condition which started before the claimant left GB and which is directly related to the claimants limited capability for work **or**
 - 3.2 the claimant is accompanying a dependant child receiving treatment abroad

1 ESA Regs, reg 153(1)(a)(b)(c) & (e)

071942 Treatment abroad, whether for the claimant or a dependant child, must be by or under the supervision of a person qualified to provide medical treatment, physiotherapy, or similar forms of treatment¹.

1 ESA Regs, reg 153(1)(d) & (2)

Absence for NHS treatment

071943 A claimant will continue to be entitled to ESA(Cont) and ESA(IR) during any period of absence from GB¹ if

1. the absence is temporary **and**
2. he continues to satisfy the other conditions of entitlement **and**
3. the absence is for the claimant to receive treatment at a hospital or similar institution outside GB but provided
 - 3.1 under section 6(2) and pursuant to section 12(1) and paragraph 18 of Schedule 4 of the NHS Act 2006 **or**
 - 3.2 under section 6(2) and pursuant to section 10(1) and paragraph 18 of Schedule 3 of the NHS (Wales) Act **or**
 - 3.3 any equivalent provision in Scotland.

1 ESA Regs, reg 154

Family member of a member of HM Forces

071944 A claimant will continue to be entitled to ESA(Cont) and (IR) for any period of absence from GB¹ if

Appendix 3

Deciding the competent state to pay cash sickness benefits

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Introduction

- 1 This appendix expands the guidance in DMG chapter 7 for deciding the competent State to pay cash sickness benefits. It also incorporates Regulation (EC) 883/2004.

General rule

- 2 In general a person is only subject to the legislation of one EU Member State¹.

1 Reg (EC) 883/04, Art 11(1)

- 3 A person will not be entitled to AA¹, CA², or DLA care component³ or unless the UK is the competent State for payment of cash sickness benefits to that person.

1 SS CB Act 92, s 65(7); 2 s 70(4A); 3 s 72(7B)

- 4 Special Non-Contributory Cash Benefits can only be paid to people by and in their Member State of residence. In the UK

1. SPC and
2. JSA (IB) and
3. DLA mobility component and
4. ESA (IR)

are Special Non-Contributory Cash Benefits¹.

1 REG (EC) 883/2004, Annex X

Additional voluntary insurance

- 5 Although a person is subject to compulsory insurance in one EU Member State, that person may voluntarily decide to join the optional insurance scheme in another EU Member State for the purposes of entitlement to

1. invalidity benefit and
2. retirement pension and
3. widow's benefits¹.

1 Reg (EC) 883/04, Art 14(3)

Deciding whose legislation applies

General rules

- 6 The general rules are¹ that

1. a person pursuing activity as an employed or self-employed person in an EEA Member State is subject to the legislation of that Member State

2. a civil servant is subject to the legislation of the Member State to which the administration employing him is subject
3. a person receiving unemployment benefits in accordance with a specific provision in the EU co-ordination Regulations² from the Member State of residence is subject to the legislation of that Member State
4. a person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State

any other person to whom sub-paragraphs 1. – 4. do not apply is subject to the legislation of the Member State of residence

Note: The rule in sub-paragraph 5. operates subject to any other rules in the EU co-ordination regs which may guarantee a person benefits under the legislation of one or more Member States.

1 Reg (EC) 883/04, Art 11(3); 2 Art 65

- 7 Except in relation to the benefits listed at paragraph 9, for the purposes of paragraph 6, a person receiving cash sickness benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity¹.

1 Reg (EC) 883/04, Art 11(2)

- 8 The benefits to which the rule detailed in paragraph 7 do not apply are¹
1. invalidity benefits **or**
 2. old age or survivors' pensions **or**
 3. pensions in respect of accidents at work or occupational diseases **or**
 4. sickness benefits in cash which are for treatment for an unlimited period.

1 Reg (EC) 883/04, Art 11(2)

Meaning of “legislation”

- 9 In paragraph 6 “legislation” means¹ the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the co-ordinating regs.

1 Reg (EC) 883/04, Art 1(l)

Meaning of “competent member state”

- 10 The “competent Member State” means¹ the Member State in which the competent institution is situated.

1 Reg (EC) 883/04, Art 1(s)

Meaning of “competent institution”

- 11 The “competent institution” means¹ the institution
1. with which the person concerned is insured at the time of the application for benefit **or**
 2. from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the Member State in which the institution is situated **or**
 3. designated by the competent authority of the Member State concerned.

1 Reg (EC) 883/04, Art 1(q)

Meaning of “competent authority”

- 12 “Competent authority” means¹ the Minister or other equivalent authority responsible for social security schemes throughout (or in any part of) the member state in question.

1 Reg (EC) 883/04, Art 1(m)

Posted to another EEA country

- 13 An employed person who is posted by their employer to another EEA State remains subject to the legislation of the Member State where the employer is based and where that person normally works, provided
1. the work is not expected to last more than twenty-four months, **and**
 2. that person has not been sent to replace somebody who has completed a posting¹.

1 Reg (EC) 883/04, Art 12

Working in More than one Member State

- 14 Persons who normally pursue activity as an employed person in two or more Member States will be subject to the legislation of¹
1. the Member State of residence if they
 - 1.1 pursue a substantial part of their activity in that Member State **or**
 - 1.2 are employed by two or more employers, at least two of which have registered offices or places of business in Member States different to that of the Member State of residence **or**
 2. the Member State in which the employer’s registered office or place of business is situated, if the person does not pursue a substantial part of his work in the Member State of residence, and either:

- 2.1 the person is employed by only one employer; **or**
- 2.2 the person is employed by two or more employers, all of which have their registered office or place of business in only one Member State.

1 Reg (EC) 883/04, Art 13(1)

- 15 A person who normally pursues activity as a self-employed person in two or more Member States shall be subject to the legislation of¹
- 1. the Member State of residence if they pursue a substantial part of their activity in that Member State **or**
 - 2. if the person does not reside in one of the Member States in which they pursue a substantial part of their activity, the Member State in which the centre of interest of their activities is situated.

1 Reg (EC) 883/04, Art 13(2)

- 16 If a person spends less than a quarter of their time on their activities as an employed or self employed person in a Member State, that shall be taken as an indication that a person is not pursuing a substantial part of their activities in that Member State¹.

1 Reg (EC) 987/2009 Art 14(8)

Employed on a ship

- 17 Subject to paragraph 18 below, activity as an employed or self-employed person normally pursued on board a vessel at sea, flying the flag of a Member State is deemed to be an activity pursued in that Member State¹
- 18 However¹ a person employed on board a vessel flying the flag of a Member State who is paid by an undertaking or person whose registered office or place of business is in a Member State other than that in which the vessel is registered is subject to the legislation of the latter Member State if they reside in that Member State.

1 Reg (EC) 883/04, Art 11(4)

1 Reg (EC) 883/04, Art 11(4)

Example

A claimant is employed on a cruise ship that flies the UK flag. The claimant lives in France and she is paid by a company registered in France. The claimant is subject to the legislation of France.

Civil Servants

- 19 Civil Servants, and people treated as Civil Servants, are subject to the legislation to which the administration employing them is subject¹.

1 Reg (EC) 883/04, Art 11(3)(b)

Example

A UK official is working in Brussels but remains employed by a UK department. That person remains subject to UK legislation.

Members of the armed forces

- 20 A member of the armed forces is subject to the legislation of the country in whose forces that person is serving¹.

1 Reg (EC) 883/04, Art 11(3)(d)

Claims from pensioners

- 21 As a general rule, if a claimant receives a pension and is entitled to benefits in kind from a single Member State, that Member State is competent for the payment of cash sickness benefits to that person¹.

1 Reg (EC) 883/04, Art 24(2)(a)

Example

A claimant resides in the UK, and only receives a pension from Greece. Greece is the competent state for cash sickness benefits.

- 22 Where a claimant

1. receives a pension from two or more Member States **and**
2. resides in one of those Member States **and**
3. is entitled to benefits in kind under the legislation of that Member State

the Member State of residence will be competent for payment of cash sickness benefits to that person¹

1 Reg (EC) 883/2004, Art 23, Art 29(1)

Example

A claimant resides in the UK and receives a pension from both Greece and from the UK. The UK is the competent State for benefits in kind and for the payment of cash sickness benefits.

Note: The general rule ceases to apply if the person receiving a pension from another Member State undertakes activity as an employed or self-employed person in the Member State of residence. In these circumstances, the Member State of residence may become competent for the payment of cash sickness benefits to that person for such time as that person is employed or self-employed.

- 23 If a claimant
1. receives a pension from two or more Member States **and**
 2. is consequently entitled to benefits in kind from two or more Member States **but**
 3. is not entitled to a pension from the State of residence

the competent Member State for payment of cash sickness benefits is the Member State to whose legislation the claimant has been subject for the longest period of time¹.

1 Reg (EC) 883/04, Art 24(2)(b)

Example

A claimant resides in Spain and receives pensions from the UK, Germany and France. The claimant worked in the UK for 6 years, Germany for 12 years and France for 20 years. France is the competent state for cash sickness benefits.

Derived rights

Family members

- 24 Claimants can derive a right to payment of benefits¹ from their family members². Family members are
1. a spouse **or**
 2. **civil partner**
 3. a parent of a child under 18 **or**
 4. a parent of a child over 18 who is a dependant.

1 Reg (EC) 883/04 Art 2(1); 2 Reg (EC) 883/04 Art 1(i)(2)

Prioritising rights

- 25 Claimants may have both an independent right to benefits and a derived right to benefits at the same time. An “independent right” to benefits is a right a person has acquired independently themselves as a consequence of, for instance, their activity as an employed or self-employed person in a Member State, their residence in a Member State, or their receipt of a pension from a Member State. A derived right is a right to benefits a person can derive from a family member. Subject to paragraphs 26 and 27 below, an independent right to cash sickness benefits should take priority over a derived right to cash sickness benefits as the family members of those covered by the Regulation¹.

1 Reg (EC) 883/04 Art 32(1)

Example

A claimant who is a Polish national is in receipt of a Polish pension and a disability benefit also from Poland. He arrives in the UK to be with his wife. His wife has been working in the UK and paying NI contributions for the last 5 years. As the claimant is in receipt of a pension from Poland he has an independent right to cash sickness benefits from Poland. However, he also has a derived right to benefits in the UK which he derives from his working wife. As the general rule is that a person's independent right to benefits takes priority over their derived right, the claimant's independent right to benefits in Poland takes priority and Poland is therefore the competent state for the payment of cash sickness benefits to the claimant.

- 26 However, where a claimant has an independent right to cash sickness benefits arising purely from their residence in a Member State, any rights they derive from a family member who is, for example, receiving a pension from or who is employed in another Member State will take priority over that claimant's independent right to benefits¹.

1 Reg (EC) 883/04 Art 32(1)

Example 1

A claimant has returned to reside in the UK, having been resident in another EU Member State. The claimant's husband lives and works in Germany but the couple are still together. The claimant is not working in the UK. The claimant has an independent right to cash sickness benefits in the UK arising solely out of their residence in the UK. The claimant also has a right to benefits in Germany derived from her husband, who is living and working in Germany. In these circumstances, Germany is the competent State for payment of cash sickness benefits to that claimant.

Note: Should the claimant in the above example start work in the UK then the UK would become the competent state, as the claimant's independent right to benefits would no longer arise solely out of her residence in the UK.

Example 2

A claimant returns to live in the UK having been resident in another EU Member State. The claimant is self-employed in the UK. The claimant's husband lives and works in Spain. In this situation, the independent rights of the claimant do not arise solely out of her residence in the UK. The UK is therefore the competent state for payment of cash sickness benefits to the claimant.

- 27 Where a claimant is employed or self employed in a Member State their independent right takes priority over a derived right even if they have a family member employed in or receiving a pension from another Member State¹.

1 Reg (EC) 883/04 Art 32(1)

Example

A claimant lives and works P/T in the UK but is financially dependent on their parent. Their parent lives and works in Germany. The UK is the competent State for cash sickness benefits for the claimant.

Note: Should the claimant in the above example stop working in the UK then Germany would become the competent state, as the claimant's independent right to benefits would arise solely out of her residence in the UK.

Step parents

- 28 As a general rule, a child cannot derive rights from a step parent as the step parent does not come within the definition of "family member" set out in paragraph 24 above.

Example

A child moves from Spain to the UK with his mother and step-father. The child's biological father lives and works in Spain. Whilst the step-father is in F/T employment in the UK the mother is not working. As the mother is not in employment in the UK but the child's father is in employment in Spain, the right to benefits the child derives from the parent working in Spain is prioritised, and Spain is therefore the competent State for cash sickness benefits for the child.

Exchange of claims between members states

- 29 If on considering the claim the DM decides that the UK is not the competent State the DM should forward the claim without delay to the competent institution in the Member State the DM considers competent¹.

1 Reg (EC) 883/04 Art 81

- 30 Where the DM receives a claim from another Member State the date of claim will be the date the claim was made in the other Member State¹.

1 Reg (EC) 883/04 Art 81

Appendix 4

Action to take once competency has been decided

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Introduction

- 1 This appendix expands the guidance for DMs on the approach to take to cases where a decision on competency has been reached.

The DM decides that the UK is the competent state for the payment of cash sickness benefits

- 2 Where the DM decides that the UK is the competent state to pay cash sickness benefits to a person, the DM should then go on to consider whether the relevant domestic conditions of entitlement are met.

The DM decides that the UK is not the competent state for the payment of cash sickness benefits

Scenario one: Where there is no acceptable evidence of a dispute regarding competence between member states

- 3 Where the DM decides that the UK is not the competent state they should:
1. refuse the claim **and**
 2. immediately forward the claim to the member state the DM considers is competent¹

1 Art 81 Reg (EC) 883/04; [2015] AACR 26

Scenario Two: Difference of opinion between member states as to competence

- 4 Where there is a difference of opinion between the UK and one or more other Member States as to the identification of the State competent to provide cash benefits to a person, then either the
1. state where the claimant resides **or**
 2. member state where the claim was first made (if the claimant does not reside in any of the member states concerned in the dispute)

will provide cash benefits to that person on a provisional basis, provided that person meets the relevant domestic eligibility criteria¹.

1 Reg (EC) 987/09 Art 6(2)

Note: Competency is not contingent on the other member state having a similar benefit to the one applied for by the claimant. Therefore the position regarding competence will not be altered if the other member state does not have a similar benefit to the one applied for by the claimant. Further, payment on a provisional basis will not need to be made in these circumstances.

- 5 Should a dispute regarding competence arise between the UK and another member state the DM should not await
1. an appeal **or**
 2. the outcome of an appeal
- before making provisional payments¹.

1 [2015] AACR 26

Resolving the dispute

- 6 Where no agreement can be reached between the member states as to who is competent the DM should refer the matter to DMA Leeds. DMA Leeds will liaise with policy and legal services to decide whether to refer to the Administrative Commission¹.

1 Reg (EC) 987/09 Art 6(3)

- 7 The Administrative Commission will try to reconcile the dispute within 6 months¹.

1 Reg (EC) 987/09 Art 6(3)

- 8 Where the UK has paid benefit on a provisional basis and the Administrative Commission decides another member state is competent that member state will reimburse the UK benefits paid¹.

1 Reg (EC) 987/09; Art 73

The content of the examples in this document (including use of imagery) is for illustrative purposes only

Part 3 - Habitual residence & right to reside - IS/JSA/SPC/ESA

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is genuine and effective because it is not on such a small scale as to be marginal and ancillary. The work was on a regular basis continuing for a reasonable length of time.

072818 - 072820

Retaining worker status

072821 A worker retains worker status when he stops working if

1. he is temporarily unable to work due to illness or accident¹ **or**

Note: The illness or accident which results in a worker being temporarily unable to work must be suffered by that worker².

2. he is in duly recorded involuntary unemployment after having been employed in the UK, as long as he has registered as a jobseeker with the relevant employment office **and**

2.1 he was employed for **a year or more** before becoming unemployed **or**

2.2 he has been unemployed for no more than six months **or**

2.3 he can provide evidence that he is seeking employment in the UK and has a genuine chance of being engaged³ **or**

3. he is involuntarily unemployed and has started vocational training⁴ **or**

4. he has voluntarily stopped working and has started vocational training which is related to his last employment⁵.

*1 Imm (EEA) Regs 2016, reg 6(2)(a); 2 CIS/3182/2005, para 20
3 Imm (EEA) Regs 2016, reg 6(2)(b); 4 reg 6(2)(d); 5 reg 6(2)(e)*

072822 DMG 072821 **2.** sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee for one year or more and then becomes involuntarily unemployed. This paragraph sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee in the UK for **less than one year**. A person who¹

1. has registered as a jobseeker with the relevant employment office **and**
2. is in duly recorded involuntary unemployment after having been in genuine and effective employment for **less than one year and**
3. can provide evidence that they are seeking employment and have a genuine prospect of work

will only retain worker status for a maximum of 6 months starting with the first day of duly recorded involuntary unemployment².

Note: this paragraph should be read in conjunction with DMG 073087.

1 Imm (EEA) Regs 2016, reg 6(2)(c); 2 reg 6(3)

072823 - 072825

Meaning of “registered as a jobseeker”

072826 On 18.12.09 a UT decided the case of an EEA national who claimed IS. She had completed a habitual residence questionnaire, answering yes to the question “Are you looking for work in the UK?” and submitted the questionnaire to a Jobcentre Plus Office. The UT held¹ that the Secretary of State had not put in place any formal system for registration, the claimant had satisfied the requirement to register by her statement on the questionnaire. The Court of Appeal later confirmed the UT’s decision².

1 SSWP v FE [2009] UKUT 287 (AAC), CIS/184/08;

2 Secretary of State for Work and Pensions v Elmi [2011] EWCA Civ 1403

072827 Consequently, with effect from 18.12.09 onwards where a claimant

1. makes a claim for IS, ESA(IR) or SPC, **and**
2. is a migrant worker from another EEA state, **and**
3. has worked in the UK but is currently unemployed **and**
4. has declared on the claim form or otherwise in the course of making the claim (including on the habitual residence form) that they are looking for work, but has **either**
 - 4.1. not claimed JSA or NI credits, **or**
 - 4.2. has made a claim for JSA or NI Credits which has failed **and**
5. can establish that they continue to seek employment in the UK

it should be accepted that the claimant is not a person from abroad/person not in GB.

072828 - 072840

Self-employed persons

072841 In the context of EU rights to reside it is the EU law meaning of self-employed that has to be applied. EU law distinguishes between “workers” (who are persons who perform “services for and under the direction of another person in return for which he receives remuneration”¹) and self-employed (who are “independent providers of services who are not in a relationship of subordination with the person who receives the services”²). The CJEU has also stated³ that the following three factors are characteristic of self-employment

1. there is no relationship of subordination concerning the choice of activity, working conditions and conditions of remuneration **and**
2. the activity is engaged under the person’s own responsibility **and**
3. the remuneration is paid in full to the person so engaged directly.

In addition self-employed earners derive their right to move and reside from article 49 of the TFEU rather than article 45 which applies to workers.

1 Case C-357/89 Raulin v Minister Van Onderwijs en Wetenschappen;

2 Case C-256/01 Allonby v Accrington and Rossendale College;

3 Case C-268/99, Jany v Staatssecretaris van Justitie

072842 Questions may arise as to whether (for the purposes of the EU right to reside) at any particular moment in time a claimant is a self-employed person. An Upper Tribunal Judge has said this¹

“I do not accept that a claimant who is for the moment doing no work is necessarily no longer self-employed. There will commonly be periods in a person’s self-employment when no work is done. Weekends and holiday periods are obvious examples. There may also be periods when there is no work to do. The concept of self-employment encompasses periods of both feast and famine. During the latter, the person may be engaged in a variety of tasks that are properly seen as part of continuing self-employment: administrative work, such as maintaining the accounts; in marketing to generate more work; or developing the business in new directions. Self-employment is not confined to periods of actual work. It includes natural periods of rest and the vicissitudes of business life. This does not mean that self-employment survives regardless of how little work arrives. It does mean that the issue can only be decided in the context of the facts at any particular time. The amount of work is one factor. Whether the claimant is taking any other steps in the course of self-employment is also relevant. The claimant’s motives and intentions must also be taken into account, although they will not necessarily be decisive”.

DMs will have to arrive at a judgement based on all the facts of the case in accordance with this guidance.

1 SSWP v JS [2010] UKUT 240 (AAC)

072843 In order for a person to be regarded as self-employed for the purposes of the right to reside, the condition that the work involved be genuine and effective must also be satisfied (see DMG 072816 & 072817).

072844 Unless Tier 1 of the MET (DMG 073038) is satisfied to establish that the self-employed work is genuine and effective, the DM should consider all the circumstances of each particular case. Factors to consider may include

1. periods of actual work
2. monies received for such work
3. administration tasks relating to the business
4. maintaining accounts
5. marketing work to generate more work
6. development of business in new directions

7. receipts for tools, stock or materials purchased

This is not an exhaustive list.

072845 A person must have more than an intention to be self-employed. They must provide evidence of the steps taken, or the ways used to set up their self-employment¹.

1 R(IS)6/00

072846 It helps to have registered with HMRC as a self-employed person. However, a person not registered with HMRC does not necessarily mean that they are not self-employed. Registration with HMRC may be one of the factors towards establishing that the person has self-employed status. However that registration should link to genuine and effective work (see 072843).

072847 - 072860

Retaining the status of being a self-employed person

072861 A self-employed person retains that status only if he is unable to work temporarily as a result of an illness or accident¹.

1 Imm (EEA) Regs 2016, reg 6(4); R (on the application of Marian Tilianu) v Social Fund Inspector and SSWP [2010] EWCA Civ 1397

Note: the illness or accident which results in a self-employed person being temporarily unable to work must be suffered by that self-employed person.

072862 - 072899

Family members of workers and self-employed persons

072900 Family members of persons referred to in 072800 **1.** and **2.** have the same rights of residence as those persons and are entitled to reside in the UK for as long as they remain family members of a worker or s/e person or someone who retains the status of worker or s/e person. These family members are deemed **not** to be persons from abroad/not in GB (see DMG 072800 **3.**). The following are family members for these purposes¹

1. spouse or civil partner **or**
2. direct descendants of the EEA national, his spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 dependants of his, his spouse or civil partner **or**
3. direct ascendant relatives of the EEA national, his spouse or civil partner, who are dependants.

Note: if certain conditions are met, family members of British citizens have the same EU law rights to reside as they would if they were a family member of another EEA state² (see DMG 073254 et seq for full details of the conditions). Thus where the conditions are satisfied and the British citizen would fall within the terms of DMG

072800 **1.** and **2.**, if they were a national of another EEA state, their family members should be treated in the same way as a family member described in DMG 072800 **3.** As such they will not be a “person from abroad” for the purposes of IS, JSA(IB) and ESA(IR). Nor will they be a person treated as not in GB for the purposes of SPC.

1 Directive 2004/38/EC, art 2; 2 Imm (EEA) Regs 2016, reg 9

Meaning of “dependent”

072901 Direct descendants aged 21 or over (see 072900 **2.2**) and any relatives in the ascending family line (see 072900 **3.**) must prove they are dependent on the EEA national or his spouse or civil partner. A UT Judge has analysed the EU case law on the meaning of “dependent” in this context. He summarised that case law¹ as finding that²

1. a person is only dependent who actually receives support from another **and**
2. there need be no right to that support and it is irrelevant that there are alternative sources of support available **and**
3. that support must be material³, although not necessarily financial, and must provide for, or contribute towards the basic necessities of life.

1 Case C-316/85, Centre Public D'Aide Sociale de Courcelles v Lebon; Case C-2000/02, Chen v Secretary of State for the Home Department; Case C-1/05, Jia v Migrationsverket;

2 CIS/2100/07; 3 C-423/12 Reyes

072902 - 072985

Three Month Residence Requirement

072986 With effect from 1.1.14 (in addition to the right to reside requirement) a JSA(IB) claimant (who is not in the exempt group) (see DMG 072800) cannot be treated as habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland **unless** that claimant has been “living in” any of those places for the past three months¹ (“the three month rule”). Where this condition is not met, such a claimant will be a person from abroad and not entitled to JSA(IB). Where the three month rule condition is met and the claimant has a qualifying right to reside, the DM will need to go on to consider whether the claimant is actually habitually resident, in accordance with guidance at DMG 073707.

Note 1: The three month period could be made up of, for example, 1 month living in the Channel Islands immediately followed by 2 months living in the UK.

Note 2: Questions of whether the person was actually habitually resident in accordance with guidance at DMG 073707 only arises once a person has satisfied the three month rule.

Note 3: For guidance in relation to posted worker exemptions, see DMG 073011 - 073027

1 JSA Regs, reg 85A(2)(a)

Example 1

Milan is a Belgian citizen. He entered the UK for the first time on 6.1.14 to look for work. He was unable to find a job and claimed JSA(IB). The date of claim was 17.3.14. There was no question of backdating and the first day of potential entitlement would have been 20.3.14. On 20.3.14, the DM decided that Milan could not be treated as habitually resident in the UK until 6.4.14. He was therefore a person from abroad with an applicable amount of nil. The DM accordingly disallowed the claim.

Example 2

Andreea is a Romanian citizen. She arrived in the UK for the first time on 2.1.14 in order to look for work. The date of her claim for JSA(IB) was 7.4.14. There was no question of backdating. On 10.4.14, the DM decided the claim. The DM decided that the claimant had an EU law right to reside in the UK as a jobseeker. She determined that the claimant had completed a period of three months living in the UK on 1.4.14. Finally the DM also concluded that Andreea was (actually) habitually resident in the UK as at the date of claim. The DM therefore decided that Andreea was entitled to JSA(IB) and made an award accordingly.

072987 - 072989

- 2.1 they are in duly recorded involuntary employment after having been employed in the UK, as long as they have registered as a jobseeker with the relevant employment office **or**
- 2.2 work as an employee in the UK has stopped because the person is temporarily unable to work due to illness or accident **or**
- 3. self-employed persons **or**
- 4. persons who retain the status of self-employed person because they are temporarily unable to pursue their activities as a self-employed person as a result of illness or accident¹

and family members (see DMG 072900) of persons described in **1. to 4.** above².

Note: The following guidance is to provide more detailed advice on the criteria for deciding whether a person is or was a “worker” or a “self-employed” person.

*1 IS (Gen) Regs, reg 21AA(4)(za); JSA Regs, reg 85A(4)(za); ESA Regs, reg 70(4)(za); SPC Regs, reg 2(4)(za);
2 IS (Gen) Regs, reg 21AA(4)(zb); JSA Regs, reg 85A(4)(zb); ESA Regs, reg 70(4)(zb); SPC Regs, reg 2(4)(zb);*

073033 - 073034

Meaning of “worker” – two tier approach

073035 It is well established in EU law that, in order to be a worker or self-employed, the person must be doing work which genuine and effective and is not on such a small scale as to be marginal and ancillary¹. In order to clarify the position for DMs the Department has decided to apply a Minimum Earnings Threshold, as part of a two tier process.

Tier 1: whether the Minimum Earnings Threshold has been met for a required period; **and**

Tier 2: in cases where the Minimum Earnings Threshold criteria have not been met whether the EEA national was in genuine and effective work assessed against a set of secondary criteria.

With respect to claims for and entitlement to JSA(IB), this two tier assessment process must be applied with effect from 1.3.14. With respect to claims for entitlement to IS and ESA(IR), the two tier assessment process should be applied from 6.10.14 and in respect of SPC, from 3.11.14.

1 Case C-53/81 D.M. Levin v Staatssecretaris van Justitie

073036 - 073037

Tier 1 – Minimum Earnings Threshold

073038 An EEA national who has worked as an employee or in a self-employed capacity will be automatically considered as a worker or self-employed person for the purposes of EU law if

1. their average gross earnings from employment or self-employment in the UK were more than £672 pcm (£155 a week) in 2015/16, **and**
2. the gross earnings were at or above that level for a continuous period of 3 months immediately before the date from which benefit has been claimed.

If these conditions are met, DMs should accept that the work activity was genuine and effective and that while the work was done, the EEA national had worker or self-employed status, as appropriate, in EU law. In this case there is no need to apply the Tier 2 assessment.

Note: The level of the Minimum Earnings Threshold is linked to the level of the HMRC Primary Earnings Threshold (PET) (see DMG Chapter 27, Appendix 2), which is the point at which employees must pay Class 1 National Insurance Contributions. Self-employed have to pay Class 2 and Class 4 NICs around this point too. As the PET level is updated every April, DMs should ensure that they use the PET level relevant to the 3 month period of earnings under consideration. Where this period spans the April PET uprating, DMs should use the pre-uprating PET rate for the entire 3 month period.

073039

Tier 2 – Minimum Earnings Threshold criteria not met

073040 In all cases where an EEA national's average gross earnings from employment or self-employment fall below the Minimum Earnings Threshold and/or their earnings have not been at or above that level for a continuous period of 3 months, the DM will need to examine each case as a whole, taking account of all circumstances, to determine whether the EEA national's activity was genuine and effective, and not marginal and ancillary and decide whether the person is or was a "worker" or a "self-employed person", applying the guidance set out below.

073041

Deciding if a person is/was a "worker" – factors to take into account

073042 Article 45 of the Treaty on the Functioning of the European Union (TFEU) says that freedom of movement for workers shall be secured within the EU and specified legislation¹ defines "worker" as meaning a worker within the meaning of Article 45 (see DMG 072810 – 072811).

1 Imm (EEA) Regs 2016, reg 4(1)(a)

073043 The following principles can be derived from EU case law

1. The term "worker" has an EU law meaning¹ and may not be interpreted restrictively²

claimant could not be treated as habitually resident because he had not been living in the UK for the 3 months period immediately prior to the date of claim. The DM decided therefore that the claimant was a person from abroad and not entitled to JSA(IB).

Example 2

The claimant was a French national. She came to the UK on 6.10.14 and claimed SPC on 17.12.14. It emerged that the claimant had been working on a self-employed basis as an interpreter. Since arriving she had worked for 12 hours per week on average charging a fee of £15 per hour. The DM decided that the claimant's activity as a self-employed person was genuine and effective and that consequently the claimant had a right to reside as a self-employed person and was therefore not a person from abroad. As she had a right to reside as a self-employed person she was deemed in law not to be a person from abroad and so did not have to satisfy the habitual residence test and was awarded SPC accordingly.

073059 – 073079

Genuine Prospects of Work (GPoW) - JSA(IB)

Introduction

073080 EEA nationals who have been unemployed and claiming JSA for

1. 6 months as a retained worker **or**
2. a total of 91 days as a jobseeker

will lose their EU right to reside in the UK, **unless** they provide **compelling evidence** that they are continuing to seek employment and that they have a genuine chance of being engaged. In which case, a short extra period of JSA(IB) will be allowed.

Note: This paragraph will not apply to anyone with a right to reside other than as a jobseeker (see 073084) or person retaining worker status (see 073085).

073081 The key changes deal with the length of period of residence as a jobseeker and the extent to which it is possible to enjoy repeat periods of residence as a jobseeker or person retaining worker status, from 1.7.14.

073082 - 073083

Jobseekers

073084 DMG 073240 explains a jobseeker's right to reside. With effect from 1.1.14, the definition of a jobseeker¹ is a person who

1. either
 - 1.1 entered the UK in order to seek employment² **or**

- 1.2** is present in the UK and seeking employment immediately after having a right to reside as a worker, self-employed person, a self sufficient person or a student³ **and**
- 2.** can provide evidence that they are seeking employment and have a genuine chance of being engaged⁴.

Note: a “worker” within **1.2** does not include a person retaining worker status under specified legislation⁵.

1 Imm (EEA) Regs 2016, reg 6(1); 2 reg 6(5)(a); 3 reg 6(5)(b); 4 reg 6(6); 5 reg 6(2)(b)

Retaining Worker Status

073085 DMG 072821 and 072822 set out the conditions for a right to reside as a worker who retains worker status after having worked as an employee and then becoming involuntarily unemployed.

Employed in the UK for less than one year

073086 A person who¹

- 1.** has registered as a jobseeker with the relevant employment office **and**
- 2.** is in duly recorded involuntarily unemployment after having been in genuine and effective employment in the UK for **less than one year and**
- 3.** can provide evidence that they are seeking employment and have a genuine chance of being engaged

will only retain worker status for a maximum of 6 months starting with the first day of duly recorded involuntary unemployment².

Note: this paragraph should be read in conjunction with DMG 073087 below.

1 Imm (EEA) Regs 2016, reg 6(2)(c); 2 reg 6(3)

073087 This group will cease to have a right to reside as retained workers after 6 months (there has been no change in the immigration rules for this group). However, in practice if a claimant falls into this group, and makes a claim after 1.1.14, they will be subject to a GPoW assessment at the end of 6 months and the reclaiming rules apply (see DMG 073111).

073088 However, if a claimant in this group made a claim before 1.1.14, they will cease to have a right to reside as a retained worker after 6 months but they may

- 1.** be entitled to be treated as jobseekers **and**
- 2.** make a new claim to JSA **and**
- 3.** receive JSA for 6 months before having a GPoW assessment.

073089

Employed in the UK for one year or more

073090 From 1.1.14, a person who¹

1. has registered as a jobseeker with the relevant employment office **and**
2. is in duly recorded involuntary unemployment after having been in genuine and effective employment in the UK for a year or more **and**
3. can provide evidence that they are seeking employment and have a genuine chance of being engaged

retains worker status for 6 months starting with the first day of duly recorded involuntary unemployment. After that they can only retain worker status if they can provide compelling evidence that they are continuing to seek employment and have a genuine chance of being engaged² (see DMG 073099). Transitional provisions³ provide that any period of duly recorded involuntary unemployment or any period during which a person is a jobseeker, prior to 1.1.14, should be disregarded.

1 Imm (EEA) Regs 2016, reg 6(2)(b), (5) & (6); 2 reg 6(7); 3 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013, Sch 3, para 1(b)

073091

The Genuine Prospect of Work Test

073092 With effect from 1.1.14, an EEA national cannot have a right to reside as

1. a jobseeker (as defined in DMG 073084) **or**
2. a person who has retained worker status in accordance with DMG 073085 to 073090

for longer than the relevant period unless they can provide **compelling evidence** that they are continuing to seek employment and have a **genuine chance of being engaged**¹. This is assessed through the genuine prospect of work test.

1 Imm (EEA) regs 2016, reg 6(7)

The Relevant Period

073093 The meaning of the relevant period¹

1. in relation to a retained worker who becomes involuntarily unemployed following a period of more than 12 months in work, is defined as a continuous period of 6 months **or**
2. in relation to a jobseeker, is defined as 91 days, minus the cumulative total of any days during which jobseeker status has been enjoyed previously, not including any days prior to a continuous absence from the UK of at least 12 months.

Note 1: In practice, prior to 10.11.14 when the relevant period for a jobseeker was 182 days (see **Note 2**), DMs should not apply the distinction between the relevant periods in **1.** and **2.** above. DMs should apply **a period of 6 months** to a jobseeker falling within **2.**.

Note 2: From 10.11.14 (see DMG 073142) in relation to a jobseeker at **2.** above, the relevant period was amended from 182 days to 91 days.

1 Imm (EEA) Regs 2016, reg 6(1)

When does the relevant period start?

073094 The relevant period starts from the first day of any successful claim to JSA made on or after 1.1.14. But see guidance at DMG 073101 to 073108 about the effect of interruptions occurring during the relevant period.

Note: Waiting days (see DMG 20901) count towards calculating the relevant period.

073095 The relevant period starts from the date of the successful claim to JSA, where the 3 month residence requirement has already been satisfied.

Standard of proof

073096 Whether a person has a genuine chance of being engaged in genuine and effective work (*Antonissen* (see 073240)) is a matter which falls to be decided on the civil standard of proof (see DMG Chapter 1 (01343 et seq)). That is proof that

1. the fact more probably occurred than not **and**
2. common sense, not law, requires that in deciding the question, regard should be given to inherent probabilities (see DMG Chapter 1 (01392)).

Within this context, the evidence provided by the claimant for having a genuine chance of being engaged must outweigh the fact that the claimant has been unable to find work after 6 months of unsuccessful jobseeking.

Genuine chance of being engaged

073097 The requirement to provide compelling evidence applies both to

1. continuing to seek genuine and effective employment (see DMG 21522 – 21791) **and**
2. having a genuine chance of being engaged.

Note: The need for the chance should be founded on something objective (i.e. that it is **genuine** as opposed to illusory or speculative), but also the **likelihood** that the **chance** will come to fruition within a reasonable period of time. There has to be a chance of a real prospect of success in obtaining work that is genuine and effective. The evidence provided at the end of the relevant period must show that their circumstances have changed in such a way that merits a continuation of their jobseeker status¹.

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Other relevant considerations

073101 The relevant period provided to jobseekers, in order to look for work, may be spread over a number of different periods as a jobseeker, but not exceeded¹. A person is always entitled to retain worker status for 6 months.

1 Imm (EEA) Regs 2016, reg 6(1)

073102 Where a claimant who was previously claiming JSA and whose claim ended before the GPoW assessments makes a subsequent claim to JSA, then they always get the balance of the relevant period remaining **unless** they had

1. obtained genuine and effective work and had worker status in that job **or**
2. been outside the UK for a continuous period of 12 months or more.

If **1.** or **2.** applies then they will be entitled to a fresh right to reside, and consequently entitled to JSA, for 6 months. At the end of that 6 month period, the GPoW assessment is conducted as normal.

073103 – 073105

JSA(Cont)

073106 JSA(Cont) is not subject to a right to reside condition. However there will be cases where when they first become unemployed, claimants satisfy the conditions for JSA(Cont) only and then later become entitled to JSA(IB). Time spent on JSA(Cont) would only be relevant to the GPoW assessment, where a person, reaching their 6 month point for receiving JSA(Cont), seeks to transfer from JSA(Cont) to JSA(IB).

Note 1: Whilst JSA(Cont) is limited to 6 months, this is a separate period to the relevant GPoW period.

Note 2: In some circumstances JSA(IB) can be paid in addition to JSA(Cont) (see DMG Chapter 23 for guidance).

073107 Only periods of entitlement to JSA(Cont) or JSA(IB) count towards the relevant period. Periods of credits only and periods between claims do not count towards calculating the relevant period. However, what the claimant has done between periods of claim will affect whether a further relevant period applies e.g. whether the claimant has worked since his last claim and retained worker status.

Note: Credits only claims are not subject to HRT. However, the period of a JSA(Cont) claim can be taken into account when calculating the balance of time to the GPoW end date.

Example 1

Salvatore, an Italian national, first came to the UK on 31.1.14 and immediately claimed JSA. Although he had jobseeker status he had not been in the UK for 3 months and his claim was disallowed. However he was awarded credits from 1.2.14. On 1.5.14 Salvatore made a new claim to JSA(IB). He now satisfied the 3 month residency requirements and was subsequently able to satisfy the HRT and general JSA entitlement conditions. Accordingly, the DM decided he was entitled to JSA(IB) from 1.5.14. On 16.6.14 Salvatore ended his claim to JSA. Salvatore made a new claim to JSA on 18.8.14.

The DM considered that Salvatore satisfied the 3 month residence requirement (he had not left the UK or CTA between his two claims) and satisfied the HRT as an EEA jobseeker. The DM then had to consider Salvatore's previous claims when calculating date for the GPoW. When calculating part months an average month is 30 whole days (this is based on 365/12). The DM did not include the period 1.2.14 – 30.4.14 as this was prior to a successful claim to JSA, when Salvatore had not satisfied the 3 month residence requirement but the period when he was claiming credits. The period 1.5.14 – 15.6.14 is 1 month 15 days. Therefore 4 months 15 days remains towards the relevant period. Therefore, as the interval between claims does not count, the DM determined that Salvatore's GPoW due date was 1.1.15.

Example 2

Maria, a Dutch national, has been living and working in the UK for 3 years when she is laid off due to a downturn in the business. She claims JSA(Cont). Although this is not subject to HRT she was given the GPoW fact sheet at her New Jobseeker Interview.

After 6 months her JSA(Cont) exhausts and she completes a claim for JSA(IB). The DM determines that she has already been claiming JSA for 6 months (during which time she had a right to reside as a person who retained worker status) her GPoW is due immediately and must be completed before a final decision can be given on her right to reside. If she cannot show a GPoW at this time, she will no longer have a right to reside as either a retained worker or a jobseeker and her entitlement to JSA will end.

073108 Certain interruptions will be disregarded in calculating when the relevant period ends. Where the claimant offers evidence at their GPoW interview that they have previously been treated as available for (see DMG 21309 – 21419) and actively seeking work (see DMG 21690 – 21791), consideration can be given to an extension of the GPoW end date. Examples for consideration may include periods of

1. up to 13 weeks when the claimant is a victim of domestic violence and is treated as available for work in accordance with the guidance at DMG 21369 et seq **or**
2. temporary absence from GB (see DMG 075350 et seq) **or**
3. Sickness.

Note: The above list is not exhaustive. However, the period that the claimant was treated as available for and actively seeking work must have been previously accepted by the employment office and must have been noted on the system.

073109 - 073110

Further claim to JSA made after GPoW assessment

073111 Where a claimant makes a further claim to JSA after having a GPoW assessment and they

1. obtained genuine and effective work and had retained their worker status (see DMG 072821 - 072822) through that job **or**
2. had been outside the UK for
 - 2.1 a continuous period of 12 months or more **or**
 - 2.2 less than 12 months, and they satisfy the GPoW at the point of this further claim

they may be entitled to a new period on JSA¹. They must satisfy the HRT, and if they have had more than a short absence from the UK, they must also satisfy the 3 month residence requirement (see DMG 072986 – 072999). Then, if either **1.** or **2.1** are met, they are entitled to a new relevant period on JSA before a GPoW assessment is due.

Note 1: If **2.2** applies (i.e. they have been absent from UK for less than 12 months and at the point of this claim they have met the compelling evidence² requirements for the GPoW at DMG 073100), they are entitled to claim JSA up until the job start date (if they have one) or for the relevant period, followed by a GPoW assessment.

Note 2: If neither **1.** or **2.1** or **2.2** are met, the claimant is not entitled to JSA.

1 Imm (EEA) Regs 2016, reg 6(8); 2 reg 6(10)

Genuine and effective work

073112 DMs should only accept that the claimant has provided compelling evidence of good prospects of employment or self-employment if, after applying the criteria described in DMG 073031 – 073058, the prospective employment or self-employment would be genuine and effective work.

073113 If, following the examination of the case

1. the DM decides that the employment or self-employment will not be genuine and effective work, he should decide that the claimant has not provided compelling evidence that he has good prospects of employment **or**
2. the DM decides that the employment or self-employment will be genuine and effective, he should decide that the claimant has provided compelling evidence that he has good prospects of employment and extend the relevant period as per DMG 073099.

073114 - 073119

Part-time work

073120 Where a claimant is undertaking work activity at the date of claim which (although part-time) is determined by the DM to be genuine and effective (see DMG 073031 to 073058), the claimant has current “worker”¹ or “self-employed”² status as appropriate. They are not subject to GPoW while they have this status. The right to reside status should be reviewed if the work activity ends.

1 Imm (EEA) Regs 2016, reg 6(1)(b); 2 reg 6(1)(c)

073121 Where a claimant is undertaking work activity at the date of claim which is not determined by the DM to be genuine and effective (i.e. that the work is on such a small scale as to be marginal and ancillary), the claimant has not gained “worker” status and therefore cannot retain worker status (see DMG 073085). Although they are working, the claimant would have “jobseeker” status¹. The claimant would be subject to a GPoW assessment as usual.

1 Imm (EEA) Regs 2016, reg 6(2)

What happens if claimant fails GPoW test?

Joint Claims

073122 Where a claimant (claimant 1) loses their right to reside following a GPoW assessment in which they fail to demonstrate a genuine prospect of work, claimant 1 will no longer be entitled to JSA. In circumstances where the claimant's partner (claimant 2) then makes a claim to JSA, demonstrating their own right to reside as a retained worker or jobseeker (having satisfied the 3 month residence requirement and the habitual residence test), claimant 2 will be entitled to JSA for the relevant period. Claimant 1 can also be included within the claim made by claimant 2, as claimant 1 now derives a right to reside from claimant 2. If claimant 2 then loses their right to reside following a GPoW assessment, neither claimant 1 or claimant 2 will be eligible for further JSA unless they can demonstrate a new right to reside in such circumstances as are described in this guidance.

Family Members

073123 DMs will need to be aware that if a JSA claimant has lost their EU rights to reside it may be that there are family members whose EU right to reside derives from the claimant's who will, as a consequence, also lose their EU rights to reside. The following are family members¹ for these purposes

1. spouse (husband or wife) or civil partner **or**
2. direct descendants of the EEA national, his spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 dependants of his, his spouse or civil partner **or**
3. direct ascendant relatives of the EEA national, his spouse or civil partner, who are dependants.

Where this applies the DM should decide that the claimant is not entitled to JSA(IB). If a family member makes a claim for JSA(IB) the DM should also decide that they are also not entitled to JSA(IB).

Note 1: "Spouse" within this paragraph includes two people of a same sex couple.

Note 2: This may also be the case with regard to extended family members (see DMG 073235 5. and 073236).

Note 3: This paragraph also applies to family members who make a claim for IS, ESA(IR) or SPC, whose only EU right to reside is derived from the claimant.

1 Imm (EEA) Regs 2016, reg 7(1)

073124 - 073125

Extending GPoW assessments to stock EEA nationals

Introduction

- 073126 From 1.1.14, EEA nationals who had been unemployed and claiming JSA for six months lost their EU right to reside as either a jobseeker or retained worker, unless they provide compelling evidence that they continued to have a GPoW (DMG 073080 – 073123). From 10.11.14, further measures have been introduced for EEA jobseekers (the position for retained workers remains the same as introduced at 1.1.14) which reduces that six month period to 91 days (after serving the three month residence requirement) (DMG 072986 to 073027). If claimants are able to provide compelling evidence at their GPoW assessment interview, a short extension period of JSA(IB) may be allowed (DMG 073099 to 073100).
- 073127 For ease of operational implementation, the above measures were initially applied to all new claims to JSA made on or after 1.1.14. From 9.2.15, the process of applying GPoW assessments to all remaining EEA nationals whose entitlement to JSA(IB) started prior to 1.1.14 (“stock cases”) commenced. GPoW assessments are applied to stock cases with effect from 9.5.15 (i.e. after a three month notification period has elapsed) (see DMG 073129 to 073130 below).

Does legislation allow for GPoW to be applied to claims made before 1.1.14?

- 073128 Immigration Regulations¹ allow DMs to apply the GPoW provisions to claims made before 1.1.14. However where the award commenced prior to 1.1.14, only periods from 1.1.14 count towards the time limit for calculating the relevant period as a jobseeker or retained worker.

Note: Guidance at DMG 073090 has been amended to clarify that the transitional provisions² provide that any period of duly recorded involuntary unemployment or any period during which a person was a jobseeker prior to 1.1.14, is to be disregarded.

1 Imm (EEA) Regs 2016; 2 Imm (EEA) (Amdt) (No. 2) Regs 2013, Sch 3, para 1(b)

Three month notification

- 073129 From 9.2.15, existing JSA(IB) stock cases were identified and claimants advised that a review of their right to reside in the UK and their continued entitlement to JSA(IB) will be undertaken in three months time, at their GPoW assessment interview. In areas where there were high volumes of stock cases, a phased approach was agreed between Work Services Directorate and the relevant Benefit Delivery Centre.

Note: An EEA retained worker stock case will be subject to the same three month notice period as an EEA jobseeker stock case (see DMG 073134 below).

1. genuine and effective work (see DMG 073031 - 073058) **and**
2. due to commence within 3 months

an extension may be allowed to the day before the job actually starts, or is due to start (whichever is the earlier) (see DMG 073099 1. and 073100, Examples 1 and 2).

073139 Where the claimant

1. provides evidence that a change in their circumstance has given them a genuine prospect of employment (see DMG 073112 to 073113) (for example, relocation to an area where there are improved labour market conditions) **and**
2. is awaiting the outcome of job interviews

an extension of up to 3 months may be allowed (see DMG 073099 2. and 073100, Examples 3 and 4).

Loss of Housing Benefit

073140 EEA nationals who lose their right to reside and lose their entitlement to JSA(IB) also lose their entitlement to HB. HB circular A6/2014 provides guidance in relation to the removal of entitlement to HB in respect of EEA jobseekers.

Right to Reside as a jobseeker - JSA

Introduction

073141 From 1.1.14 Immigration Regulations were amended to restrict the right to reside for EEA jobseekers to six months, unless they provide compelling evidence that they have a genuine chance of being engaged. Further amendments were introduced from 10.11.14¹ which mean that an EEA national who comes to the UK to look for work will still have a total of six months residence as an EEA jobseeker in the UK, but that this will be made up of the initial three month right of residence², followed by a right to claim JSA(IB) as a jobseeker for the latter 91 days. This also applies where the claimant has resided in the UK for more than 3 months prior to the date of claim. In such cases, the claimant will still only receive JSA for 91 days.

Note 1: For GPoW guidance from 1.1.14, please see DMG 073092 – 073123.

Note 2: An EEA national with a right to reside as a jobseeker may be exempt from the three month residence requirement³, if they are Posted Workers. In these cases the claimant will be entitled to access JSA(IB) for 3 months + 91 days (see DMG 072800 and 073011 - 073027).

1 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014 (2014 No. 2761), reg 1;

2 Imm (EEA) Regs 2016, reg 13; 3 JSA Regs, 85A(2A)

Relevant period

073142 Guidance at DMG 073093 advises on the meaning of relevant period. The relevant period during which a person is entitled to enjoy a right to reside in the UK as a jobseeker (see DMG 073093 2.) was amended from 182 days to 91 days from 10.11.14¹.

1 Imm (EEA) Regs 2016, regs 6(1) & 6(8)(b)

On entry jobseeker

073143 On or after 10.11.14 an EEA national, **who for the first time** relies on their right to reside as a jobseeker

1. has arrived in the UK **and**
2. has completed their initial three month right of residence¹ (see DMG 072986 – 072999)

will enjoy 91 days of residence as a jobseeker, before being required to provide compelling evidence that they have a genuine chance of being engaged in employment². The 91 day period starts from the first day of a successful claim to JSA made on or after 10.11.14.

Note: Where an EEA national has been resident in the UK for longer than the required three month residence period prior to making a successful claim to JSA, that person would still enjoy 91 days of residence as a jobseeker before undergoing a GPoW assessment.

1 Imm (EEA) Regs 2016, regs 13; 2 reg 6(1) & 6(7)

Example 1

Piotr, a Polish national, came into the UK to seek work in June 2014. He made a claim to JSA on 16.11.14. The DM determined that Piotr had satisfied the three month residence requirement and found him to be factually habitually resident. The DM determined that Piotr's award of JSA(IB) would end after 91 days on 14.2.15, unless Piotr could show a genuine chance of being engaged. Although there was evidence that Piotr had already been in the UK for five months when he made his claim to JSA on 16.11.14, he will be entitled to 91 days, from the start of his successful claim to JSA, before his GPoW is due.

Note: Waiting days (see DMG 20901) count towards calculating the relevant period.

Example 2

Georg, an Austrian national, has been resident and working in genuine and effective employment in the UK for the last 6 months. Georg is then posted to work at his company's Barcelona branch for a period of 6 months. On completion of his 6 months working in Spain, Georg's contract ends and he returns immediately to the UK where he makes a claim to JSA. Georg provides a pay slip which shows that at some time during the 3 month period prior to making his claim to JSA, he has paid UK Class 1 NICs for the period whilst working in Spain. The DM therefore

determines that Georg is an EEA posted worker and is exempt from the three month residence requirement, so can immediately be treated as habitually resident. Georg is entitled to JSA as a jobseeker for a total period of 3 months + 91 days before being subject to a GPoW assessment.

073144

Jobseeker – previous right to reside in another capacity other than as a jobseeker since 1.1.14

073145 On or after 10.11.14, an EEA national who prior to their claim to JSA

1. exercised a right to reside in the UK in another capacity¹ (for example as a worker or student) **and**
2. transfers to residence in a jobseeking capacity

will enjoy 91 days residence as a jobseeker², starting from the first day of a successful claim to JSA, before being required to provide compelling evidence that they have a genuine chance of being engaged in employment³.

Note: A jobseeker is entitled to exercise a right to reside for up to 91 days after serving their three month right of residence (for breaks in claim, see DMG 073153). Any period where the claimant was receiving JSA with a different right to reside (see 1.) must not be deducted from the 91 days.

1 Imm (EEA) Regs 2016, reg 6(5)(b); 2 reg 6(8)(b); 3 reg 6(7)

Example

Anton, a Hungarian national, worked in genuine and effective employment until due to a lack of work he became involuntarily unemployed when his contract ended in December 2014. He claimed JSA immediately and was determined to have retained his worker status. He was entitled to six months before his GPoW assessment.

In April 2015, Anton returned to Hungary for 2 weeks to visit his family and his entitlement to JSA ended, having been in receipt of it for approximately 4½ months. On his return to the UK, Anton made a new claim to JSA from 1.5.15. The DM determined that Anton now had jobseeker status, was subject to the three month residence requirement, but determined that as Anton's absence was temporary it did not mean that Anton had ceased to be living in the UK during that absence. The DM determined that Anton was habitually resident. As he held retained worker status during the previous award this is not deducted from the relevant period for this new claim. Anton is entitled to 91 days before his GPoW, so his relevant period ends on 30.7.15. His GPoW will be booked to take place on or soon after 31.7.15.

073146

Retained worker

073147 An EEA national who, on or after 10.11.14, satisfies the conditions in DMG 072821 and retains worker status will continue to enjoy six months residence as a person who retains worker status before being required to provide compelling evidence that they have a genuine chance of being engaged in employment¹.

1 Imm (EEA) Regs 2016, regs 6(1) & 6(7)

Example

Andrzej, an Estonian national, provided evidence at his GPoW interview on 5.10.14 that he had a full time job to start on 26.10.14. An extension was granted until 25.10.14.

The contract ended after six months and Andrzej made a new claim to JSA from 1.5.15. As he retained his worker status, Andrzej had a new six month period before his GPoW was due.

073148

Absence from the UK of 12 months or more

073149 Before being required to provide compelling evidence that they have a genuine chance of being engaged in employment¹, an EEA jobseeker who is returning to jobseeking following an absence from the UK of 12 months or more, will be

1. treated as an on entry jobseeker (DMG 073143) **and**
2. required to satisfy the three month residence requirement

before they can enjoy the 91 days relevant period as a jobseeker.

1 Imm (EEA) Regs 2016, reg 6(7) & 6(8)(b)

Example

Ernst, a German national, claimed JSA and was given a GPoW due date of 1.12.14. He was unable to provide evidence of a genuine prospect of work at his GPoW assessment and his right to reside as a jobseeker ended. He left the UK to return to Germany where he found work, but came back to this country on 4.1.16. As he had been away from the UK for more than a temporary period, he was subject to the three month residence requirement.

Ernst made a new claim to JSA from 4.4.16. As he had previously reached GPoW stage and had then left the UK for a continuous period of 12 months or more, Ernst is entitled to a new period of 91 days as an on entry jobseeker.

073150

Absence from the UK of less than 12 months

073151 Where, since last claiming JSA, the claimant has been out of the UK for a continuous period of less than 12 months, the claimant may only enjoy a period of 91 days of jobseeker status, starting from the first day of a successful claim to JSA,

if they are able to provide compelling evidence of a genuine prospect of engagement from the outset¹. Such claimants are subject to an immediate “Post GPoW New Claim Assessment” to provide them with the opportunity to demonstrate this.

Note: For guidance relating to the “Post GPoW New Claim Assessment”, please refer to operational guidance.

1 Imm (EEA) Regs 2016, reg 6(8) – 6(10)

Example 1

Nils, a Swedish national, has previously been in receipt of JSA(IB) for six months as a retained worker. As a result of moving labour market to a better area for the type of work he was looking for, Nils was granted a short extension at GPoW stage pending the outcome of some interviews he had attended. However, the expected work did not materialise and when JSA ended Nils returned to Sweden for a month to visit family.

On his return Nils made a new claim to JSA from 3.3.15. His only potential right to reside would be as a jobseeker. As he has only been out of the UK temporarily to visit family, the DM determines that he was subject to the three month residence requirement but decided that the absence was temporary and that Nils had not ceased to be living in the UK during that absence, and could be treated as habitually resident. However as Nils has already had a GPoW decision and has left the UK for less than 12 months, the DM determines that Nils must go through the “Post-GPoW New Claim Assessment” before a final decision can be made on the right to reside. The DM telephones Nils and completes the assessment form over the phone. Taking into account the information provided by Nils, the DM determines that he has not shown an improved prospect of work and makes the decision that Nils has no qualifying right to reside. Nils must therefore be treated as a person from abroad and has no entitlement to JSA(IB).

Example 2

Sergej, a Lithuanian national, claimed JSA and was given a GPoW due date of 11.11.14. Due to a busy diary the Jobcentre were unable to book his GPoW interview until 17.11.14. However, Sergej signed off on 14.11.14, before going through the GPoW interview. He returned to Lithuania for 4 months.

On 16.3.15 Sergej returned to the UK. He needed to satisfy the three month residence requirement, during which time he gained an HGV licence and applied for jobs. He made a new claim to JSA from 16.6.15.

Although Sergej had not previously had a GPoW interview, records show that he had exhausted his allowed period before a GPoW was due. As this is the case the DM follows the post GPoW new claim process and telephones Sergej to complete the assessment form.

Sergej is able to show that he has significantly improved his prospects of work by gaining an HGV licence. He is also able to provide evidence to show that he has 10

live applications for work related to his new qualification and is awaiting the outcome of a number of interviews.

The DM determines that Sergej is entitled to a new period of 91 days before GPoW.

073152

Breaks in claim

073153 An EEA jobseeker who breaks their claim before reaching their GPoW assessment should, upon their return to jobseeking, enjoy the balance (if any) of their original 91 day period¹ starting from the first day of their successful claim to JSA (unless they have an absence abroad of 12 months or more (see DMG 073149)).

Note 1: This paragraph follows the same principle for those claimants whose original claim was calculated with a six month GPoW due date (see DMG 073102).

Note 2: Where a claim to JSA is made prior to 10.11.14 and there is no break in the claim, the claimant will enjoy the full 6 months as a jobseeker.

1 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014, reg 4

073154 In the case of an EEA jobseeker who made a claim to JSA on or after 1.1.14, so began their claim with a six month GPoW due date, but who, before reaching their six month GPoW assessment

1. breaks their claim to JSA before 10.11.14 but makes a new claim to JSA on or after 10.11.14 **or**
 2. breaks their claim to JSA on or after 10.11.14 then makes a new claim to JSA
- will only be given the remaining balance (if any) of a 91 day period.

Note 1: An immediate GPoW assessment may be required in some cases.

Note 2: see DMG 073162 - 073163 for transitional provisions.

073155

JSA(Cont)

073156 JSA(Cont) is not subject to the Habitual Residence Test. An EEA national who meets the conditions of entitlement to JSA(Cont) will continue to receive JSA(Cont) for a period of six months.

073157 Where a claim is made to JSA, an EEA national who satisfies the conditions for entitlement to both JSA(Cont) and JSA(IB), who does not retain their worker status, would receive JSA(IB) as a jobseeker for 91 days before being required to undergo a GPoW assessment. If at that GPoW assessment, the claimant was unable to provide compelling evidence of a genuine chance of being engaged in employment, they would no longer be able to exercise their right to reside as a jobseeker and their entitlement to JSA(IB) would end. However as their entitlement to JSA(Cont) is for a period of six months, if at the time entitlement to JSA(IB) ends, their entitlement to JSA(Cont) has not yet exhausted, JSA(Cont) would remain in

payment after the JSA(IB) ends. For further guidance relating to JSA(Cont), please see DMG 073106 – 073107.

Note: System case controls will be set to notify DMs of entitlement to JSA(C).

Example

Gustav, a Norwegian national, lives with his civil partner who is unable to work due to health problems. He made a claim to JSA from 1.2.15. He satisfied the conditions to receive JSA(Cont), having paid enough NICs during the relevant tax years. However, as he had left his job voluntarily he did not retain worker status. A DM determined that he had status as a jobseeker and had satisfied the three month residence requirement. The relevant period of 91 days was due to end on 2.5.15. For this period he received additional JSA(IB) as he was also claiming for an inactive partner.

Gustav was unable to demonstrate a GPoW when required and could no longer exercise a right to reside as a jobseeker and his entitlement to JSA(IB) ended.

As he was entitled to JSA(Cont) for 182 days this element of the claim remained in payment after the JSA(IB) ended.

Note: JSA(Cont) and JSA(IB) may not always start on the same date (see DMG 073158).

073158 Where an EEA jobseeker makes a claim to JSA and is entitled to JSA(Cont), but as a result of a change of circumstances later becomes entitled to JSA(IB), the calculation of the relevant 91 day period, starts from the point that their JSA(Cont) claim started. An immediate GPoW assessment may be required in some cases.

073159

Joint Claims

073160 DMG 073122 provides guidance on joint claims where claimant 1 loses their right to reside and is no longer entitled to JSA following their failure at a GPoW assessment to demonstrate a genuine chance of being engaged, and claimant 2 then makes a claim to JSA, demonstrating their own right to reside as a retained worker or jobseeker (and the jobseeker having satisfied the three month residence requirement and habitual residence test). In such circumstances where, for example, claimant 2 demonstrates a right to reside as a jobseeker, claimant 2 will be entitled to 91 days before their GPoW due date. Claimant 1 can also be included within the claim made by claimant 2, as claimant 1 now derives a right to reside from claimant 2.

Example

Louis, a French national, made a claim to JSA online from 1.1.15 and is awarded JSA(IB). The DM determined that he retained worker status and had six months before GPoW, his relevant period ending on 30.6.15. During this time his wife, Anne, also French, is treated as his family member rather than exercising her own

rights. As Anne is his partner she is not subject to an HRT interview. On 1.7.15 Louis attended a GPoW interview but could not provide compelling evidence that he had a GPoW. He no longer had a right to reside and his JSA(IB) claim closes. Anne no longer derives rights from him as he has no right to reside.

Following the GPoW decision on Louis' claim, the couple decide that Anne should become the principal claimant. Anne therefore makes a claim to JSA with herself as the principal claimant. An HRT decision is made on Anne. The DM determines that as she cannot be treated as retaining worker status she has a right to reside as a jobseeker and is habitually resident. She is entitled to 91 days before her GPoW is due. During this time Louis is able to derive a right to reside from Anne.

073161

Transitional provisions

073162 Any period after 31.12.13, but prior to 10.11.14, during which a person has enjoyed a right to reside as a jobseeker is to be taken into account¹ for the purposes of determining

1. the relevant period in relation to that person **and**
2. whether that person has previously enjoyed a right to reside under specified legislation².

Note: Where there has been no break in the claim, and the 6 month relevant period was determined to start prior to 10.11.14 and end after 10.11.14, the claimant will continue to enjoy the full 6 month period before being subject to a GPoW assessment.

1 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014, reg 4(1);

2 Imm (EEA) Regs 2016, reg 6(8)

073163 Where the relevant period in 073162 1. would result in a negative balance, the relevant period is to be treated as though it were zero days¹.

1 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014, reg 4(2)

Example

Antonia, an Italian national, previously made a claim to JSA in May 2014 when it was determined that she had jobseeker status and was awarded JSA(IB) for approximately 4½ months until 14.9.14. She then signed off in order to start a college course but after a couple of months decided that it did not suit her. She returned to the labour market and started applying for jobs.

Antonia made a new claim to JSA from 24.11.14. The DM determined that, as she had previously been a jobseeker and had the same right to reside again, the duration of the previous claim must be deducted from the relevant period of 91 days. However as the previous claim lasted 4½ months, which is more than 91 days, the relevant period is treated as zero days and Antonia is subject to an immediate GPoW assessment. The DM makes the right to reside decision specifying that

experienced lower back pain. He was treated as available for and ASE for each of these 2 week periods.

On 16.7.15 person A was involved in a car accident, where he sustained fractures to his arm and clavicle. He submitted a fit note to say that he was unfit for work for 13 weeks. Person A's extended period of sickness was set from 16.7.15 to 14.10.15. On 15.10.15, person A recovers as expected and resumes his normal jobseeking activities.

The DM calculates that by the end of person A's relevant period on 29.10.15, he will have had periods of sickness totalling 17 weeks:

21.5.15 to 3.6.15	=	2 weeks
18.6.15 to 1.7.15	=	2 weeks
16.7.15 to 14.10.15	=	13 weeks (extended period of sickness)
Total	=	17 weeks

The DM allows a fixed extension of 17 weeks (see DMG 073171 above) and extends person A's relevant period to 25.2.16. Person A will be required to attend a GPoW assessment interview on 26.2.16.

073174 - 073180

Exemptions to the Habitual Residence Test

Persons exempted from the general rule on the right of permanent residence

- 073181 The general rule on the right of permanent residence requires that EEA nationals and their family members have resided legally in the UK for five years¹ (see DMG 073350 et seq). Workers or S/E persons and their family members, who have ceased activity, acquire the right to reside in the UK permanently without that requirement². To be a “worker or S/E person who has ceased activity” a person must be an EEA national who either
1. stops working **and**
 - 1.1 has reached the age at which he is entitled to a state pension on the day he stops working **or**
 - 1.2 if he is a worker, stops working to take early retirement **and**
 2. was working in the UK for at least twelve months before stopping **and**
 3. resided in the UK continuously for more than three years before stopping³ **or**
 4. stops working in the UK because of a permanent incapacity to work **and**
 - 4.1 has resided in the UK continuously for over two years before stopping **or**
 - 4.2 the incapacity resulted from an accident at work or an occupational disease entitling him to a pension payable in full or in part by an institution in the UK⁴ **or**
 5. a person who was the family member of a worker or S/E person where
 - 5.1 the worker or S/E person has died **and**
 - 5.2 the family member resided with him immediately before his death **and**
 - 5.3 the worker or S/E person had resided continuously in the UK for at least two years immediately before his death or the death was the result of an accident at work or an occupational disease⁵.

Where the spouse or civil partner of the worker or S/E person is a UK national the conditions on length of residence or time working will not apply⁶.

1 Imm (EEA) Regs 2016, reg 15(1)(a) & (b) & Directive 2004/38/EC, Art 16; 2 reg 15(1)(c) & (d); 3 reg 5(2); 4 reg 5(3); 5 reg 15(1)(e); 6 reg 5(6)

073182

Refugees/Persons granted humanitarian protection

073183 Refugees¹ are people who are outside their country of origin and are unwilling to return there for fear of persecution because of their

- race

Right to reside

073234 Regulations¹ provide that a person cannot be habitually resident where he does not have a qualifying right to reside in the CTA unless he falls within one of the exclusion categories. But see transitional provisions² for those already in receipt of benefit at 30.4.04. There is no statutory definition of the term “right to reside”. Whether a person has a right to reside in the UK is determined by domestic nationality and immigration law for non-EEA nationals and by EU law and domestic immigration law for EEA nationals arriving in the UK and claiming free movement rights³.

*1 IS (Gen) Regs, reg 21AA; JSA Regs, reg 85A; ESA Regs, reg 70(2); SPC Regs, reg 2;
2 SS Hab Res Regs, reg 6; 3 R(IS) 8/07*

073235 The following persons have the right to reside in the UK and therefore in the CTA

1. UK nationals (including persons from other countries who are granted British citizenship) **or**
2. all EEA nationals and their family members with an initial right of residence **or**
3. “qualified persons” **or**
4. family members of “qualified persons” or EEA nationals with a permanent right of residence **or**
5. extended family members of “qualified persons” or EEA nationals with a permanent right of residence **or**
6. family members who retain the right of residence **or**
7. persons who have acquired the right of permanent residence **or**
8. the parent and primary carer of the child of a migrant worker who is in education in the UK.

Note: this list is not exhaustive.

Extended right of residence

073236 Qualified persons have the right to reside in the UK for as long as they remain qualified persons. Family members of qualified persons and of EEA nationals with a permanent right of residence are entitled to reside in the UK as long as they remain family members of those persons (see DMG 073252 for the definition of “family member”).

073237

Qualified persons

073238 A “qualified person”¹ is an EEA national who is in the UK and, by virtue of EU legislation, is

1. a jobseeker (see DMG 073084) **or**
2. a worker **or**
3. a S/E person **or**
4. a self-sufficient person **or**
5. a student.

1 Imm (EEA) Regs 2016, reg 6(1)

073239

Jobseekers

073240 Jobseekers who have registered with Jobcentre Plus and have claimed JSA will have a right to reside for an initial period of six months, and for longer if they can provide evidence that they are seeking employment, and have a genuine chance of being engaged¹. A person who is a jobseeker will not satisfy the right to reside element of the habitual residence test for IS, ESA(IR) and SPC², but will satisfy the test for JSA(IB)³. Family members of persons who have a right to reside as a jobseeker will not have a right to reside for IS, ESA(IR) or SPC purposes⁴.

Note: Decision makers should keep under review whether the person continues to have a genuine chance of being engaged, for example where they make repeated claims for JSA having not previously secured work.

1 Directive 2004/38/EC, Art 14(4)(b); Case C-292/89, Antonissen; Imm (EEA) Regs 2016, reg 6(1) & reg 14;

2 IS (Gen) Regs, reg 21AA(3); ESA Regs, reg 70(3); SPC Regs, reg 2(3); 3 JSA Regs, reg 85A(3);

4 IS (Gen) Regs, reg 21AA(3)(b)(ii); ESA Regs, reg 70(3)(b)(ii); SPC Regs, reg 2(3)(b)(ii)

073241

Workers and self-employed persons

073242 Workers and S/E persons continue to have a right to reside¹ (see DMG 072821 & DMG 072861).

1 Directive 2004/38/EC, Art 7; Imm (EEA) Regs 2016, reg 14(1)

073243

Self-sufficient persons with comprehensive sickness insurance

073244 EEA nationals who

1. have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the UK **and**

2. have comprehensive sickness insurance cover in the UK for themselves and their family members

and their family members have a right to reside¹ but must **also** satisfy the second element of the Habitual Residence Test - the factual assessment of habitual residence.

Note: Social assistance includes HB, ESA(IR), IS, JSA(IB), SPC and UC.

1 Directive 2004/38/EC, Art 7(1)(b); Imm (EEA) Regs 2016, reg 4(1)(c)

073245 An EEA national's resources (and where applicable the resources of their family members) are to be regarded as "sufficient" if¹

1. they are greater than the level of resources at or below which a British Citizen (and where appropriate their family members) would be entitled to social assistance in the UK **or**
2. 1. above does not apply (i.e. resources are not above social assistance levels) but, taking into account the personal situation of the person concerned (and where applicable their family members), it appears to the DM that the resources of the person(s) concerned should be regarded as sufficient.

1 Imm (EEA) Regs 2016, reg 4(2) & 4(4)

073246 The requirement for comprehensive sickness insurance is not met by simple access to free treatment under the NHS. However, a claimant will have comprehensive sickness insurance where the UK is entitled to reimbursement of NHS healthcare costs from another Member State¹. This will usually be the case where the claimant is receiving a pension or invalidity benefit from another Member State, but it can arise in other circumstances. The European Health Insurance Card (EHIC) only offers comprehensive sickness insurance where the EU citizen concerned has not moved residence to the UK and intends to return to his home state, such as a student on a course in the UK².

1 SG v Tameside MBC (HB) [2010] UKUT 243 (AAC);

2 European Commission COM 2009) 313 & SG v Tameside MBC (HB) [2010] UKUT 243 (AAC)

073247

Students

073248 A student¹ means a person who

1. is enrolled for the principal purpose of following a course of study (including vocational training) at a public or private establishment which is
 - 1.1 financed from public funds **or**
 - 1.2 otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the UK in which the establishment is located" **and**

2. assures the Secretary of State that he has, and (where their right to reside is dependent on being a family member of the student) his family members have, sufficient resources to avoid him and his family members becoming a burden on the social assistance system of the UK **and**
3. is covered by sickness insurance in respect of all risks in the UK (see 073246 above) .

1 Directive 2004/38/EC, Art 7(1)(c) and (d); Imm (EEA) Regs 2016, reg 4(1)(d)

Comprehensive Sickness Insurance for family members of students

073249 From 6.4.15, specified legislation¹ was amended which brings in the requirement for EEA nationals who are exercising Treaty rights in the UK as a student, to hold comprehensive sickness insurance cover not only for themselves, but also for their family members. Prior to 6.4.15, EEA nationals who were residing in the UK as students were required to hold comprehensive sickness insurance for themselves, but the regulations did not explicitly require such persons to also hold comprehensive sickness insurance for any family members who were residing in the UK with them. That was in contrast to the requirements for self-sufficient persons, who are explicitly required to hold comprehensive sickness insurance for themselves and their family members. The changes from 6.4.15 bring the requirements for family members of students in line with those for the family members of self-sufficient persons.

1 Imm (EEA) Regs 2016, reg 4(2), 4(3) & 4(4)

Family Members

073250 The family members of a qualified person (see DMG 073238) residing in the UK or an EEA national with a permanent right to reside have the same rights to reside as that qualifying person or EEA national as long as¹

1. they remain a member of the family of that person **and**
2. that person continues to be a qualifying person or to have a permanent right to reside.

1 Imm (EEA) Regs 2016, reg 14(2)

073251

Meaning of “family member”

073252 For the purposes of the extended right to reside, a “family member” means¹

1. spouse or civil partner **or**
2. direct descendants of the EEA national, his spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 dependants of his, his spouse or civil partner **or**

3. direct ascendant relatives of the EEA national, his spouse or civil partner, who are dependants **or**
4. extended family members (see DMG 073293)

Note: See DMG 072901 for advice on dependency

1 Imm (EEA) Regs 2016, reg 7(1)

073253

Family Members of British Citizens

073254 If certain conditions are satisfied, family members (as defined in DMG 073252) of British citizens have the same EU law rights to reside as they would if they were a family member of another EEA state¹. Those conditions were amended with effect from 1.1.14 but there are some transitional provisions. The following guidance gives the conditions as they were before 1.1.14, then the new conditions and finally the details of the transitional provisions.

1 Imm (EEA) Regs 2016, reg 9

073255

The old rules

073256 Prior to the amendment described below, a person who was a family member of a British citizen ("BC") enjoyed the same rights to reside as if they were a family member of an EEA national but only if

1. the BC was either
 - 1.1 residing in an EEA State as a worker or S/E person **or**
 - 1.2 so residing before returning to the UK **and**
2. if the family member was the spouse or civil partner of the BC, they were living together in the EEA state where the BC was residing as a worker or S/E person as in **1.1 or**
3. had married or entered into a civil partnership before the BC returned to the UK after having resided in an EEA state as a worker or a S/E person as in **1.2.**

073257

The new rules

073258 With effect from 25.11.16, a person who is a family member (as defined in 073252) of a British citizen (BC) has the same rights to reside in the UK as if they were the family member of a national of any other EEA state, provided that the following conditions are satisfied¹

1. the BC
 - 1.1 was residing in an EEA state (other than the UK) as a worker, S/E person, self-sufficient person or student immediately before returning to the UK **and**
 - 1.2 had acquired a right of permanent residence in an EEA state **and**
2. the family member and BC resided together in the EEA state **and**
3. the family member and BC's residence in the EEA state was genuine.

Note: For the purposes of 1.2 the BC is only to be treated as having acquired the right of permanent residence in the EEA state², if such residence would have led to the acquisition of the right of permanent residence³, had it taken place in the UK.

1 Imm (EEA) Regs 2016, reg 9(2); O&B (C-456/12); 2 Imm (EEA) Regs 2016, reg 9(6); 3 reg 15

073259 From 25.11.16, factors that are relevant to whether residence in an EEA state (other than the UK) is or was genuine, include¹

1. whether the centre of the BC's life transferred to the EEA state **and**
2. the length of the family member and BC's joint residence in the EEA state **and**
3. the nature and quality of the family member and BC's accommodation in the EEA state and whether it is or was the BC's principal residence **and**
4. the degree of the family member and BC's integration in the EEA state **and**
5. whether the family member's first lawful residence in the EU with the BC was in an EEA state.

1 Imm (EEA) Regs 2016, reg 9(3)

073260 There is no application¹ of the regulation in the circumstances where

1. the purpose of the residence of the BC in the other EEA state was as a means to circumvent any immigration laws² applicable to any non-EEA family members to have leave to enter or remain in the UK **or**
2. a person is only eligible to be treated as a family member as a result of being an extended family member³ (see 073293).

1 Imm (EEA) Regs 2016, reg 9(4); 2 Immigration Act 1971; 3 Imm (EEA) Regs 2016, reg 7(3)

073261 Where it is necessary to treat a BC as though the BC were an EEA national¹, for the purposes of determining whether the BC would be a qualified person² (see 073238)

1. any requirement to have comprehensive sickness insurance (see 073244 – 073246 and 073249) cover in the UK still applies, except that cover is not required to extend to the BC **or**
2. in assessing whether the BC can continue to be treated as a retained worker³, the BC is not required to satisfy condition A⁴ (see 073084) **or**

3. in assessing whether the BC can be treated as a jobseeker², the BC is not required to satisfy condition A⁴ and where relevant, condition C⁵.

1 Imm (EEA) Regs 2016, reg 9(7); 2 reg 6(1); 3 reg 6(2)(b) or (c); 4 reg 6(5); 5 reg 6(9)

Definition of EEA national

073262 The Imm (EEA) Regs set out the rights of EEA nationals to reside in the UK. UK nationals are excluded from the definition of “EEA national”. With effect from 16.10.12 the definition also excludes people who are nationals of both an EEA state and the UK¹. Thus a person with that sort of dual nationality is not entitled to a right to reside conferred by the Imm (EEA) Regs in their own right; neither can family members derive an EU right to reside from such a person. This change reflects the judgment of the CJEU in McCarthy². The transitional provisions preserving the rights of family members of persons with dual UK/EEA nationality are set out in DMG 073263 – 073264 below.

1 Imm (EEA) Regs 2016, reg 2(1); 2 Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department

Transitional provisions

073263 The amended rules will not apply¹ to the family member (F) of a British citizen (BC) where one of the conditions set out below applied as at 1.1.14. (This transitional protection will continue to apply until the date determined in accordance with DMG 073262).

1. F was a person with a permanent right to reside² under the Imm (EEA) Regs (see DMG 073350 et seq) **or**
2. F was a person with a right to reside under the Imm (EEA) Regs who³
 - 2.1 held a valid registration certificate, residence card or EEA family permit issued under the Imm (EEA) Regs **or**
 - 2.2 had made an application under the Imm (EEA) Regs for a registration certificate, residence card or EEA family permit which (as at 1.1.14) had not yet been determined **or**
 - 2.3 had made an application under the Imm (EEA) Regs for a registration certificate or residence card which had been refused **and either**
 - 2.3.a the time limit for an appeal against that refusal had not yet expired (excluding the possibility of an out of time appeal) **or**
 - 2.3.b an appeal against a refusal is pending.

*1 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013, Sch 3, para 2(1), para 2(2)
2 para 2(2); 3 para 2(3)*

073264 The old rules continue to apply until the occurrence of the earliest of one of the following events

1. where DMG 073263 2.1 or 2.2 apply and where F has (or has applied for) an EEA family permit, the date 6 months after an EEA family permit has been issued, if, within that 6 month period F has not been admitted to the UK¹ **or**

2. where DMG 073263 **2.3.a** applies, the date the time limit for an appeal expires² **or**
3. where DMG 073263 **2.3.b** applies, the date the appeal is finally determined, withdrawn or abandoned³ (except, of course, where the outcome of the appeal is favourable to F with the result that a registration certificate or residence card must be issued) **or**
4. the date on which F ceases to be⁴
 - 4.1 the family member of an EEA national **or**
 - 4.2 a family member who has retained the right to reside (as described in DMG 073300) **or**
5. in a case where F has a permanent right to reside, the date on which that right is lost because of an absence from the UK for a period of more than 2 consecutive years⁵.

1 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013, Sch 3, para 2(4)(a); 2 para 2(4)(b); 3 para 2(4)(c); 4 para 2(4)(d); 5 para 2(4)(e)

Transitory provisions

073265 Guidance at 073263 – 073264 sets out transitional provisions for cases prior to 1.1.14. For the purposes of 073258 to 073261, any application made under the Imm (EEA) Regs 2006 between 25.11.16 and 1.2.17 for

1. an EEA family permit **or**
2. a registration certificate **or**
3. a residence card **or**
4. a document certifying permanent residence **or**
5. a permanent residence card **or**
6. a derivative residence card

made but not determined before 25.11.16, is to be treated as having been made under the Imm (EEA) Regs 2006¹.

1 Imm (EEA) Regs 2016, reg 44 & Sch 5, para 2

073266 - 073290

Family members of students

073291 In the case of an EEA student, other than a student who is a “qualified person” under other provisions, after the period of three months beginning on the date on which the student is admitted to the UK only the following shall be treated as his family members¹

1. his spouse or civil partner **or**

2. the dependent children of the student, his spouse or civil partner.

1 Imm (EEA) Regs 2016, reg 7(2)

073292

“Extended family members”

073293 An “extended family member” is a person (who is not a family member of an EEA national within the meaning given in DMG 073252 **1 to 3.**) who is a relative (plus, in one case, a partner) of an EEA national, who is treated as a family member for the purposes of the right to reside aspect of the habitual residence test only. They may or may not be EEA nationals¹.

1 Directive 2004/38/EC, Art 3(2); Imm (EEA) Regs 2016, reg 8

073294 An extended family member should have an EEA family permit, a registration certificate or a residence card. They will continue to be treated as a family member as long as they hold such documents¹ **and**

1. reside in any state other than the UK and are dependent on the EEA national or is a member of the EEA national's household² **or**
2. satisfied the conditions in **1.**, and are accompanying the EEA national to the UK or wish to join the EEA national in the UK³ **or**
3. satisfied the conditions in **1.**, and have joined the EEA national in the UK and continue to be dependent (see DMG 072901) on the EEA national or a member of his household⁴ **or**
4. on serious health grounds strictly require the personal care of the EEA national, his spouse or civil partner⁵ **or**
5. would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the UK as a dependent relative of the EEA national were the EEA national a person settled and present in the UK⁶ (where this applies DMs should submit such cases to DMA Leeds for advice as evidence from the HO will be needed and their guidance will be required on the application of the Immigration Rules) **or**
6. are the partner of an EEA national (other than a civil partner) and can prove that they are in a durable relationship with the EEA national⁷.

Extended family members of EEA nationals who are students are issued with family permits, registration certificates or residence cards under specific provisions. DMs should submit such cases to DMA Leeds for advice as evidence from the HO will be required about the provisions under which those documents have been issued.

*1 Imm (EEA) Regs 2016, reg 7(3); 2 reg 8(2)(a) & 8(7); 3 reg 8(2)(b) & 8(7);
4 reg 8(2)(c) & 8(7); 5 reg 8(3) & 8(7); 6 reg 8(4); 7 reg 8(5)*

073295 - 073299

“Family member who retains the right of residence”

073300 Under certain circumstances a family member of an EEA national may retain the right to reside on the death or departure from the UK of the EEA national¹. To retain the right of residence the person

1. must
 - 1.1 have been the family member of a qualified person or an EEA national with a permanent right to reside when that person died **and**
 - 1.2 have resided in the UK in accordance with the Regulations for at least the year before the death of the qualified person or the EEA national with a permanent right to reside **and**
 - 1.3 satisfy the condition that either
 - 1.3.a although not an EEA national, he would, if he were one, be a worker, self-employed person or self-sufficient person for the “qualified person” provisions **or**
 - 1.3.b he is the family member of a person who falls within 1.3.a².

In other situations where the claim is based on a family member’s retained right of residence cases should be submitted to DMA Leeds for guidance. This applies in particular to cases where the right relates to the attendance by the person or their children on an educational course³ or where it relates to termination of the marriage or civil partnership of the family member to the qualified person⁴.

1 Directive 2004/38/EC, Art 12; Imm (EEA) Regs 2016, reg 10; 2 reg 10(2); 3 reg 10(3) & (4);

4 Directive 2004/38/EC, Art 13; Imm (EEA) Regs 2016, reg 10(5)

073301 - 073349

Permanent right of residence - 5 Years Residence

073350 The EU Citizenship Directive¹ introduced for the first time a permanent right to reside for EU citizens and members of their family who have resided legally in a host Member State of the EU for a continuous period of five years. The Directive was brought into force in the UK by regs² which took effect from 30.4.06.

1 Directive 2004/38/EC; 2 Imm (EEA) Regs 2006

073351 Under the Imm (EEA) regs 2016 the following persons acquire the right to reside in the UK permanently

1. an EEA national who has resided in the UK in accordance with the Imm (EEA) Regs 2016 for a **continuous** period of five years¹ **or**
2. family members of EEA nationals (who are not themselves EEA nationals) who have resided in the UK in accordance with the Imm (EEA) Regs 2016 for a **continuous** period of five years².

Note: Subject to DMG 073360, a break in continuity during which residence is not in accordance with the Imm (EEA) Regs will mean that the five year qualifying period has to be served afresh.

1 Imm (EEA) Regs 2016, reg 15(1)(a); 2 reg 15(1)(b)

073352 The five year qualifying period therefore includes periods during which the EEA national

1. was a jobseeker (see DMG 073240) **or**
2. was a worker or self employed person in the UK **or**
3. retained worker status in the UK whilst temporarily incapable of work because of illness or accident or whilst involuntarily unemployed and seeking work **or**
4. was both self-sufficient and had comprehensive sickness insurance for themselves and their family members **or**
5. was a student who was both self sufficient and had comprehensive sickness insurance **or**
6. was a family member accompanying or joining a person who satisfied the above conditions.

Note: this list is not exhaustive

073353 Periods of workseeking mixed with periods of work will normally count for the purposes of considering a permanent right of residence¹.

1 Directive 2004/38/EC Art 7

073354 Periods of residence completed in accordance with a derivative right to reside (see DMG 073387 et seq) **do not count** towards the acquisition of a permanent right to reside¹.

1 Imm (EEA) Reg 2016s, reg 15(2); Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department. Case C529/11

073355 - 073359

Temporary absences that do not break continuity

073360 Certain temporary absences from the host Member State will not break the continuity of residence¹

1. absences not exceeding six months in a year **or**
2. absences of more than six months for compulsory military service **or**
3. one absence of a maximum of 12 consecutive months for important reasons such as
 - 3.1 pregnancy **or**
 - 3.2 childbirth **or**
 - 3.3 serious illness **or**
 - 3.4 study or vocational training **or**
 - 3.5 a posting abroad

Note: although these absences do not break the continuity of residence requirement, they do not count towards the accrual of the 5 years continuous residence².

1 Directive 2004/38/EC, Art 16(3); 2 CIS/2258/08

073361 From 1.2.17, additional criteria are added to the circumstances where continuity of residence is broken¹. This is when the EEA national

1. serves a sentence of imprisonment² **or**
2. has a deportation or exclusion order made in relation to that person **or**
3. is removed from the UK under the Imm (EEA) Regs 2016.

1 Imm (EEA) Regs 2016, reg 3(3); 2 Onuekwere (C-378/12); MG (C-400/12)

Qualifying period - effect of periods of residence before 30.4.06 – EEA nationals

073362 Subject to DMG 073366 below, any period during which an EEA national carried out activities or was resident in the UK in accordance with specific regulations¹ (i.e. the UK regulations and Directives concerning the right to reside in EU law that were in force before 30.4.06) is to be treated as a period in which that activity or residence was in accordance with the Imm (EEA) Regs 2016². Accordingly this will count towards the qualifying period for the acquisition of a permanent right to reside. **But note that the permanent right to reside can only take effect from 30.4.06.**

1 Immigration (European Economic Area) Regs 2000; Immigration (European Economic Area) Order 94; Dir 64/221 /EEC; Dir 68/360/EEC; Dir 72/194/EEC; Dir 73/148/EEC; Dir 75/34/EEC; Dir 75/35/EEC; Dir 90/364/EEC; Dir 90/365/EEC; Dir 93/96/EEC; 2 Imm (EEA) Regs 2016, Sch 6, para 8(2);

073363

Qualifying period - periods before accession

073364 Subject to paragraph DMG 073366 below, any period during which a national of a non-EEA state which subsequently became an EEA state carried out an activity or was resident in the UK throughout which they

1. had leave to enter or remain in the UK **and**
2. would have been carrying out that activity or residing in the UK in accordance with the Imm (EEA) Regs 2016

2.1 had the Imm (EEA) Regs 2016 been in force **and**

2.2 the person's state of nationality had been an EEA state

at that time.

is to be treated¹ as a period of activity or residence in the UK completed in accordance with the Imm (EEA) Regs 2016. Such periods will therefore count towards the acquisition of a permanent right to reside.

1 Imm (EEA) Regs 2016, Sch 6, para 8(3)

073365

Periods where residence was not in accordance with the regs

073366 A period during which the conditions in DMG 073362 or 073364 above were satisfied will not be regarded¹ as a period of activity or residence completed in accordance with the Imm (EEA) Regs 2016 where it was followed by a period of more than two consecutive years throughout which

1. the person was absent from the UK **or**
2. the person's residence in the UK was not in accordance with paragraphs DMG 073362 or DMG 073364 **or**
3. was not otherwise in accordance with the Imm (EEA) Regs 2016.

1 Imm (EEA) Regs 2016, Sch 6, para 8(4)

073367

Effect of absence after right to permanent residence acquired

073368 Once acquired on or after 30.4.06, the right of permanent residence is only lost by absence from the host Member State for a period exceeding two consecutive years¹.

1 Directive 2004/38/EC, art 16(4); Imm (EEA) Regs 2016, reg 15(3)

073369 - 073380

Primary Carers

Introduction

073381 Certain children and their primary carers have a right to reside in the UK. This is known as a derivative right to reside. The guidance below describes the conditions for this right to reside. A primary carer satisfying those conditions satisfies the requirement that they have a right to reside in the CTA. However they have to be actually habitually resident in the CTA.

Note: periods of residence in the UK as a result of a derivative right to reside do not count towards the five year qualifying period needed to acquire a permanent right to reside.

073382

Meaning of “exempt person”

073383 In DMG 073385 & 073387 below “exempt person” means¹ a person

1. who has a right to reside in the UK as a result of any provision in the Imm (EEA) regs other than a derivative right to reside² **or**
2. who has a right of abode in the UK by virtue of specific legislation³ (which includes British citizens) **or**
3. to whom specific legislation⁴ exempting certain persons from the requirement to have leave to enter or remain applies (for example certain aircrew & seamen who are under an engagement requiring them to leave within 7 days and certain diplomats) **or**
4. who has indefinite leave to enter or remain in the UK.

1 Imm (EEA) Regs 2016, reg 16(7)(c); 2 reg 16; 3 Immigration Act 1971, s 2; 4 s 8

073384

Meaning of “primary carer”

073385 A person is to be regarded¹ as the primary carer of another person (“the child”) if they are a direct relative or legal guardian of the child **and**

1. they have primary responsibility for the child’s care **or**
2. they share equally the responsibility for the child’s care with one other person (“the joint primary carer”) provided that the joint primary carer is not an exempt person

Note 1: the term “direct relative” is not defined in the Imm (EEA) Regs but should be taken as including direct relatives in the ascending line (i.e. parents, grand parents, great grandparents) of the child, but not uncles, aunts, cousins etc.

Note 2: a person is not to be regarded as having responsibility for a person’s care on the sole basis of a financial contribution towards that person’s care².

1 Imm (EEA) Regs 2016, reg 16(8); 2 reg 16(11)

073386

Derivative Rights to Reside

073387 A person who is not an exempt person has a derivative right to reside¹

Primary Carer of a Self-sufficient child

1. where that person² is the primary carer of an EEA national **and** that EEA national
 - 1.1 is under the age of 18 **and**
 - 1.2 is residing in the UK as a self-sufficient person **and**
 - 1.3 would be unable to remain in the UK if the primary carer left the UK for an indefinite period.

Note: The child must be self sufficient (see DMG 073248). The primary carer is treated as a family member of the child³ so the child and the primary carer must have sufficient combined resources to ensure that the primary carer does not become a burden on the social assistance system of the UK during their period of residence. Equally both must have comprehensive health insurance cover. **A primary carer with the type of derivative right to reside described in subparagraph 1 will not normally be entitled to IS, JSA(IB), ESA(IR) and SPC.**

Person in general education

2. where⁴
 - 2.1 any of the child’s parents is an EEA national who resides or has resided in the UK **and**
 - 2.2 both the child and EEA national parent reside or have resided in the UK at the same time and during such a period of residence, the EEA national parent has been a worker (see DMG 073407 below) **and**

2.3 the child is in general education (see DMG 073405 below) in the UK.

Note 1: The EEA national who has worked or been a worker must be the parent of the child(ren) (see **2.2** above). A derivative right of residence does not arise where the worker is a grandparent.

Note 2: From 1.2.17, where a child of an EEA national has a derivative right to reside because they are in education in the UK, the EEA national parent does not have to have been resident when the child first entered education (see **2.3** above)

Primary carer of a person in general education

3. where⁵

3.1 that person is the primary carer (see DMG 073385) of a person in general education in the UK who satisfies the conditions in subparagraph **2.** above **and**

3.2 that person in education would be unable to continue to be educated in the UK if the primary carer left the UK for an indefinite period (but see DMG 073403 for how this rule applies where there are joint primary carers)

Dependant children of a primary carer

4. where⁶

4.1 that person (“the child”) is under the age of 18 **and**

4.2 the child does not have leave to enter or remain in the UK **and**

4.3 the child’s primary carer is entitled to a derivative right to reside in the UK as the primary carer of a person in education in accordance with subparagraph **3.** above **and**

4.4 the child’s primary carer would be prevented from residing in the UK if the child left the UK for an indefinite period..

1 Imm (EEA) Regs 2016, reg 16(1); 2 reg 16(2), Case C-200/02 Zhu and Chen v Secretary of State for the Home Department; 3 Imm (EEA) Regs, reg 4(5); 4 reg 16(3); NA (Pakistan)(C-115/15); Reg (EEC) 1612/68, art 12; 5 reg 16(4), Case C 310/08 Ibrahim v London Borough of Harrow and Secretary of State for the Home Department; Case C-480/08 Teixeira v London Borough of Lambeth and Secretary of State for the Home Department; 6 reg 16(6)

Example

Lucia is a Spanish national. She entered the UK in July 2012 with her husband Hugo, also a Spanish national. Hugo worked in the UK but Lucia did not. The couple have a child, Alba born on 25.8.2003 who started primary school in the UK in September 2012. Alba is a Spanish national. In March 2013 the couple separated and Hugo returned to Spain. Lucia claimed ESA(IR) in April 2013. The DM decided that Lucia had a right to reside in the UK as Alba’s primary carer in accordance with **3.** above. It was evident that Alba would not be able to continue his general education in the UK if his mother and sole carer had to leave the country.

073388 Once a child of a migrant worker has gained a derivative right to reside, that right and the consequent right to reside of the primary carer will continue whilst ever the child remains in general education in the UK (see DMG 073405) and the ability of the child to remain in general education continues to require the presence of the parent/primary carer. It will not matter that the migrant worker might subsequently leave the UK.

073389 - 073399

Effect of Absences

073400 If the child leaves the UK for anything other than temporary periods, the rights under Article 12 will end. Absences of less than 6 months could be considered as temporary if that was the intention at the outset and remained so throughout. Longer absences could still be temporary depending on the reason for the absence.

073401 The derived rights to reside of a child in education described in DMG 073387 **2. & 3.** have their origins in a specific EU provision intended to facilitate the free movement of workers. They are triggered where an EEA national parent of the child is employed in the host Member State. Where an EEA national parent has worked in the UK and this is followed by a period when the parent and child are absent from the UK where (on return) the parent is not employed here, the DM will need to make a judgement as to whether the right has been lost during the absence in the light of the circumstances of the case. While a substantial period of habitual residence in another EEA state will mean that the right is lost, an absence that can properly be regarded as temporary will not have that effect. DMs should consider the following factors in relation to the period of absence

1. the reasons why the parent ceased to be resident in the UK **and**
2. the activities of the parent in the country to which they went, including economic activity **and**
3. the roots the parent put down in the country to which they went **and**
4. the contact which the parent maintained with the UK whilst absent and the quality of that contact **and**
5. the length of the absence (the longer the absence the more difficult it will be to maintain that the right can be reasserted).

073402

Application to joint primary carers

073403 Where there are joint primary carers, the condition described in DMG 073387 **3.2** is that the child would be unable to continue to be educated in the UK if **both** joint primary carers were required to leave the UK¹. However this condition does not apply if² one of the joint primary carers had acquired a derivative right to reside as a sole primary carer before sharing responsibility for care with a joint primary carer.

1 Imm (EEA) Regs 2016, reg 16(9); 2 reg 16(10)

073404

Meaning of “general education”

073405 General education can include up to and including university or similar courses and vocational courses, but the primary carer’s right to reside set out in DMG 073387 **3**, generally ends when the child reaches the age of majority. This is 18 in the UK¹. However it can 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 education². Whether there is a continuing need for the presence and care of the parent is a matter for determination by the DM. Factors to take into account include: the age of the child, whether the child is residing in the family home or whether the child needs financial or emotional support from the parent in order to be able to continue and to complete his education³. General education excludes nursery education, but does not exclude education received before compulsory school age where that education is equivalent to the education received at or after compulsory school age⁴. It usually starts around age 5. A primary carer of the child of an EEA national who has been employed in the host Member State is entitled to a derivative right to reside once that child has entered into reception class education⁵.

1 Family Law Reform Act 1969, s 1 Age of Majority (Scotland) Act 1969;

2 Teixeira v London Borough of Lambeth CJEU Case C-480/08 (para 87);

3 Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department, Case C-529/11; 4 Imm (EEA) Regs 2016, reg 16(7)(a);

5 Shabani[2013] UKUT 315 (IAC)

073406

Meaning of “worker”

073407 In 073387 **2.2** above a “worker” does not include¹ a jobseeker or a person who, on stopping work retains worker status in the circumstances described in DMG 072821. It also does not include a self employed person².

Note: See DMG 072810 to 072817 for guidance on when a person is a worker.

1 Imm (EEA) Regs 2016, reg 16(7)(b);

2 Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11);

RM v Secretary of State for Work and Pensions (IS) [2014] UKUT 401 (AAC) [2015] AACR 11

073408 Work carried out by a national of another Member State before that Member State joined the EU cannot trigger a right under DMG 073387. Where an A8 or A2 national has been employed in the UK on or after the date of accession, they may be a “worker” for the purposes of a derivative right to reside¹ if it is for an authorised employer, or the migrant worker is otherwise exempt from the requirement to register or seek authorisation. The A2/A8 national does not have to complete 12 months registered or authorised work in order to be regarded as a worker for the purposes of the derivative right to reside².

1 Reg (EEC) 1612/68, Art 12; 2 S of S for W & P v JS (IS) [2010] UKUT 347 (AAC)

073409 An A8 national is working for an authorised employer in the first month of any employment in the UK starting on or after 1.5.04¹, even if it is not subsequently registered: but an A2 national must seek authorisation before starting employed work in the UK². From 1.5.11 A8 nationals, and A2 nationals from 1.1.14, have full EU rights and do not need to register any work with the Home Office scheme.

1 Accession Regs 2004, reg 7(3); 2 Accession Regs 2006, reg 9

073410

Self-employed Parent

073411 A derivative right to reside under DMG 073387 **2. to 4.** can only apply where there is an EEA national parent who resided in the UK as a “worker” i.e. those who are in genuine and effective work that is more than marginal and ancillary and are under the direction of another (see DMG 072816 to 072817). It does not therefore apply to those who are genuinely self-employed i.e. employed on their own account¹.

1 Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11). at para 33; RM v Secretary of State for Work and Pensions (IS) [2014] UKUT 401 (AAC) [2015] AACR 11

073412

Derivative residence card

073413 A derivative residence card is a card issued to a person as proof of the holder’s derivative right to reside as at the date of issue¹. The card can also take the form of a stamp in the person’s passport. The card or stamp will be valid for five years or until a specified date and can be renewed upon application. However, the card itself does not confer a derivative right to reside which can only arise from satisfaction of the conditions in DMG 073387. DMs should not therefore rely on the existence of a derivative residence card as conclusive proof of a derivative right to reside.

1 Imm (EEA) Regs 2016, reg 20

EEA Right to reside - permanent residence

Introduction

073414 Guidance at DMG 073415 to 073443 is to enhance existing DMG guidance regarding permanent residence for EEA nationals and their families.

073415 Since 30.4.06, EEA nationals and their family members, who have resided legally in the UK for a continuous period of 5 years in accordance with laws relating to EU free movement rights that were in force during the 5 year period, will acquire a right of permanent residence¹ (see DMG [073350 - 073352](#)). This means they must have resided in the UK as a worker/S/E person (or someone who retained that status), or as a student or self-sufficient person (and had comprehensive sickness insurance - see [DMG 073246](#) and 073248 - 073249).

1 Directive 2004/38/EC, Art. 16; Imm (EEA) Regs 2016, reg 15

073416 An EEA national who has acquired the right of permanent residence on or after 30.4.06 will only lose that right if they are absent from the UK for more than 2 consecutive years¹ (see DMG [073368](#)).

1 Directive 2004/38/EC, Art. 16(4); Imm (EEA) Regs 2016, reg 15(3)

Continuity of residence - Breaks during 5 year qualifying period

073417 Detailed guidance in relation to temporary absences from the UK that do not break continuity of residence during the 5 year qualifying period can be found at DMG [073360](#). In general, temporary absences from the UK will not break the continuity of residence¹ if they

1. are no more than a total of 6 months a year **or**
2. comprise of one absence of up to a maximum of 12 consecutive months for important reasons, such as pregnancy and childbirth, serious illness, study or vocational training, or a posting to another country abroad **or**
3. are for compulsory military service.

Although these absences do not break the continuity of the residence requirement, they do not count towards the accrual of the 5 years continuous residence². This is because these absences will generally be periods when the claimant is not exercising a right to reside as defined within the EEA regulations.

1 Directive 2004/38/EC, Art. 16(3); 2 CIS/2258/08

Permanent residence with less than 5 years residence

073418 The general rule on the right of permanent residence requires that EEA nationals and their family members have resided legally in the UK for a continuous period of 5 years (see DMG [073350](#) et seq). Workers or S/E persons and their family members, who have ceased activity, can acquire a right to reside in the UK permanently without that 5 year requirement¹ (see DMG [073181](#), [073528](#) and [073613](#)).

Note: With regard to a family member, who retains the right of residence², see DMG [073300](#).

1 Imm (EEA) Regs 2016, reg 15(1)(c) & (d); 2 reg 15(1)(f) & reg 10

073419 A worker or S/E person who has ceased activity is a person who satisfies the conditions in DMG 073420, 073421, 073422 or 073423, and can acquire the right to reside in the UK permanently with less than 5 years residence.

073420 A worker or S/E person who

1. ceases activity as a worker or S/E person **and**
2. has reached the age at which they are entitled to a state pension on the date their work ceases or in the case of a worker, ceases working to take early retirement **and**

3. was working in the UK, as a worker or S/E person, for at least 12 months prior to ceasing work **and**
4. resided in the UK continuously for more than 3 years prior to ceasing work¹.

1 Imm (EEA) Regs 2016, reg 5(2)

073421 A worker or S/E person who

1. ceases activity in the UK as a worker or S/E person as a result of a permanent incapacity to work **and**
2. either
 - 2.1 that person resided in the UK continuously for more than 2 years prior to ceasing work **or**
 - 2.2 the incapacity is the result of an accident at work or an occupational disease that entitles that person to a pension payable in full or in part by an institution in the UK¹.

1 Imm (EEA) Regs 2016, reg 5(3)

073422 A worker or S/E person who

1. is active in an EEA state, but retains their place of residence in the UK, to which they return (as a rule) at least once a week **and**
2. prior to becoming active in that EEA state, had been continuously resident and continuously active as a worker or S/E person in the UK for at least 3 years¹.

1 Imm (EEA) Regs 2016, reg 5(4)

073423 A person who satisfies the condition in paragraph 073422 1. but not 073422 2. shall, for the purposes of 073420 and 073421, be treated as being active and resident in the UK during any period that they were working or S/E in the EEA state¹.

1 Imm (EEA) Regs 2016, reg 5(5)

073424 The family member of a worker or S/E person where

1. the worker or S/E person has died **and**
2. the family member resided with the worker or S/E person immediately before their death **and**
3. the worker or S/E person has resided continuously in the UK for at least 2 years immediately before their death, or the death was a result of an accident at work or occupational disease¹.

Note 1: For guidance in relation to family members of British citizens – see DMG [073254](#).

Note 2: For guidance in relation to extended family members – see DMG [073293 - 073294](#).

1 Imm (EEA) Regs 2016, reg 15(1)(e)

Periods of residence prior to 30.4.06

073425 In accordance with the CJEU judgments in *Lassal* and *Dias*, periods of residence prior to 30.4.06 (the date of transposition of Directive 2004/38) which were in accordance with earlier EU instruments relating to residence must be taken into account for the purposes of acquisition of permanent residence under Directive 2004/38 (see DMG [073362](#)). However, where a period of residence in accordance with the earlier EU instruments is followed by a period of more than 2 years during which the person's residence is not in accordance with earlier EU instruments, then the earlier period of residence will not count (see DMG [073366](#)).

Note: Subject to DMG [073360](#), a break in continuity during which residence is not in accordance with the Imm (EEA) Regs will mean that the 5 year period has to be served afresh.

Derivative right of residence

073426 Residence in the UK, which is a result of a derivative right of residence does not count towards the period for calculation of the 5 year period for permanent residence¹ (see DMG [073354](#)).

1 Imm (EEA) Regs 2016, reg 15(2); Alarape and Tijani (C-529/11)

Long-term jobseeker

073427 Guidance at DMG [073240](#) and [073080](#) advises that EEA jobseekers who have registered with Jobcentre Plus will have a right to reside for an initial period of 6 months¹. If the claimant is able to provide compelling evidence that they are continuing to seek employment and have a genuine chance of being engaged, a short extension period of JSA(IB) may be allowed (DMG [073099 – 073100](#) and 073138 - 073139).

1 Directive 2004/38/EC, Art 14(4)(b); Antonissen (C-292/89); Imm (EEA) Regs 2016, regs 6(1)) & 14

073428 Where a claimant is relying entirely on a right to reside as a jobseeker for the entire 5 year period for calculating permanent residence, it should be accepted that the immigration regulations¹ would be satisfied in those circumstances. This is because an EEA national acquires the right to reside in the UK permanently, where they have resided in the UK, in accordance with the immigration regulations for a continuous period of 5 years. Where a claimant has been awarded JSA(IB) on the basis of having a right to reside as a jobseeker, it should therefore be accepted that their continuous period of 5 years of pure jobseeking, would be sufficient for the acquisition of permanent residence.

Note 1: An accession state national, whose JSA claim commenced within the accession period, must have satisfied the accession regulations, in order to have had jobseeker status.

Note 2: With effect from 1.1.14, an EEA national cannot have a right to reside as a jobseeker or retained worker for longer than their relevant period, unless they provide compelling evidence that they are continuing to seek employment and have a GPoW² (see DMG [073092](#)). As such, unless they can demonstrate an alternative right to reside, their right to reside as a jobseeker or retained worker would cease at the end of their relevant period and they would no longer be residing legally in the UK.

1 Imm (EEA) Regs 2016, reg 15(1)(a); 2 reg 6(7)

Evidence to demonstrate permanent residence

073429 The following documents may be evidence that can be used when determining whether a person has gained a permanent right to reside

1. valid passport or ID card
2. marriage or civil partnership certificates
3. P60s, contracts or letters of employment for workers
4. Business accounts & tax returns for S/E persons
5. leases for premises used to conduct business
6. utility bills
7. document certifying permanent residence (issued by the HO) where the person is an EEA national – this document does not carry a date of expiry
8. permanent residence card (issued by the HO) where the person is a non-EEA national – this document is valid for 10 years from the date of issue and must be renewed upon application.
9. comprehensive sickness insurance (see DMG [073246](#) or 073248) where the EEA national claims to have resided in the UK as a self-sufficient person or student
10. Bank statements showing self-sufficiency
11. evidence of study
12. where the family member of an EEA national applies on the basis that the EEA national is a worker or S/E person who has ceased activity, they must supply
 - 12.1 evidence confirming the relationship **and**
 - 12.2 documentation confirming their EEA family member was employed or S/E prior to retirement or becoming permanently incapacitated **and**

- 12.3** documentation confirming permanent incapacity (where appropriate)
- 13.** where the family member of an EEA national applies on the basis that the EEA national has died, they must supply
- 13.1** the death certificate of the EEA national **and**
- 13.2** evidence confirming the relationship **and**
- 13.3** evidence that the EEA national had resided continuously in the UK for at least 2 years prior to death, or evidence that the death was as a result of an accident at work or occupational disease **and**
- 13.4** evidence that they were residing in the UK with the EEA national immediately prior to the EEA national's death
- 14.** Worker registration or Worker Authorisation documents in cases where the claimant is an accession state national who worked during the relevant accession period.

Note 1: For the purposes of **7.** and **8.**, documents cease to be valid if the holder ceases to have a right of permanent residence. This can happen when the right to reside is lost through absence from the UK for a period exceeding 2 consecutive years.

Note 2: For the purposes of **12.** and **13.**, the claimant could be an EEA national or non-EEA national.

This is not an exhaustive list.

Claimant unable to provide original documentary evidence

- 073430 The claimant has primary responsibility to provide original documentary evidence of their nationality, continuous residence and their qualifying status, throughout the 5 year period within which they wish to confirm that they have met the conditions for permanent residency. If the claimant has not provided sufficient evidence to the DM to confirm their status, the conditions for permanent residency will not be met.
- 073431 DMs should also utilise additional records available to them, to confirm whether or not the conditions for permanent residency have been met. For example, National Insurance Contribution records.
- 073432 Where the claimant declares that they may have acquired a right to permanent residency, but they are awaiting documentation to confirm this, the DM should allow the claimant a reasonable timescale to provide supporting evidence before making a decision.

Moving between alternate rights to reside

073433 Where a qualified person switches their status to that of another qualified person, the DM has the discretion to allow a period of up to 30 days, so that the gap between the claimant's statuses does not break a permanent right of residence.

073434 A cumulative break of up to 30 days in any 12 month period is allowable when switching between rights to reside, for example student to worker, worker to S/E person, S/E person to jobseeker, or between the end of one job and the start of the next. In such circumstances, the claimant will be required to provide evidence of

1. acquiring another right to reside as a jobseeker, worker, S/E person, student or self-sufficient person (or as a dependent) within 30 days of their previous right to reside ending **and**
2. acquiring a right to reside as a jobseeker, worker, S/E person, student, or self-sufficient person (or as a dependent) for the remainder of the 5 year period of continuous residence.

Note 1: Any work activity carried out must be genuine and effective.

Note 2: For accession state nationals (see DMG [073500](#) et seq), work carried out during the accession period must be in accordance with the accession regulations.

Note 3: Periods of residence as a Saint Prix worker (see DMG [073203 – 073216](#)) would count towards permanent residence.

Example 1

Person A is an Italian national. He arrived in the UK as a single person on 1.6.10. He claimed JSA as a jobseeker on 3.6.10 and signed off to start full time work as a retail assistant on 3.7.10. On 28.2.12 his employer closed down the shop and terminated person A's contract. Person A claimed JSA on 25.3.12 but was unsuccessful in finding work and signed off on 10.8.12. He started a F/T course as a student on 3.9.12 and took out a comprehensive sickness insurance policy. The course ended on 6.8.15 and person A made a claim to JSA the next day. The DM decided that person A had acquired a permanent right to reside as he had demonstrated 5 years continuous residence as a qualified person, and the break between his right to reside as a retained worker and a student maintained continuity as the break was within 30 days.

Example 2

Person B is a Dutch national. She arrived in the UK as a single person and started F/T work as a barista on 30.6.10. She continued to work F/T until 2.2.14 and then decided to leave. The next day she claimed JSA. The DM decided she was a jobseeker and informed her that she would be subject to a GPoW interview if she was still claiming JSA in 6 months time. Person B began receiving JSA(C) until it exhausted on 6.8.14. She found a F/T job as a receptionist which was due to start on 1.11.14. Person B presented this evidence at her GPoW interview and was

awarded an extension of JSA(IB) until 31.10.14. Person B left her job on 31.7.15 and claimed JSA. The DM decided that person B had acquired a permanent right to reside as she had demonstrated 5 years continuous residence as a qualified person. Person B was treated as a jobseeker for the period 3.2.14 – 31.10.14 as she had demonstrated she was actively seeking employment and had a genuine chance of engagement throughout that period.

073435 A break, as described within 073433 and 073434, would not be allowable when the break is within a single right to reside, such as a jobseeker. This is because the claimant, in those circumstances, has failed to comply with the requirements to demonstrate that right continuously (see 073440 with regard to disallowances).

Imprisonment

073436 Periods of imprisonment by an EEA national (or their family member) interrupt continuity of residence¹ for the purposes of satisfying the Residence Directive².

1 MG (C-400/12); Onuekwere (C-378/12); 2 Directive 2004/38/EC, Art. 16(3)

073437 The CJEU in *MG* point out that the imposition of a custodial sentence by a national court is an indication that the person concerned has not respected the values expressed by the society of the host Member State in its criminal law. Accordingly the taking into consideration of periods of imprisonment, for the purposes of the acquisition of the right of permanent residence, would clearly be contrary to the aim pursued by the Directive in establishing that right of residence.

073438 The CJEU in *Onuekwere* also found that the continuity of residence of 5 years is interrupted by periods of imprisonment in the host Member State. As a consequence, periods which precede and follow the periods of imprisonment may not be added up to reach the minimum period of 5 years required for the acquisition of a permanent residence permit. Therefore upon release from prison, a person must satisfy a new 5 year period, in order to acquire permanent residence status. The period of imprisonment does not count towards a permanent right to reside because it is a period when the claimant was not exercising a right to reside, nor exercising free movement rights.

073439 – 073441

Sanctions & Disallowances of JSA

073442 In the case of a sanction, payment of JSA is removed for a time, but entitlement may continue. So where the EEA national has not yet reached their GPoW assessment interview, they would still get their 6 months as a retained worker or 91 days as a jobseeker. The period of the sanction would not break continuity for the calculation towards the 5 year period for permanent residence.

073443 In the case of a disallowance, the JSA award ends. If the disallowance is for a fixed period, the claimant will have to reclaim JSA once the disallowance has ended. Once the claimant has made a repeat claim as a jobseeker (who has received such

a disallowance), they will get the balance (if any) of their relevant period. A period of disallowance would therefore break the continuity for the calculation towards the 5 year period for permanent residence.

Separation from EEA partner

073444 Family members have an automatic right of residence in the UK for as long as they remain the family member of an EEA national¹ who

1. is entitled to reside in the UK for an initial period of three months **or**
2. is a qualified person **or**
3. has a right of permanent residence (DMG [073250](#)).

The meaning of family member² includes (amongst others) a spouse or civil partner (DMG [073252](#) 1.)

1 Imm (EEA) Regs 2016, reg 14(2); 2 reg 7(1)(a)

073445 Where there has been a breakdown in the relationship and the spouse or civil partner no longer live in the same household as the EEA national, the spouse or civil partner is still considered to be a family member for as long as

1. the relationship between the spouse or civil partner and the EEA national has not been dissolved **and**
2. the EEA national continues to be a qualified person, or have a permanent right to reside¹.

If they later get divorced or legally terminate their civil partnership, the spouse or civil partner will only have a right to live in the UK if they satisfy the conditions² relating to a family member who has retained the right of residence (DMG [073300](#)).

Note: The breakdown in the relationship can also include a child under the age of 21, who is estranged from their parents. Such a child remains a family member without being in the same household³.

1 Imm (EEA) Regs 2016, reg 14(2); Diatta (C-267/83); 2 Imm (EEA) Regs 2016, reg 10; 3 reg 7(1)(b)(i)

073446 Where there has been a breakdown in the relationship and the claimant wishes to demonstrate permanent residence, the onus is on the claimant to provide documentary evidence of their EEA national sponsor. Where the claimant has been the victim of domestic violence (DMG 21369) and cannot provide such evidence, the DM should adopt a pragmatic approach. However, where there is no evidence available to the DM, the claimant's case is not proven.

Note: This guidance does not cover a couple who are LTAMC.

073447 - 073449

Rights to reside which are excluded

Introduction

073450 As stated in DMG 072771, a person cannot be treated as habitually resident in the CTA unless they have a right to reside. However certain EU rights to reside are specifically excluded by the regulations. Thus if a person **only** has an excluded right to reside, they cannot be treated as habitually resident in the CTA and so they are a person from abroad/person not in GB and therefore not entitled to IS, JSA(IB), ESA(IR) or SPC. The following paragraphs give details of the excluded rights to reside.

073451 - 073459

Initial right of residence

073460 All EEA nationals and their family members have the right to reside in any other Member State for a period of three months. This includes economically inactive people who are not required to be self-sufficient during this period¹.

1 Directive 2004/38/EC, Art 6; Imm (EEA) Regs 2016, reg 13

073461 This right to reside is specifically excluded by regs¹, so, persons who have a right to reside **solely** on the basis of the initial three month residence right referred to above will not be treated as habitually resident in the CTA and will therefore be persons from abroad/person not in GB.

1 IS (Gen) Regs, reg 21AA(3); JSA Regs, reg 85A(3); ESA Regs, reg 70(2); SPC Regs, reg 2(3)

073462 - 073465

Primary carers of British citizen children

073466 A person who is not an “exempt person” (see DMG 073383 for the meaning of this term) has a derivative right to reside in the UK if¹

1. they are the primary carer of a British citizen **and**
2. that British citizen is residing in the UK **and**
3. that British citizen would be unable to reside in
 - 3.1 the UK **or**
 - 3.2 another EEA state or Switzerland

if the person (i.e. the primary carer) left the UK for an indefinite period.

1 Imm (EEA) Regs 2016, reg 16(1) & (5), 1 Ruiz Zambrano v Office national de l'emploi (ONEm) Case C-34/09

073467 A right to reside on the basis of paragraph 073466 above is an **excluded** right to reside¹. A person who only has a right to reside in accordance with DMG 073466 will therefore not satisfy the right to reside element of the habitual residence test and

will therefore be a person from abroad/person not in GB and thus not entitled to IS, JSA(IB), ESA(IR) and SPC.

Note: The regulations described in DMG 073466 and this paragraph were introduced with effect from 8.11.12 because of a decision of the Court of Justice of the European Union (CJEU) dated 8.3.11 (“the *Zambrano* decision”). DMs still dealing with claims or appeals, which involve the application of the *Zambrano* decision to periods **before** 8.11.12 should contact DMA (Leeds) for advice.

1 IS (Gen) Regs, reg 21AA(3)(bb); JSA Regs, reg 85A(3)(aa); ESA Regs, reg 70(3)(bb); SPC Regs, reg 2(3)(bb)

073468 - 073480

EU Citizenship rights

073481 EU case law has established the principle that in certain circumstances a third country national may have a right to reside where to deny that right would mean that an EU citizen would be deprived of their rights as an EU citizen under the Treaty¹ to move and reside freely within the territory of the EU. In the *Zambrano* case² the basis of the CJEU’s judgment was that, if Mr Zambrano (a third country national) was not granted a right to reside and a work permit in Belgium, the result would be that his dependent children, who were Belgian (and thus EU) citizens, would be deprived of the genuine enjoyment of the substance of their rights as EU citizens under article 20 of the Treaty¹.

1 TFEU, art 20; 2 Ruiz Zambrano v Office national de l’emploi (ONEm) Case C-34/0

073482 A right to reside which exists in accordance with the Treaty¹ where that right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of the substance of their rights as a European Citizen is an excluded right to reside².

1 TFEU, art 20; 2 IS (Gen) Regs, reg 21AA(3)(e); JSA Regs, reg 85A(3)(c); ESA Regs, reg 70(3)(e); SPC Regs, reg 2(3)(e)

073483 So, a person whose sole right to reside is the right described in DMG 073481 above will not satisfy the right to reside condition of the habitual residence test. Such a person will therefore be a person from abroad/not in GB and thus will not be entitled to IS, JSA(IB), ESA(IR) and SPC.

073484 - 073485

Worker registration scheme

073508 To have the right of residence in the UK a national of an A8 country who is a worker and is not in an exempt category is required to register with the Home Office Worker Registration Scheme and is an 'accession State worker required to register' (other than during the first month of any employment - see DMG 073505 2.).

073509 Registration is required within one month after starting employment but cannot be made before the employment starts. Registration ends when that employment terminates and the worker must re-register with each new employer.

073510 Workers who register will be issued with a Worker Registration Scheme card when they first register and a Worker Registration Certificate for subsequent registrations.

Exempt workers

073511 Workers from A8 countries are exempt from the requirement to register if, amongst other exemption categories, they

1. had on 30.4.04 leave to enter or remain in the UK and their immigration status had no restrictions on work¹ **or**
2. were legally working in the UK on 30.4.04 and had been so for a continuous period of 12 months prior to that date² **or**
3. have legally worked in the UK for an uninterrupted period of 12 months either partly or wholly after 30.4.04, at the end of that 12 month period³.

1 Accession Regs 2004, reg 2(2); 2 reg 2(3); 3 reg 2(4)

Uninterrupted work

073512 A person is to be treated as having worked for an uninterrupted period of 12 months if he is not legally working for less than 30 days in total, provided that he was legally working at the beginning and end of that period¹.

1 Accession Regs 2004, reg 2(8)

Self-employed persons

073513 Transitional provisions in the Treaty of Accession do not allow derogation from the principle of freedom of movement within the EEA for self-employed persons¹. An A8 national who works in the UK as a self-employed person is not subject to the Worker Registration Scheme and is a qualified person with normal EEA rights whilst pursuing an activity as a self-employed person.

1 TFEU, art 49

073514 An A8 national who is a self-employed person in the UK will retain that status if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident¹ (see DMG 072861). He will still be a qualified person² (see DMG 073238).

1 Imm (EEA) Regs 2016, reg 6(4); 2 reg 6(1)

073515 However, where an A8 national, who has been working as a self-employed person, becomes unemployed, he does not retain the status of a self-employed person. If he seeks work, he will be treated the same as other A8 nationals who are seeking work (see DMG 073503). This means that he will only have a right to reside by virtue of his status as a work seeker if he is in an exempt category¹ (see DMG 073511).

1 Accession Regs 2004, reg 4(2) & (3)

073516 - 073519

A8 Nationals - Ending of Restrictions on Right to Reside

073520 Subject to the savings provisions described below, the additional restrictions on the rights of A8 nationals to reside in the UK ceased to have effect on 1.5.11. From that date A8 nationals became subject to the same EU rules about right to reside.

073521

Effect on JSA(IB)

073522 With effect from 1.5.11, A8 nationals can be jobseekers. This means that, for the purposes of JSA(IB) they have a right to reside if they are seeking work¹.

1 JSA Regs, reg 85A(2) & (3); Imm (EEA) Regs 2016, reg 6(1)

073523

Saving Provisions

“Accession Worker”

073524 In the guidance in DMG 073516 to 073520 to the phrase “accession worker” means an A8 national who was required to register as a worker as at 30.4.11.

Right to reside

073525 With effect from 1.5.11 accession workers (as defined in DMG 073515 above) will retain worker status when¹

1. they become unable to work, become unemployed or ceased to work in the circumstances described in DMG 072821 on or after 1.5.11 **or**
2. they had ceased working in the circumstances described at DMG 072821 for an authorised employer
 - 2.1 within the first month of employment **and**
 - 2.2 they were still within that one month period.

1 Imm (EEA) Regs, reg 7A(4)

073526 It follows that an A8 national required to register as at 30.4.11, who, ceased work in the circumstances described in DMG 072821 **before 1.5.11** will not retain worker status on account of the ending of the A8 restrictions. The only exception is where the A8 national had started work for an authorised employer after 1.4.11. Provided such a person satisfies the conditions in DMG 072821 they will retain worker status on ceasing work and on past 1.5.11.

Acquiring a permanent right to reside

073527 An EEA national who has resided in the UK in accordance with the Imm (EEA) regs 2016 continuously for five years¹ acquires a permanent right to reside. An accession worker (within the definition in DMG 073515 above) is treated² as having resided in accordance with the regulations

1. during any period before 1.5.11 in which they were working in the UK for an authorised employer³ **and**
2. in the case of an accession worker who started work for an authorised employer after 1.4.11 and ceased that work before 1.5.11 on the grounds set out in DMG 072821, for the remainder of April 2011 after work ceased.

1 Imm (EEA) Regs 2016, reg 15; 2 reg 7A(5); 3 Accession Regs 2004, reg 2(7)

Workers who have ceased activity

073528 Certain persons who permanently cease activity as workers or self-employed persons can acquire a permanent right to reside in the UK¹ (see DMG 073181). The conditions for acquiring this right include the need to have completed certain periods of activity as a worker and the regs² treat certain periods of unemployment, sickness etc as periods of such activity.

1 Imm (EEA) Regs 2016, reg 15(1)(c); 2 reg 5(7)

073529 In the case of accession workers, periods of involuntary unemployment duly recorded by the relevant employment office will only be treated as periods of activity as a worker where¹

1. the accession worker ceased working during the first month of registered employment, for the remainder of that month **or**
2. the accession worker became unemployed or ceased work on or after 1.5.11.

1 Imm (EEA) Regs, reg 7A(3)

Savings and modifications of Immigration (EEA) Regs 2006

073530 Arrangements within the Imm (EEA) Regs for accession member states¹ continue to have effect in relation to any EEA national to whom the provisions applied immediately before 1.2.17².

1 Imm (EEA) Regs, reg 7A & 7B; 2 Imm (EEA) Regs 2016, Sch 4, para 2

073531 - 073550

Right to reside - A2 country nationals

Nationals of Bulgaria and Romania

073551 Romania and the Republic of Bulgaria joined the EU on 1.1.07. Transitional provisions in the Treaty of Accession allow derogation from the principle of freedom of movement within the EEA¹ for a limited period, initially five years after 1.1.07. Regulations on immigration² restrict the right to reside in the UK of nationals of Bulgaria and Romania (known as A2 nationals). The transitional provisions also gave Member States the option of extending the initial period for a further two years. The UK government decided to exercise this option and the restrictions will continue until 31.12.13³.

Note 1: from 1.1.14 all A2 nationals have full EU rights in accordance with Directive 2004/38/EC⁴. The guidance at 073555 to 073585 below is retained for cases where the period at issue is between 1.1.07 and 31.12.13. DMG 073605 et seq gives guidance on some savings provisions that apply at the end of this period.

Note 2: Savings and modifications provisions continue to have effect on any EEA national to whom the provisions applied immediately before 1.2.17⁵ (see 073530).

1 Treaty establishing the European Community; Regulation (EEC) 1612/68, A 1-6;

2 Accession Regs 2006, reg 6; 3 reg 1(2)(c), definition of "accession period"

4 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013;

5 Imm (EEA) Regs 2016, Sch 4, para 2

073552 - 073554

Derogation for A2 nationals

073555 A2 nationals wishing to work in the UK must, except where they are exempt from the requirement, obtain a worker authorization document before they commence employment in the UK¹. (See DMG 073565 onwards for those A2 nationals who are not subject to worker authorization).

1 Accession Regs 2006, reg 9(1)

073556 To have a right to reside as a worker, an A2 national who is subject to worker authorization, must have a worker authorization document and be working in accordance with the conditions set out in that authorization document¹.

1 Accession Regs 2006, reg 6(2)

073557 If A2 nationals subject to worker authorization cease working for any reason, including illness or involuntary unemployment, they cease to have a right to reside in the UK as a worker¹.

1 Accession Regs 2006, reg 6(3)

073558 An A2 national who is subject to worker authorization and who is a work seeker, does not have a right to reside as a work seeker¹, although he may have a right to

reside if he is self-sufficient. He is not treated as a jobseeker for the purposes of the definition of “qualified person”².

1 Accession Regs 2006, reg 6(2); 2 The Imm (EEA) Regs, reg 6

073559

A2 nationals exempt from the habitual residence test

073560 Amendments to IS, JSA, and SPC legislation, and subsequent ESA legislation, introduced a new category of persons who are exempt from the habitual residence test¹.

1 IS (Gen) Regs, reg 21AA(4)(f)(ii); JSA Regs, reg 85A(4)(f)(ii); ESA Regs, reg 70(4)(f)(ii), SPC Regs, reg 2(4)(f)(ii)

073561 An A2 national is exempt from the habitual residence test if he

1. is subject to worker authorization **and**
2. has a worker authorization document **and**
3. is working in accordance with the conditions in that document¹.

He will not be treated as a person from abroad for ESA, IS or JSA, or not treated as not in GB for SPC.

1 Accession Regs 2006, reg 6(2)

073562 - 073564

Exempt from worker authorization

073565 However certain categories of nationals of Bulgaria and Romania are not subject to worker authorization. An A2 national is not an Accession State national subject to worker authorization where he or she

1. has leave to enter or remain in the UK under the Immigration Act 1971 and their immigration status has no condition restricting employment¹ **or**
2. was legally working² in the UK on 31.12.06 and had been so working in the UK without interruption for a continuous period of 12 months ending on that date³ **or**
3. legally works in the UK without interruption for a period of 12 months falling partly or wholly after 31.12.06, at the end of that 12 month period⁴ **or**
4. has dual nationality and is also a national of the UK or some other EEA State (other than Bulgaria or Romania)⁵, or during any period where they are the spouse or civil partner of a UK national⁶ **or**
5. is the spouse, civil partner or child under 18 of a person who has leave to enter or remain in the UK⁷, where that leave allows the person to work in the UK⁸ **or**
6. has a permanent right of residence⁹ under regulation 15 of the Immigration (EEA) Regulations 2006 **or**

7. is a family member of an EEA national¹⁰ who has a right to reside in the UK under certain legislation¹¹ other than a family member in an excluded category¹² **or**
8. is¹³ the spouse, civil partner or descendant of an accession State national subject to worker authorisation who has a right to reside as a worker¹⁴.
However the descendant must be either
 - 8.1 under 21 **or**
 - 8.2 dependent on the accession state worker subject to worker authorisation **or**
9. is highly skilled and holds a registration certificate from the HO that includes a statement that they have unconditional access to the UK labour market¹⁵ **or**
10. is in the UK as a student and does not work for more than 20 hours per week and holds a registration certificate that includes a statement that they are a student who has access to the UK labour market for 20 hours a week¹⁶ **or**
11. is a posted worker¹⁷ as defined in EU legislation¹⁸, being an A2 national working for an employer of another member state but posted to work in the UK, during the period of the posting.

1 Accession Regs 2006, reg 2(2); 2 reg 2(12); 3 reg 2(3); 4 reg 2(4); 5 reg 2(5); 6 reg 2(6); 7 Immigration Act 1971; 8 Accession Regs 2006, reg 2(5A); 9 reg 2(7); 10 reg 2(8); 11 Imm (EEA) Regs; 12 Accession Regs 2006, reg 3(8)(a) & (b) 13 reg 2(8A); 14 Imm (EEA) Regs, reg 14(1) & 6(1)(b); 15 Accession Regs 2006, reg 2(9); 16 reg 2(10); 17 reg 2(11); 18 Directive 96/71/EC, Art 1(3)

073566 A2 nationals who fall into the above groups can obtain a registration certificate from the HO to confirm their status, or will have a valid passport marked with

1. a UK residence permit granting leave to remain with permission to work that has not expired **or**
2. indefinite leave to remain **or**
3. a “no time limit” stamp.

073567 Those A2 workers who are exempt from the worker authorization scheme (see DMG 073565) can retain worker status in the same way as other EEA nationals when, for example, temporarily unable to work due to illness or accident¹.

1 Imm (EEA) Regs, reg 6(1)(b) and 6(2)

073568 - 073580

Uninterrupted work

073581 A person is treated as having worked in the UK without interruption for a period of twelve months if he was legally working in the UK at the beginning and end of that period and any intervening periods in which he was not legally working in the UK do not, in total, exceed 30 days¹.

1 Accession Regs 2006, reg 2(12)(c)

073582

Self-employed

073583 Transitional provisions in the Treaty of Accession do not allow derogation from the principle of freedom of movement for self-employed persons within the EEA¹. Bulgarian and Romanian nationals who are working in the UK in a self-employed capacity are not subject to worker authorization while they are working, and are qualified persons with normal EEA rights whilst pursuing activities as self-employed persons.

1 TFEU, art 49

073584 An A2 national who is a self-employed person in the UK will retain that status if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident¹. He will still be a qualified person² (see DMG 072861).

1 Imm (EEA) Regs, reg 6(3); 2 reg 6(1)(c)

073585 However, where an A2 national, who has been working as a self-employed person, becomes unemployed, he does not retain the status of a self-employed person. If he seeks work, he will be treated the same as other A2 nationals who are seeking work. This means he will only have a right to reside as a “jobseeker”¹ for the purpose of the definition of “qualified person” if he is in an exempt category (see DMG 073565).

1 Accession Regs 2006, reg 6(2)

073586 - 073599

Bulgarians and Romanians - Ending of Restrictions

Effect on JSA(IB)

073600 With effect from 1.1.14, A2 nationals can be jobseekers (see DMG 073240). This means that, for the purpose of JSA(IB) they have a right to reside if they are seeking work¹. DMs are reminded however that JSA(IB) claimants with a right to reside as jobseekers must be actually habitually resident in the UK (see DMG 073707 et seq).

1 JSA Regs, reg 85A(2) & (3); Imm (EEA) Regs 2016, reg 6(1)

073601 - 073604

Transitional Rules

A2 National who was subject to worker authorisation

073605 Where an A2 national was subject to worker authorisation (see DMG 073555 et seq) before 1.1.14 then certain particular rules, as described in DMG 073607 to 073614 below apply to them.

073606

Retaining Worker Status

073607 An A2 national who is subject to worker authorisation on 31.12.13 can **only** retain worker status as a person

1. who, having worked in the UK, is in duly recorded involuntary unemployment, is registered with the relevant employment office and has genuine prospects of engagement **or**
2. where that person became unemployed or ceased to work because of illness on or after 1.1.14¹.

1 Imm (EEA) Regs, reg 7B(5)

073608

Permanent Right to Reside

073609 An EEA national who has resided in the UK in accordance with the Imm (EEA) regs continuously for five years¹ acquires a permanent right to reside. An A2 national who was subject to worker authorisation before 1.1.14 shall be treated as having resided as a worker in accordance with the Imm (EEA) Regs only for those periods when they were “legally working” in the UK² (see DMG 073611 below).

Note: A2 nationals may also have resided in accordance with the Imm (EEA) regs in other ways which may count for the purposes of the acquisition of a permanent right to reside; for example as a self-employed person or as a student.

1 Imm (EEA) Regs, reg 15; 2 reg 7B(6)

073610

Meaning of “legally working”

073611 For the purpose of DMG 073609, a person was “legally working” with respect to periods of work by an A2 national in the UK on or after 1.1.07 either

1. when they were exempt from worker authorisation when working **or**
2. when they held an accession worker authorisation document and were working in accordance with the conditions set out in that document **or**
3. with regard to any period when they were working lawfully under UK domestic law.

073612

Workers who have ceased activity

073613 Certain EEA nationals who permanently cease activity as workers or self-employed persons can acquire a permanent right to reside in the UK¹ (see DMG 073181). The conditions for acquiring this right include the need to have completed certain periods of activity as a worker and the Imm (EEA) regs² treat certain periods of unemployment, sickness etc as periods of such activity.

1 Imm (EEA) Regs, reg 15(1)(c); 2 reg 5(7)

073614 In the case of A2 nationals who are/were subject to worker authorisation as at 31.12.13, periods of involuntary unemployment duly recorded by the relevant employment office will **only** be treated as periods of activity as a worker if the unemployment began on or after 1.1.14¹.

1 Imm (EEA) Regs, reg 7B(4)

073615 - 073649

073681 Croatian nationals subject to worker authorisation nonetheless **do** have rights to reside if they are self-employed persons¹ (see DMG 073683 and DMG 073700 - 073701 below for more on self-employment).

1 Imm (EEA) Regs 2016, reg 14 & 6(1)

073682

Self-employment stops

073683 A Croatian national subject to worker authorisation will retain the status of being a self-employed person if they are temporarily unable to pursue activity as a self-employed person as a result of illness or accident¹. However if self-employment ceases altogether (on which see DMG 072842) a Croatian national subject to worker authorisation will not have a right to reside as a jobseeker².

1 Imm (EEA) Regs 2016, reg 14 & 6; 2 Accession (Croatia I & WA) Regs 2013, reg 5(1)

073684

Self-sufficient persons and students

073685 Croatian nationals subject to worker authorisation do have a right to reside¹ as

1. self-sufficient persons (see DMG 073244 - 073246) **or**
2. students (see DMG 073248).

However these groups need to have sufficient resources not to become a burden on UK social assistance (which includes IS, JSA(IB), ESA(IR) and SPC) throughout their period of stay and they must have comprehensive sickness insurance-

1 Imm (EEA) Regs 2016, reg 6(1)

073686

Summary

073687 In practice the result of these rules is that a Croatian national subject to worker authorisation will not normally be entitled to IS, JSA(IB), ESA(IR) or SPC. They will usually either be persons from abroad/treated as not in GB for the lack of a right to reside or they will fail to satisfy the other conditions of entitlement.

073688

Croatian nationals who are not subject to worker authorisation

073689 A Croatian national is not subject to worker authorisation if

1. on 30.6.13, they had leave to enter or remain in the UK under the Immigration Act 1971 and their immigration status has no condition restricting employment¹, or they are given leave of this type (including that their immigration status has no condition restricting employment) **or**

2. they were legally working (see DMG 073691 – 073692) in the UK on 30.6.13 and had been legally working in the UK without interruption (see note) throughout the period of 12 months ending on that date² **or**
3. they legally work (see DMG 073691 - 073692) in the UK without interruption (see note) for a period of 12 months falling partly or wholly after 30.6.13, at the end of that 12 month period³ **or**

Note: for sub-paragraphs 2 & 3: a person shall be treated⁴ as having worked without interruption for a period of 12 months provided they were legally working in the UK at the beginning and end of the 12 month period and, if their work was interrupted, any intervening period(s) **do not exceed 30 days in total.**

4. they have dual nationality and are also a national of the UK or an EEA State (other than Croatia)⁵, except that, where the person is also a Bulgarian or Romanian national subject to worker authorisation in accordance with the Accession Regs 2006 (see DMG 073551 et seq), they will only be exempt from worker authorisation as a Croat during any period when they are working in accordance with the Accession Regs 2006 **or**
5. during any period in which they are⁶
 - 5.1 the spouse, civil partner, unmarried or same sex partner (see DMG 073696) of **or**
 - 5.2 a child under 18 of
a person who has been given leave to enter or remain in the UK under the Immigration Act 1971 where that leave allows that person to work **or**
6. during any period when they are⁷ the spouse, civil partner, unmarried or same sex partner (see DMG 073696) of a national of the UK or a person settled (as defined in specific legislation⁸) in the UK **or**
7. during any period when they are⁹ a member of a diplomatic mission, or a family member of a member of a diplomatic mission, as defined in specific legislation¹⁰ and other persons who are not British citizens specified in an order of the Secretary of State for the Home Department¹¹ exempting them from any or all of the provisions of the Immigration Act 1971 **or**
8. they have a permanent right to reside in the UK under the Imm (EEA) Regs¹² **or**
9. except where sub-paragraph 10 applies, during any period when they are a family member of an EEA national who has a right to reside in the UK¹³ **or**
10. Where the EEA national with a right to reside in the UK referred to in sub-paragraph 9 is a Croatian national subject to worker authorisation or a Bulgarian or Romanian national subject to worker authorisation (referred to below as “Y”) then only the following family members are not subject to worker authorisation¹⁴

- 10.1** Y's spouse or civil partner **or**
- 10.2** an unmarried or same sex partner of Y (see DMG 073696) **or**
- 10.3** a direct descendent of Y, Y's spouse or civil partner who is
 - 10.3.a** under 21 **or**
 - 10.3.b** dependent on Y, Y's spouse or Y's civil partner **or**
- 11.** they are highly skilled as defined¹⁵ and hold a registration certificate from the HO that includes a statement that they have unconditional access to the UK labour market **or**
- 12** during any period when they are a student in the UK and either
 - 12.1** they hold a registration certificate which states that they are a student who may work on the UK for not more than 20 hours per week (except where they are working, as part of a course of vocational training or during vacations) and provided they comply with those work conditions¹⁶ **or**
 - 12.2** they have leave to enter or remain under the Immigration Act 1971 as a student provided they are working in accordance with any conditions attached to that leave¹⁷ **or**
- 13** during the 4 months starting from the end of the course where they are a former student who holds a registration certificate (issued before they completed their course) saying that they may work during that period¹⁸ **or**
- 14** they are a posted worker¹⁹ as defined in specific EU legislation²⁰, being a person posted to the UK by an employer based in another EEA state in pursuance of a contract to provide services in the UK.

1 Croatia (I & WA) Regs 2013, reg 2(2); 2 reg 2(3); 3 reg 2(4); 4 reg 2(5)(c); 5 reg 2(6) & (7); 6 reg 2(8); 7 reg 2(9); 8 Immigration Act 1971, s 33(2A); 9 Croatia (I & WA) Regs 2013, reg 2(10) & (11); 10 Immigration Act 1971, s 8(3); 11 s 8(2); 12 Croatia (I & WA) Regs 2013, reg 2(12); 13 reg 2(13); 14 reg 2(14); 15 reg 2(15); 16 reg 2(16)(a) & (17); 17 reg 2 (16)(b); 18 reg 2(18); 19 reg 2(19); 20 Reg 2(20) & Directive 96/71/EC, Art 1(3)

073690

Meaning of legally working

Periods before 1.7.13

073691 For the purposes of DMG 073689 **2. & 3.**,

- 1.** a Croatian national working in the UK during a period falling before 1.7.13, was working legally in the UK during that period if¹
 - 1.1** they had leave to enter or remain in the UK under the Immigration Act 1971 for that period **and**
 - 1.2** that leave allowed them to work in the UK **and**

- 1.3 they were working in accordance with any condition on that leave restricting their employment **or**
2. they were exempt from the provisions of the Immigration Act 1971 in accordance with specific legislation **or**
3. they were entitled to reside in the UK under the Imm (EEA) Regs.

1 Croatia (I & WA) Regs 2013, reg 2(5)(a)

Periods on or after 1.7.13

073692 For the purposes of DMG 073689.3, a Croatian national is legally working in the UK on or after 1.7.13 during any period in which they¹

1. are exempt from worker authorisation because they fall within one of subparagraphs.4 to 13 of DMG 073689 above **or**
2. hold an accession worker authorisation document (see DMG 073678) above and are working in accordance with the conditions set out in that document.

1 Croatia (I & WA) Regs 2013, reg 2(5)(b)

073693

Meaning of “family member”

073694 For the purposes of DMG 073689 above, a Croatian national’s family members are¹ (subject to the special rules about the family members of students described in DMG 073291)

1. their spouse or civil partner **and**
2. their direct descendents or the direct descendents of their spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 their dependants or dependants of their spouse or civil partner **and**
3. their direct ascendant relatives or the direct ascendant relatives of their spouse or civil partner **and**
4. extended family members as described in DMG 073293.

Note: see DMG 073703 for more on family members

1 Croatia (I & WA) Regs 2013, reg 1(2)(a) & Imm (EEA) Regs 2016, reg 7

073695

Meaning of “unmarried or same sex partner”

073696 An “unmarried or same sex partner” means¹ a person who is in a durable relationship with another person. If a DM has doubts about whether this is the case, a view should be sought from the Home Office in the first instance.

1 Croatia (I & WA) Regs 2013, reg 1(2)

073697

Right to Reside

073698 For as long as they continue to satisfy one of the conditions for exemption in DMG 073689 above, Croatian nationals **who are not subject to worker authorisation** have the same rights to reside as are enjoyed by a non-accession EEA national such as a French or German national.

073699

Self-employment

073700 Transitional provisions in the Treaty of Accession do not allow limitation of the principle of freedom of movement for self-employed persons within the EEA. This means that, from 1.7.13, all Croatian nationals (regardless of whether or not they are subject to worker authorisation) have a right to reside as a “qualified person” when they are working as a self-employed person in the UK¹.

Note: DMs are reminded that work as a self-employed person must be genuine and effective (see DMG 072816). In addition DMs may need to establish whether at any particular moment in time a claimant is a self-employed person (see DMG 072842)

1 Imm (EEA) Regs 2016, reg 14 & reg 6(1)

073701 Any Croatian national who is a self-employed person in the UK will retain that status and a right to reside only if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident¹ (see DMG 072861). Such a person is deemed not to be a person from abroad/person not in GB for the purposes of IS², JSA(IB)³, ESA(IR)⁴ or SPC⁵ (see DMG 072800 2.)

*1 Imm (EEA) Regs 2016, reg 6(4); 2 IS (Gen) Regs, reg 21AA(4)(b); 3 JSA Regs, reg 85A(4)(b);
4 ESA Regs, reg 70(1)(4)(b); 5 SPC Regs, reg 2(4)(b)*

073702

Family members

073703 In general the family members of an EEA national with a right to reside in the UK, also have a right to reside derived from and linked to the EEA national’s right to reside¹. Where a Croatian national **not** subject to worker authorisation (“C”) has a right to reside in the UK then their family members (as defined in DMG 073694) are not subject to worker authorisation and have the same rights to reside as the family members of any other EEA national.

1 Imm (EEA) Regs 2016, reg 14(2)

073704 However where a Croatian national is subject to worker authorisation then only

1. their spouse, civil partner, unmarried or same sex partner (hereafter “partner”)
and
2. their (or their partner’s)
 - 2.1 children **or**
 - 2.2 grand childrenwho are aged under 21 or dependant

escape the requirement for worker authorisation (see DMG 073689.10). A Croatian national's Croatian father, father in law, mother, mother in law, and grandparents will have a right to reside as family members of an EEA national. However in their own right they will only have the limited rights to reside of any Croatian national subject to worker authorisation (see DMG 073670 to 073676) (i.e. as an authorised worker, a self-employed or self sufficient person or a student). In other words they have a right to reside in the UK but their access to work and the labour market here is limited.

073705 - 073706

Actual habitual residence

Requirement to establish a residence that is habitual in nature

073707 To be habitually resident in a country a person must have actually taken up residence and lived there for a period. It is not sufficient that the person came to this country voluntarily and for settled purposes. He must be resident in fact for an appropriate period of time which demonstrates that his residence has become, and is likely to remain, habitual in nature¹.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL

073708 - 073710

Settled intention to remain

073711 The period of time cannot begin before the person is both living in the UK, and has a settled intention to remain in the UK for the time being. The person does not have to intend to remain permanently.

073712 - 073715

Relevant factors

073716 Whether and when a person's residence has become habitual in nature is a question of fact. The period is not fixed and depends on the facts of each case. Amongst the relevant factors to be taken into account are bringing possessions so far as is practicable, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, and having durable ties with the country of residence or intended residence¹. The list is not exhaustive and any facts which may indicate whether or not the residence is habitual in nature should be taken into account.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL

073717 Only the appropriate weight should be given to factors wholly or partly outside the person's control. The person may have close relatives, even immediate family, outside the UK. There may be an intention that family members will join the person here when permission to do so can be obtained. The person may, quite reasonably, visit them regularly. That need not indicate that the person himself does not have a settled intention to remain in the UK, or that he cannot be habitually resident here. Cultural differences in the nature of contact between family members should be respected.

073718 It is not necessary to have permanent or private accommodation to establish habitual residence. A person may be resident in a country whilst having a series of temporary abodes.

073719 A person's financial viability may be a relevant factor, but the test for habitual residence should not be applied so as to prevent access to public funds. It must be applied in a way that allows for the possibility of a claimant establishing both habitual residence and an entitlement to benefits¹.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL

073720 - 073722

Appropriate period of time

073723 The appropriate period of time need not be lengthy if the facts indicate that a person's residence has become habitual in nature at an early stage¹. In some circumstances the period can be as little as a month, but it must be a period which is more than momentary in a claimant's life history². A period of between one and three months is likely to be appropriate to demonstrate that a person's residence is habitual in nature. Cogent reasons should be given where a period longer than three months is considered necessary³.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL; 2 CIS/4389/99; 3 CIS/4474/03

073724 - 073725

Becoming habitually resident

073726 The nature of a person's residence should be considered throughout the period in question, to establish whether or when it became habitual. The fact that a person's residence has become habitual in nature after a period of time does not mean that the residence was habitual in nature from the outset. Residence only changes its quality at the point at which it becomes habitual.

073727 - 073728

Resuming a previous habitual residence

073729 There may be special cases where a person who has previously been habitually resident in the UK resumes that habitual residence immediately when he returns to the UK following a period living abroad¹. The only element of habitual residence that is bypassed by a returning former resident is the need to be resident in the UK for an appreciable period. Factors to be considered in deciding whether the previous habitual residence has been immediately resumed include the settled intention to remain, whether the person is in a position to make an informed decision about residence in the UK, the ties and contacts with the UK retained or established by the person while abroad, the reasons why the claimant left the UK and became habitually resident elsewhere, the similarity between their residence in the UK now and when they were previously here, and the length of the period of absence². This is a different situation to that where a person is temporarily absent from the UK and does not lose their habitual residence during that period of absence.

Note: For claims made to JSA with effect from 1.1.14, please see guidance at 072986 et seq with regard to the three month residence requirement.

1 House of Lords, Nessa v CAO (1999) 1 WLR 1937 HL; 2 CIS/1304/1997 and CJS/5394/1998

Example

Karen has British nationality. In December 2010 she left the UK to live and work in the United States. In January 2013, when her two year employment contract came to an end, Karen returned to the UK. She claimed JSA on 18.1.13. It emerged that, during her absence, Karen had retained a property here and had continued to pay the mortgage on it. She had put the bulk of her belongings in storage in the UK. She had also returned to the UK twice a year. The DM decided that Karen was resuming her previous habitual residence here immediately on her return.

073730 - 073745

