

# International Issues

## Chapter C4: ESA

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# International Issues

## Chapter C4: ESA

### Introduction

C4001 This Chapter contains guidance on the international aspects of new style ESA as they apply from 29.4.13. In particular it deals with

1. Presence in GB and the effect of temporary absences
2. The residence and presence conditions for ESA where the conditions relating to youth are satisfied
3. The use of insurance in other countries to satisfy the contribution conditions for new style ESA.
4. The effect of the EU rules concerning the co-ordination of social security benefits on ESA.

**Note:** at present (June 2013) it is not possible to make a claim for new style ESA from abroad, nor to export it. Much of the guidance below will therefore not be immediately applicable.

### Meaning of ESA

C4002 In this chapter references to ESA are to be read as referring to “new style ESA” as defined in Chapter M1 (Universal Credit: Transition – Pathfinder).

C4003 – C4004

### Presence in GB

C4005 It is one of the basic conditions of entitlement to ESA that the claimant is “in GB”<sup>1</sup>. In addition, the Act provides that a person shall be disqualified for receiving ESA for any period during which they are absent from GB<sup>2</sup>. However both these rules are subject to regulations<sup>3</sup> which provide that a claimant can nonetheless be entitled to and receive ESA during certain absences.

*1 WR Act 07, s 1(3)(d), 2 s 18(4); 3 s 22 & Sch 2 paras 5 & 6*

C4006 The presence condition can also be subject to the application of EU law (see C4100 et seq)

### Meaning of “in Great Britain”

C4007 To be “in” a place means to be physically there on the day or period in question. It is not the same as being resident in a place. A person may be resident in a place without being present there<sup>1</sup> and vice versa.

*1 R(U) 18/60; R(P) 2/67*

## **Days of arrival and departure**

C4008 With regard to any particular day, a person should be regarded as present if they are in GB for part of a day: thus the day when a person arrives in GB and a day when they leave count as days when they are “in” GB.

## **Meaning of “Great Britain”**

C4009 GB includes

1. England and Wales, and Scotland<sup>1</sup>
2. adjacent islands including, Orkney, Shetland, the Hebrides, the Isles of Scilly, the Isle of Wight and Lundy **and**
3. the territorial waters of the UK adjacent to GB<sup>2</sup>

*1 Union with Scotland Act 1706 preamble & Art 1; Union with England Act 1707 (Scottish Parliament), Art 1;  
2 JS Act 95, s 35(1) (definition of “Great Britain”)*

C4010 N Ireland<sup>1</sup>, the Isle of Man<sup>2</sup> and the Channel Islands<sup>3</sup> are not part of GB.

*1 R(S) 5/85, para 9; 2 CSU 14/48; R(U) 8/81; 3 R(P) 2/64*

C4011 – C4014

## **Absence from GB- Mariners & Airmen**

### **Mariners**

C4015 A mariner is<sup>1</sup> a person employed under a contract of service on board any ship or vessel

1. as a master **or**
2. as a crew member **or**
3. in any other capacity on board when the employment in that other capacity is with the ship or vessel **or** the crew **or** any passengers or cargo or mail carried **and** the contract is entered into in the UK with a view to its performance (in whole or in part) while the ship or vessel is on its voyage.

*1 SS (Mariners' Ben) Regs, reg 1(2)*

C4016 This does not include a serving member of the forces<sup>1</sup> except those undergoing training or instruction **for 72 hours or less**<sup>2</sup> in one of the following organisations or establishments

1. Royal Fleet Reserve.
2. Royal Navy Reserve.
3. Royal Marines Reserve.
4. Army Reserve.
5. Territorial Army.
6. Royal Air Force Reserve.
7. Royal Auxiliary Air Force
8. The Royal Irish Regiment, to the extent that its members are not members of the regular armed forces

*1 SS (Conts) Regs, Sch 6, Part 1; 2 SS (Mariners' Ben) Regs, reg 1(2)*

C4017 A person who is, or has been, employed as a mariner on board a ship or vessel or who is under contract to travel (at his employer's expense) to start such employment is not disqualified for receiving ESA during an absence from GB where<sup>1</sup>, because of

1. any hurt **or** injury **or** illness suffered by the person while so employed or under contract to travel **or**
2. any action taken to prevent infection while the person is so employed or under contract to travel

that person has been left outside GB **or** has been discharged **or** has not started the employment.

**Note:** This provision continues to have effect until the date established in accordance with C4019 below.

*1 SS (Mariners' Ben) Regs, reg 4(a)*

C4018 A person who is or has been employed as a mariner on board any ship or vessel or who is under contract to travel (at his employers expense) to start such employment remains entitled to ESA where<sup>1</sup>

1. while so employed or under contract to travel, that person is left outside GB for any reason other than those referred to in C4017 **and**
2. that person reports to the appropriate superintendent or consular officer or chief officer of customs not later than 14 days after
  - 2.1 being left **or**
  - 2.2 if, at the time of being left the person was placed in custody, immediately after his release from custody.

**Note:** This provision continues to apply until the date established in accordance with C4019

*1 SS (Mariners' Ben) Regs, reg 4(b)*

- C4019 The provisions described in C4017 & C4018 cease to have effect<sup>1</sup>
1. when the person starts or resumes employment outside GB **or**
  2. in any case where there is undue delay in the person being returned to the place to which specific regulations<sup>2</sup> require them to be returned, on the occurrence of the delay **or**
  3. In any other case when the person is returned to the place required by regs<sup>2</sup>
- 1 SS (Mariners' Ben) Regs, reg 4; 2 Merchant Shipping (Repatriation) Regs, reg 7*

## Airmen

- C4020 An airman is<sup>1</sup> a person employed under a contract of service on any aircraft
1. as a pilot **or**
  2. as a commander **or**
  3. as a navigator **or**
  4. as any other crew member **or**
  5. in any other capacity on board when the employment in that other capacity is with the aircraft **or** the crew **or** any passengers or cargo or mail carried **and** the contract is entered into in the UK with a view to its performance (in whole or in part) while the aircraft is in flight.
- 1 SS (Airmen's Ben) Regs, reg 1(2)*
- C4021 This does not include a serving member of the forces<sup>1</sup> except those undergoing training or instruction **for 72 hours or less**<sup>2</sup> in one of the following organisations or establishments
1. Royal Fleet Reserve.
  2. Royal Navy Reserve.
  3. Royal Marines Reserve.
  4. Army Reserve.
  5. Territorial Army.
  6. Royal Air Force Reserve.
  7. Royal Auxiliary Air Force
  8. The Royal Irish Regiment, to the extent that its members are not members of the regular armed forces.
- 1 SS (Conts) Regs, Sch 6, Part 1; 2 SS (Airmen's Ben) Regs, reg 1(2)*

- C4022 Except in the case of a person disqualified for misconduct (see Chapter U6 - ESA Disqualification), an airman is not disqualified<sup>1</sup> for receiving ESA because of absence from Great Britain if the airman

1. is, or has been, under contract to travel at the employer's expense to start work **and**
2. has been left outside Great Britain or unable to start work because of any hurt **or injury or illness or** action taken to prevent infection.

*1 SS (Airmen's Ben) Regs, reg 2*

C4023 – C4029



# Temporary Absences

## Meaning of “temporary absence”

C4030 There is no statutory definition of “temporary absence”. However the meaning of temporary absence has been considered by both the Commissioner and the Courts. On 16.3.94 the Court of Appeal decided an appeal involving disqualification for being absent from Great Britain<sup>1</sup>. All previous case law on temporary absence must be read in the light of the Court's decision.

*1 R(S) 1/96*

### General meaning

C4031 “Temporary absence” is not to be equated with “not permanent”<sup>1</sup>.

*1 R(S) 1/96*

### Example

A man aged 25 leaves GB to live in Egypt. He states that he intends to work there until he is 60 and then he will return to GB. Although the absence is not permanent it is too long to be regarded as temporary.

C4032 In deciding whether an absence is temporary the decision maker should consider

1. the claimant's intention **and**
2. the length of the absence **and**
3. the purpose of the absence<sup>1</sup>.

*1 R(S)1/96; R(P) 1/90*

### Intention

C4033 A person's intention is always relevant when deciding whether an absence is temporary. But, it is not decisive. It is possible to decide that an absence is not temporary from the start. But if the decision maker decides that the absence is temporary then the person's intention should be looked at more closely the longer the absence lasts<sup>1</sup>.

*1 R(S) 1/96*

C4034 Although a person may intend to return there may be circumstances which prevent it. However, it cannot be assumed that the absence is not temporary just because the person cannot return. The circumstance preventing the return may only last a short time, for example, a short illness.

C4035 If a person is prevented from returning for a substantial period the absence may not be temporary<sup>1</sup>. A person who is permanently prevented from returning to GB is not temporarily absent from GB<sup>2</sup>.

*1 R(S) 10/83; 2 R(S) 1/96*

## Length of absence

C4036 The length of absence is a significant factor in deciding whether an absence is temporary<sup>1</sup>. In general a temporary absence means that it will be for a limited period only. Only in exceptional cases can an absence which has lasted years rather than months be accepted as temporary.

*1 R(S) 1/96*

C4037 The nature of the absence may change the longer the absence from GB lasts.

C4038 When considering the length of the absence the decision maker should consider the total period of the absence. This includes

1. any period of absence before the decision maker's decision **and**
2. the intended or likely future period of absence<sup>1</sup>.

*1 R(S) 1/96*

C4039 A person may have been absent from GB several times before the decision maker considers whether to disqualify. Although each of the absences may have been temporary, the total period of absences compared to the periods spent in GB may show that the absence now being considered is not temporary<sup>1</sup>.

*1 R(I) 54/51; R(I) 73/54*

C4040 A person who visits GB regularly, but is residing in another country, may be temporarily absent from that country rather than temporarily absent from GB<sup>1</sup>. This may apply to a seasonal worker who normally spends only part of the year in GB.

*1 R(S) 10/83*

C4041 An indefinite absence can still be temporary<sup>1</sup>.

*1 R(S) 1/96*

## Purpose of the absence

C4042 The reason for a person's absence from GB is an important factor.

C4043 An absence will probably be temporary if it is

1. for a holiday **or**
2. to visit relatives **or**
3. for a course of treatment.

C4044 An absence will probably not be temporary if the reason for the absence is for example, to live with relatives who have already emigrated.

## The DM's decision

- C4045 The DM must decide whether an absence is temporary by considering the facts at the date of decision. In some cases the person will have returned to GB before the DM's decision. The DM can look with hindsight and take this into account<sup>1</sup>.

*1 R(S) 1/96; R(S) 10/83; R(S) 1/85*

### Example

A man receiving ESA goes to South Africa on 21 June but does not tell the DWP. He returns to GB on 19 December after an absence of six months and informs the local office that he has been away. The DM decides that the absence is temporary because he has returned to GB and the absence lasted only six months.

- C4046 The DM should not automatically decide that an absence is temporary just because the person has returned<sup>1</sup>. For example, on leaving GB the person may have intended to live permanently in another country.

*1 R(S) 1/85*

## Onus of proof

- C4047 The burden of showing that an absence is temporary is on the claimant<sup>1</sup> who should prove that

1. the absence is or was temporary **and**
2. one of the other conditions for avoiding disqualification is satisfied.

*1 R(S) 1/96*

## Change of circumstances

- C4048 Although an absence may originally have been considered temporary, it may not remain so. Whether an absence from GB has ceased to be temporary may be considered at any time. A temporary absence will cease to be temporary overnight if a person decides to stay permanently outside GB. Other circumstances which make the ending of the absence uncertain may also mean that an absence which was temporary at the outset ceases to be temporary at some later date<sup>1</sup>.

*1 R(S) 1/85*

C4049 Once the DM has decided that an absence is not temporary, that absence should not be treated as temporary (either from the start of the absence or a later date) just because

1. the claimant states an intention to return **or**
2. makes preparations to return<sup>1</sup>.

*1 R(P) 1/90*

C4050 – C4054

## **Absences of up to 4 weeks**

C4055 Claimants will continue to be entitled to ESA 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. while absent from GB they continue to satisfy the other conditions of entitlement to ESA<sup>1</sup>.

*1 ESA Regs 13, reg 89*

## **Absence to receive medical treatment**

C4056 A claimant will continue to be entitled to ESA for the first 26 weeks of absence from GB<sup>1</sup> if

1. the absence is temporary **and**
2. the absence is unlikely to exceed 52 weeks **and**
3. while absent, that claimant continues to satisfy the other conditions of entitlement to ESA **and**
4. the absence is solely
  - 4.1 in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement which
    - 4.1.a is directly related to the claimant's limited capability for work **and**
    - 4.1.b started before the claimant left GB **or**
  - 4.2 because the claimant is accompanying a "dependent child" (see paragraph C4058 et seq for the definition of this term) in connection with arrangements made for the treatment of that dependant child for a disease or bodily or mental disablement

**and**

5. The arrangements referred to in subparagraphs **4.1** and **4.2** relate to treatment which
- 5.1 is outside GB **and**
  - 5.2 takes place during a period whilst the claimant is temporarily absent from GB **and**
  - 5.3 is by or under the supervision of a person appropriately qualified to carry out that treatment.

*1 ESA Regs 13, reg 90*

### **Meaning of “appropriately qualified”**

- C4057 “Appropriately qualified” means<sup>1</sup> qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment.

*1 ESA Regs 13, reg 90(2)*

### **Meaning of “dependent child”**

- C4058 The term “dependent child” as used in paragraph C4056.**4.2** above means<sup>1</sup> a child (C4059) or qualifying young person (C4060) for whom either the claimant or the claimant’s partner is responsible where that child or qualifying young person is a member of the claimant’s household.

*1 ESA Regs 13, reg 90(1)(c)(ii)*

### **Meaning of “child”**

- C4059 A child means<sup>1</sup> a person under the age of 16.

*1 ESA Regs 13, reg 2*

### **Meaning of “qualifying young person”**

- C4060 A qualifying young person is<sup>1</sup> a person
- 1. who has left education or training, is aged 16 years (in Scotland also a 15 year old), until the 31st August that next follows their 16<sup>th</sup> birthday<sup>1</sup>
  - 2. aged 16 years or over who is undertaking a course of full-time education at a school, college or other establishment that is approved by HMRC Commissioners, which is not advanced education (see C4066) **or**
  - 3. aged 16 years or over who is undertaking approved training that is not provided through a contract of employment **or**
  - 4. having undertaken a course/approved training as in **2.** or **3.** and has been accepted or is enrolled on a further such course/approved training<sup>2</sup>.

*1 ESA Regs 13, reg 2; SS CB Act 92, s 142 & Child Benefit (General) Regulations 2006, reg 4; 2 reg 3(2)*

C4061 For the purposes of C4060 **2.** and **3.** above the person

1. if aged 19 years, must have commenced the course of FTE or approved training before reaching that age<sup>1</sup> **and**
2. must be less than 20 years of age<sup>2</sup>.

*1 Child Benefit (General) Regulations 2006, reg 3(4); 2 reg 3(1)*

**Note:** A person shall be treated as undertaking a course of FTE during the period between the end of one course and the start of another where the person is enrolled on and starts the latter course.

C4062 Where a person is aged 16 or 17, a qualifying young person is a person

1. who has ceased to be in education or training **and**
2. who is registered for work, education or training with a qualifying body **and**
3. who is not engaged in remunerative work **and**
4. whose extension period has not expired **and**
5. where the person who is responsible for the 16/17 year old
  - 5.1 was entitled to CHB for them immediately before the extension period began<sup>1</sup> **and**
  - 5.2 has made a written request to the HMRC Commissioners within 3 months of the education or training ceasing for the payment of CHB during the extension period.

**Note:** The extension period begins on the first day of the benefit week after that in which the 16/17 year old ceased to be in education or training and ends 20 weeks later.

*1 Child Benefit (General) Regulations 2006, reg 5(4)*

C4063 A qualifying young person can be up to, and including, the age of 19 where that person's education or training has been relevantly interrupted. If immediately before the interruption they were a qualifying young person under the conditions in C4060 to C4061, they will remain a qualifying young person for the duration of the interruption.

C4064 Subject to an exception, the condition in C4063 will only apply where the period of interruption is

1. one of up to six months duration, even if it began before the person was 16, but only to the extent that it is considered to be reasonable in the opinion of the HMRC Commissioners **and**
2. due to mental or physical illness or disability and for a period that is considered reasonable in the opinion of the HMRC Commissioners<sup>1</sup>.

**Note:** The exception is where the period of interruption is, or is likely to be, followed immediately by a period during which the person is undertaking non approved training, receiving advanced education or receiving education by virtue of his employment or any office held by him<sup>2</sup>.

*1 Child Benefit (General) Regulations 2006 reg 6(3); 2 reg 6(4)*

## **Full-time education**

C4065 Full-time<sup>1</sup> education must involve education undertaken in pursuit of a course where,

1. the young person spends on average more than twelve hours a week during term time in
  - 1.1 receiving instruction and tuition
  - 1.2 doing supervised study
  - 1.3 doing examinations or practical work
  - 1.4 taking part in any exercise, experiment or project which is part of the course **and**

this must not include meal breaks or unsupervised study, including homework, whether done on or off the premises of the educational establishment.

*1 Child Benefit (General) Regulations 2006 reg 1(3)*

## **Non-advanced education**

C4066 Non-advanced education means any course up to, and including, the standard of

1. ordinary national diploma
2. BTEC national diploma
3. national certificate of the Scottish Qualifications Authority
4. GCE (advanced level)
5. Scottish certificate of education (higher grade)
6. Scottish certificate of sixth year studies
7. National certificate of Edexcel.

## **Meaning of “household”**

C4067 Household is not defined in legislation. It should be given its normal everyday meaning; that is a domestic establishment containing the essentials of home life<sup>1</sup>. Household may refer to people held together by a particular kind of tie, even if temporarily separated<sup>2</sup>. People living in one dwelling (for example a house, flat, caravan) do not necessarily live together in the same household.

*1 R(SB)4/83; 2 Santos v Santos [1972] All ER 246*

## Meaning of “partner”

C4068 “partner” means<sup>1</sup> where a claimant

1. is a member of a couple, the other member of that couple;
2. is a husband or wife by virtue of a polygamous marriage, the other party to the marriage or any spouse additional to either party to the marriage

*1 ESA Regs 13, reg 2*

## Meaning of “couple”

C4069 “couple” means<sup>1</sup>

1. a man and woman who are married to each other and are members of the same household;
2. a man and woman who are not married to each other but are living together as husband and wife;
3. two people of the same sex who are civil partners of each other and are members of the same household; or
4. two people of the same sex who are not civil partners of each other but are living together as if they were civil partners,

and for the purposes of sub-paragraph 4., two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex.

*1 ESA Regs 13, reg 2*

C4070 – C4074

## Absence in order to receive NHS treatment

C4075 A claimant will continue to be entitled to ESA during any period of absence from GB<sup>1</sup> if

1. the absence is temporary **and**
2. the claimant 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 arrangements under section 12(1) and paragraph 18 of Schedule 4 of the NHS Act 2006 **or**
  - 3.2 under section 6(2) and pursuant to arrangements under section 10(1) and paragraph 18 of Schedule 3 of the NHS (Wales) Act 2006 **or**
  - 3.3 any equivalent provision in Scotland.



## Family Member of a Member of the Armed Forces

C4076 A claimant will continue to be entitled to ESA for any period of absence from GB<sup>1</sup> if

1. the absence is temporary **and**
2. the claimant is a member of the family of a member of Her Majesty's Forces **and**
3. the absence is because the claimant is living with that member of the forces

1 ESA Regs 13, reg 92

C4077 Member of the family<sup>1</sup> in paragraph C4076.2 means the spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law and step-mother. References to "step-parent and step-children and in-laws" are to be read as including such relationships arising through civil partnerships.

1 ESA Regs 13, reg 92(2)

### Meaning of "member of Her Majesty's Forces"

C4078 A person is within the definition of "Member of Her Majesty's Forces" if<sup>1</sup> they are

1. over 16 years of age **and**
  2. a member of one of the following establishments or organisations<sup>2</sup> who gives full pay service and who is not absent on desertion
    - 2.1 Any of the regular naval, military or air forces of the Crown.
    - 2.2 Royal Fleet Reserve.
    - 2.2 Royal Navy Reserve.
    - 2.3 Royal Marines Reserve.
    - 2.4 Army Reserve.
    - 2.5 Territorial Army.
    - 2.6 Royal Air Force Reserve.
    - 2.7 Royal Auxiliary Air Force.
    - 2.8 The Royal Irish Regiment, to the extent that its members are not members of any force falling within subparagraph 2.1
- and**
3. Not an excluded person listed in paragraph C4079 below.

1 ESA Regs 13, reg 2; 2 Sch 1 Part 1

C4079 A person is excluded from the definition of a "member of Her Majesty's Forces" if they are a person<sup>1</sup>

1. who is serving as a member of any naval force of Her Majesty's forces and who (not having been an insured person under specific legislation) locally entered that force at an overseas base **or**
2. who is serving as a member of any military force of Her Majesty's forces and who entered that force, or was recruited for that force outside the United Kingdom, and the depot of whose unit is situated outside the United Kingdom **or**
3. who is serving as a member of any air force of Her Majesty's forces and who entered that force, or was recruited for that force, outside the United Kingdom, and is liable under the terms of engagement to serve only in a specified part of the world outside the United Kingdom.

*1 ESA Regs 13, Sch 1 Part 2*

C4080 – C4084

## **ESA In Youth - Residence and Presence Conditions**

C4085 With effect from 1.5.12 no further claims for ESA (Cont) could be made under the youth conditions. However some claimants who were entitled to ESA on the basis of satisfying the youth conditions prior to that date will continue to be entitled to ESA after 6.4.13

**Note 1:** At present (June 2013) no old style ESA(Y) claimants are subject to the ESA Regs 2013. At some stage however they may move to being subject to those regs and become entitled to new style ESA. The guidance below relating to ESA in Youth will therefore only apply when that move occurs.

**Note** These residence and presence conditions are modified in cases where EU law applies (see C4100 et seq)

C4086 In order to continue to satisfy the youth provisions<sup>1</sup>, a claimant must satisfy prescribed conditions of residence and presence in GB. Claimants must

1. be ordinarily resident in GB<sup>2</sup> **and**
2. **either**
  - 2.1 not be subject to immigration control<sup>3</sup> **or**
  - 2.2 be a person to whom paragraph C4087 applies**and**
3. be present in GB<sup>4</sup> **and**
4. have been present in GB for a period of (or periods totalling) not less than 26 weeks in the previous 52 weeks immediately preceding the relevant benefit

week<sup>5</sup> (which will normally be the first benefit week of entitlement following the date of claim).

*1 WR Act 07 Sch 1 para 4(1)(c); 2 ESA Regs 13, reg 12(1)(a); 3 reg 12(1)(b) & reg 12(3); 4 reg 12(1)(c); 5 reg 12(1)(d)*

C4087 A person satisfies the condition in paragraph C4086 **2.2** if they are<sup>1</sup>

1. a member of the family of a national of an EU or EEA country
2. a person who is legally working and living in GB and is a national of a State with which the EU has made an agreement relating to equal treatment and any member of their family living with them
3. a sponsored immigrant regardless of the length of stay in the UK.

*1 ESA Regs 13, reg 12(3)*

**Note:** the countries mentioned in **2.** above are Turkey, Morocco, Algeria, Tunisia and Switzerland.

C4088 Where a claimant whose entitlement is under the youth conditions satisfies the conditions in paragraph C4086.1 to 4 on the first day of a period of limited capability for work is treated as satisfying those conditions throughout that period of limited capability for work.

**Note:** this means that the specific residence and presence conditions that apply to ESA(Y) will be satisfied throughout the period of limited capability for work but an ESA(Y) claimant still has to satisfy the basic condition for entitlement to ESA which is that (subject to the allowable temporary absences) they be “in GB” (see C4005 to C4079). Remember also that the requirement to be “in GB” can be modified where EU exportability rules apply (see C4100 et seq).

C4089 Claimants whose entitlement to ESA is under the youth provisions who are absent from GB on any day should, for the purposes of the residence and presence tests, be treated as resident or present in GB if on that day they are

1. in prescribed employment on the continental shelf<sup>1</sup> **or**
2. aircraft workers or mariners<sup>2</sup> **or**
3. living with a serving member of the armed forces<sup>3</sup> (who is abroad in that capacity) and are that person’s spouse or civil partner, son, daughter, father, father-in-law, mother or mother in law<sup>4</sup>.

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

*1 ESA Regs 13, reg 12(2)(b); 2 reg 12(2)(c); 3 reg 2 & Sch 1; 4 reg 12(2)(a)*

## Continental Shelf Operations - Prescribed employment

C4090 “Prescribed employment” means<sup>1</sup> any employment, whether or not under a contract of service, in any designated or prescribed area in connection with any activity mentioned in specific legislation.

*1 SS Ben (PA) Regs, reg 11(1)*

C4091 Designated area means any area set out by Order in Council under the Continental Shelf Act 1964 as an area where the UK may explore the seabed, subsoil and exploit their natural resources<sup>1</sup>.

*1 SS Ben (PA) Regs, reg 11(1)*

C4092 Prescribed area means<sup>1</sup> any area over which Norway or any EC country (except the UK) exercises sovereign rights to explore the seabed and subsoil and exploit the natural resources or other named areas. This area must be outside the territorial water of

1. Norway **or**
2. any EC country (except the UK).

*1 SS Ben (PA) Regs, reg 11(1)*

### Meaning of “aircraft worker”

C4093 An “aircraft worker” means<sup>1</sup> a person who is or has been employed under a contract of service

1. as a pilot, commander, navigator or other member of the crew of any aircraft **or**
2. in any other capacity on board any aircraft, provided the employment is for the purposes of the aircraft or its crew or any passengers, cargo or mail carried on that aircraft;

provided that the contract is entered into in the UK with a view to its performance (in whole or in part) while the aircraft is in flight

**Note:** the definition excludes a person who is in employment as a member of Her Majesty’s forces.

*1 ESA Regs 2013, reg 12(5)*

### Meaning of “mariner”

C4094 A “mariner” means<sup>1</sup> a person who is in employment under a contract of service as a

1. master or member of the crew of any ship or vessel **or**
2. in any other capacity on board any ship or vessel provided that the employment is for the purposes of that ship or vessel or her crew or any passengers, cargo or mails carried by the ship or vessel.

Provided the contract is entered into in the UK with a view to its performance while the ship or vessel is on her voyage.

**Note:** the definition excludes a person who is in employment as a member of Her Majesty's forces.

*1 ESA Regs 2013, reg 12(5)*

C4095 - C4099

## The effect of EU law

### Introduction

C4100 There are two main kinds of EU legislation: regulations and directives. EU regulations apply directly and are part of UK law.

C4101 There are two current sets of EU regulations relating to the co-ordination of Social Security benefits across the Member States. These are

1. Regulation (EC) NO. 883/2004 which sets out the main rules, **and**
2. Regulation (EC) No. 987/2009 which deals with the administrative procedures to be followed in implementing the main rules.

**Note:** For the EU Member States, these regulations replaced earlier regulations<sup>1</sup> with effect from 1.5.10. They applied to Switzerland from 1.4.12 and to Norway, Iceland and Liechtenstein from 1.6.12. The old regulations<sup>1</sup> continue to apply in certain transitional cases. See also C4106 to C4108 below concerning third country nationals.

*1 Reg (EEC) 1408/71 & Reg (EEC) 574/72*

C4102 EU provisions do not create a harmonized social security system common to all EEA countries. EU provisions coordinate the national social security systems of EU countries so that a migrant moving within the EEA may

1. be protected against the risks covered by EU provisions **and**
2. maintain rights acquired in one EEA country when moving to another country.

C4103 Where Regulation 883/04 applies it can have the effect that the UK's domestic rules about residence and presence are modified.

### Transitional Provisions

C4104 The old<sup>1</sup> EC Social Security co-ordination rules were replaced by new<sup>2</sup> rules with effect from 1.5.10. However the old rules continue to apply to

1. Third country nationals (e.g. persons with indefinite leave to remain who are not themselves EEA nationals). This is because the UK did not opt in to an EU Council Regulation which extended 883 to this group of people<sup>3</sup>.

2. persons with certain rights acquired under the old rules.

*1 Reg (EEC) 1408/71; 2 Reg (EC) 883/04; 3 Regulation (EU) 1231/10, Recital 18 & Art 2*

C4105 There may be cases where, as a result of the new regulation<sup>1</sup>, a person receiving benefit as at 1.5.10 would be subject to the legislation of a different Member State to that determined under Reg (EEC) 1408/71. In such circumstances, the legislation determined under Reg (EEC) 1408/71 shall continue to apply for up to ten years, provided the relevant situation remains unchanged<sup>2</sup>. However, the person concerned may request that he be subject to the legislation of the Member State applicable under Reg (EC) 883/04. If such a request is submitted to the competent state under the new Regulation within three months of 1.5.10, they will assume competency from 1.5.10. If the request is made after that time limit, the change of applicable legislation will take place on the first day of the following month.

*1 Reg (EC) 883/04; 2 Reg (EC) 883/04, Art 87(8)*

### Third country nationals

C4106 The UK is not covered by the extension of rights to Third Country Nationals (TCNs) under Reg (EC) 883/04, which came in to force on 1.5.10. However TCNs will continue to be subject to the terms and limitations of Reg (EEC) 1408/71 as summarised below.

C4107 An amendment to EU Regulations<sup>1</sup> extended the provisions of Reg (EEC) 1408/71 to third country nationals (TCNs) from 1.6.03 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to TCNs:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

*1 Reg (EC) 859/2003*

C4108 Therefore a TCN who has worked will be able to export an award of ESA if he satisfies the same conditions that apply to an EEA national (and the UK is the competent state for payment of a sickness benefit) **except** where he leaves GB to live in Denmark, Iceland, Norway, Liechtenstein, or Switzerland. Of course, the TCN must be legally residing in both the UK and then the new state of residence that they move to.

C4109 - C4114

## Personal Scope

C4115 In order to establish whether the EU co-ordination regs apply, DMs first need to establish whether the claimant is within their personal scope.

C4116 A person is within the personal scope of the EU co-ordination regs if that person<sup>1</sup>

1. is

1.1 a national of a Member State, **or**

1.2 a stateless person or refugee residing in a Member State

who is or has been subject to the legislation of one or more Member States

**or**

2. is a member of the family or a survivor of a person falling within subparagraph 1.

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

C4117 Also within the personal scope of EU provisions<sup>1</sup> are survivors of persons who have been subject to the legislation of one or more Member States (regardless of the nationality of such persons), provided the survivor is

1. a national of a Member State, **or**

2. a stateless person or refugee residing in one of the Member States.

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

### Meaning of “member of the family”

C4118 “Member of the family” as used in C4116.2 means<sup>1</sup>

1. the spouse (or civil partner) **and**

2. children under 18 **and**

3. children over 18 who are dependant.

*1 Reg (EC) 883/04, Art 1(i)*

### What type of benefit is ESA?

C4119 The EU co-ordination regulations apply different rules depending upon the classification of the benefit concerned. ESA during the assessment phase is a “sickness benefit”. After the assessment phase it is an “invalidity benefit”.

### Deciding which EEA State’s legislation applies

C4120 The EU Social Security Co-ordination regulations contain rules intended to avoid a conflict between the domestic laws of the Member States. The basic rules are<sup>1</sup>

1. a person pursuing activity as an employed or self-employed person in a 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 EC co-ordination regs<sup>2</sup> 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.
5. any other person to whom sub-paragraphs 1 to 4 do not apply is subject to the legislation of the Member State of residence.

**Note:** C4120.5 is subject to other rules in the EC co-ordination regs which guarantee benefits under the legislations of one or more Member States.

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

C4121 Except in relation to the benefits listed at C4122, for the purposes of C4120.1, a person receiving cash benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity<sup>1</sup>.

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

C4122 C4121 does not apply to<sup>1</sup>

1. invalidity benefits
2. old age or survivors' pensions
3. pensions in respect of accidents at work or occupational diseases
4. sickness benefits in cash which are for treatment for an unlimited period.

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

C4123

## The EU Rules concerning “sickness benefits”

### Contribution conditions – EU provisions

C4124 Provided the UK is the competent state for the payment of sickness benefits, periods of insurance (whether they are made up through employment, self-employment, payment of contributions or residence) completed under the legislation of another EEA country may be used to help satisfy the contribution conditions for ESA<sup>1</sup> if the claimant is

1. within the personal scope of the EU social security co-ordination regs **and**
2. the UK’s legislation applies **and**
3. not entitled by using the UK contribution record alone.



C4125 The Secretary of State decides whether the contribution conditions are satisfied, including any related questions<sup>1</sup>. The decision maker decides

1. the date of claim **and**
2. other related questions<sup>2</sup>.

*1 SS Act 98, s 10A; Scrivner v CAO [1990] 1 CMLR 637;  
S of S v Scully [1992] 4 ALL ER 1; 2 SS (C&P) Regs*

## **Incapable of work in another European Economic Area country**

C4126 A person's incapacity for work must be decided in accordance with UK criteria<sup>1</sup>. A person who claims ESA in another EEA country must **either**

1. provide a certificate of incapacity for work issued by the doctor who established their state of health<sup>2</sup> **or**
2. if doctors in that country do not provide certificates, notify the appropriate social security institution of that country which will immediately arrange for a medical assessment of the person's incapacity and for a certificate of incapacity to be drawn up<sup>3</sup>.

Any further medical examinations will be undertaken as if the claimant were insured in that country.

*1 R(S) 3/82; R(S) 13/83; Case 150/82, Coppolla v Insurance Officer;  
2 Reg (EC) 987/09, Art 27; 3 Art 27(3)*

C4127 At the request of the DWP, the relevant social security institution of the EEA country will carry out any medical examinations required under ESA legislation and the report of the examining doctor (which will state the probable duration of the incapacity for work) will be forwarded without delay to the DWP<sup>1</sup>.

*1 Reg (EC) 987/09, Art 27(5)*

## **Deciding the competent state for the payment of ESA during the assessment phase**

C4128 There are two main rules for deciding which state is competent for the payment of cash "sickness benefits" depending upon whether the claimant is an "insured person" or a person receiving a pension.

### **Insured persons**

C4129 In relation to sickness benefits, an insured person means<sup>1</sup> any person who satisfies the conditions of entitlement for a UK sickness benefit. In practice this means a person who satisfies the contribution conditions for ESA, **provided** they have not been lastly 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.

**Note:** DMs are reminded of the need to consider which EEA State's legislation applies (see C2111 to C2114). 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.

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

C4130 An "insured person" (and members of that person's family – see C4118) 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 B<sup>1</sup>.

*1 Reg (EC) 883/04, Art 21*

C4131 – C4134

## **Pensioners**

C4135 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 kind<sup>1</sup>.

*1 Reg (EC) 883/04, Art 29*

C4136 In receipt of a pension under GB legislation means entitled to and actually in receipt of

1. state RP of any category (except Category D only awards with no contributory element) **or**
2. 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**
3. a pension for Industrial Injuries Disablement Benefit (including REA and RA).

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

## **Meaning of sickness "benefits in kind"**

C4137 For the purposes of the EU rules about sickness and maternity benefits "benefits in kind" means<sup>1</sup> benefits in kind provided for under the legislation of a Member State which are intended to

1. supply
2. make available
3. pay directly to a provider for
4. reimburse the cost of

medical care and products and services ancillary to that care, including long term care benefits in kind.

*1 Reg (EC) 883/04, Art 1(va)(i)*

## **Deciding which state is responsible for sickness benefits for a pensioner**

C4138 Where a person who receives a pension or pensions under the legislation of one or more Member States, one of which is the Member State of residence and the person is entitled to sickness benefits in kind under the legislation of the Member State of residence, then that State will pay sickness benefits (in cash and in kind)<sup>1</sup>.

*1 Reg (EC) 883/04, art 23*

### **Example**

Martin resides in Germany. He receives pensions under both German and UK legislation and he is entitled to sickness benefits in kind under German legislation. Germany is the Member State responsible for paying cash sickness benefits to Martin.

C4139 Where a person receives a pension or pensions under the legislation of one or more Member States but there is no entitlement to benefits in kind under the legislation of the Member State of residence, sickness benefits in cash and in kind will be provided by one of the Member States responsible for the pension(s) determined as follows<sup>1</sup>

1. where the person is entitled to benefits in kind under the legislation of only one Member State then that Member State will bear the cost of benefits in kind and pay the cash sickness benefits.
2. where the person is entitled to benefits in kind under the legislation of two or more Member States then the Member State where the person was insured for the longest period of time will bear the cost of benefits in kind and pay cash sickness benefits.

*1 Reg (EC) 883/04, Art 24*

C4140 Where a person receives a pension under the legislation of one or more Member States (other than the Member State of residence) resides in a Member State where entitlement to sickness benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person then the rule in C4139 will apply<sup>1</sup>.

*1 Reg (EC) 883/04, Art 25*

## **Visits to the United Kingdom**

C4141 A person who is entitled to ESA whilst in another EEA country remains entitled if

1. habitually resident<sup>1</sup> in **or**

2. temporarily staying in<sup>2</sup> or visiting

the UK.

*1 Reg (EC) 883/04 Art 18*

### **Example**

A man is living in Germany and entitled to ESA. Although he remains resident in Germany he visits GB for a short period. He remains entitled to ESA during his temporary visit. He would also remain entitled to ESA if he decided to live in GB permanently.

## **Staying in another European Economic Area country**

C4142 A person can receive ESA during the assessment phase<sup>1</sup> and benefits in kind (see C4137) if

1. **temporarily staying<sup>2</sup>** in another EEA country **and**
2. that person would, but for the disqualification for being absent from GB, be entitled to assessment phase ESA.

*1 Reg (EC) 883/04, Art 21; 2 Art 1(k)*

## **Transfer or return to another European Economic Area country**

C4143 A person can continue to be entitled to Assessment Phase ESA, and benefits in kind<sup>1</sup> (see C4137) if that person would, but for the disqualification for being absent from GB be entitled to Assessment Phase ESA.

*1 Reg (EC) 883/04, Art 21*

C4144-C4149

## **The EU rules concerning “invalidity benefits”**

### **Introduction**

C4150 Entitlement to and the rate of Main Phase ESA under EU provisions depends on the legislation to which the claimant has been subject<sup>1</sup>. There are two types of legislation, Type A and Type B.

*1 Reg (EC) 883/04, art 44(1)*

C4151 Type A<sup>1</sup> are those where the rate of invalidity benefit does not depend on the length of insurance. Type B<sup>2</sup> are those where the rate of invalidity benefit depends on the length of insurance. Main Phase ESA is a Type A invalidity benefit.

*1 Reg (EC) 883/04, art 44; 2 art 44(1)*

C4152 Guidance on entitlement to “invalidity benefit” where a person has been subject only to Type A legislation is at C4155 et seq. Guidance on entitlement to invalidity benefit where a person has been subject to Type B legislation is at C4165 et seq.

## Countries with Type A invalidity benefit

C4153 Type A legislations<sup>1</sup> are

**1. Czech Republic**

Full disability pension for persons whose total disability arose before reach age 18 and who were not insured for the required period

**2. Estonia**

Invalidity pensions granted before 1.4.00 under the State Allowances Act and which are retained under the State Pension Insurance Act

National pensions granted on the basis of invalidity according to the State Pension Insurance Act

Invalidity pensions granted according to the Defence Forces Service Act, Police Service Act, Prosecutor’s Office Act, Status of Judges Act, Members of the Riigikogu Salaries, Pensions and Other Social Guarantees Act and President of the Republic Official Benefits Act.

**3. Finland**

National pensions paid to persons who are born disabled or become disabled at an early age.

**4. Greece**

Legislation relating to the agricultural insurance scheme.

**5. Ireland**

Part 2, Chapter 17 of the Social Welfare (Consolidation) Act 2005.

**6. Sweden**

Income- related sickness benefit and activity compensation

**7. United Kingdom**

Invalidity benefit, IB(Y), long term Incapacity Benefit, ESA(C) after the assessment phase and Severe Disablement Allowance<sup>2</sup>.

*1 Reg (EC) 883/04, Art 44(1) & Annex VI; 2 SS CB Act 92, sec 30A(5), 40, 41 & 68; SS CB (N. Ireland) Act 92, sec 30A(5), 40, 41 & 68; SS Pens (N. Ireland) Order 75, Art 16-1*

## Countries with Type B legislation

C4154 The countries with Type B legislation are<sup>1</sup>

1. Austria

2. Denmark
3. Finland (except for the pensions mentioned in C4153.3)
4. France
5. Germany
6. Greece (except for the pensions mentioned in C4153.4)
7. Iceland
8. Italy
9. Liechtenstein
10. Luxembourg
11. Norway
12. Portugal
13. Sweden.
14. Switzerland

*1 Reg (EC) 883/04, Art 44(1)*

## **Subject only to Type A Legislation**

C4155 A person who has been subject to the legislation of two or more EEA States and has completed periods of insurance or residence only under Type A legislation is entitled to invalidity benefits **only** from the EEA State whose legislation was applicable when the incapacity for work (followed by invalidity) first began<sup>1</sup>. In the guidance that follows, that EEA State is described as “the relevant country”.

*1 Reg (EC) 883/04, Art 44(2)*

## **Entitlement to invalidity benefit in only one country**

C4156 If the relevant country (see paragraph C4155) decides that there is entitlement to Type A invalidity benefit, there is no entitlement to invalidity benefit under the legislation of any other EEA country<sup>1</sup>.

*1 Reg (EC) 883/04, Art 44(2)*

## Not entitled in relevant country

C4157 A person may be entitled to invalidity benefit under the Type A legislation of an EEA country, other than the one whose legislation applied at the date the incapacity which led to the invalidity began if

1. they have been subject to the country's legislation **and**
2. they are not entitled to invalidity benefit under the relevant country's legislation<sup>1</sup>.

*1 Reg (EC) 883/04, Art 44(3)*

C4158 – C4164

## Subject to both Type A and Type B legislation

C4165 Where a person has been subject to both Type A and Type B legislations the rules in paragraph C4166 to C4168 will apply<sup>1</sup>. However if<sup>2</sup> such a person has previously been subject to Type B legislation and then suffers incapacity for work leading to invalidity while subject to Type A legislation, then invalidity benefits will be paid by the Type A legislation state **provided that**

1. they satisfy the conditions of entitlement for invalidity benefits that apply in the Type A state **and**
2. they do not assert any claims to old age benefits.

*1 Reg (EC) 883/04, art 46(1); 2 art 46(2)*

## Subject to Type B legislation - The Main Rule

C4166 Where a person has been subject to a Type B legislation, the DM will have to calculate the amount of main phase ESA payable by the UK which will be the higher of the result of applying the two methods of calculation set out below.

### Method 1

C4167 Main Phase ESA will be paid at the UK rate if<sup>1</sup>

1. the person is entitled to Main Phase ESA without relying on insurance in any other EEA country **and**
2. periods of sickness benefit, wages or salary paid in place of sickness benefit, or invalidity benefit in another EEA country have **not** been taken into account **and**
3. contributions paid in another EEA country have **not** been used in deciding entitlement to Main Phase ESA.

*1 Reg (EC) 883/04, Art 46(2);*

## Method 2 - pro rata

C4168 The rate Main Phase ESA is calculated in three stages

### 1. Stage 1 - Addition

Add together all the periods of insurance for invalidity benefits whether made up of paid contributions, employment, self employment or residence before the start of incapacity in all the EEA countries where the claimant has been insured and treat them as periods of insurance completed in the UK<sup>1</sup>.

### 2. Stage 2 - Theoretical rate of Main Phase ESA

Determine the **theoretical** amount of Main Phase ESA which would be payable if all the insurance added together in **Stage 1** had been paid in the UK<sup>2</sup>.

**Note:** This theoretical rate will always be 100% and therefore no calculation is needed .

### 3. Stage 3 - Actual rate of pro-rata Main Phase ESA

Apply to the theoretical amount, the ratio of the period of insurance under UK legislation to the total period of insurance prior to the date the claimant first became incapable of work through sickness<sup>3</sup>

*1 Reg (EC) 883/04, Art 51; 2 Art 52 (1)(b)(i); 3 Case 793/79, Menzies Reg (EC) 883/04, Art 52(1)(b) (ii);  
4 Reg (EEC) 1408/71, Art 46(2)(b)*

#### Example

A person claims ESA but is not entitled using UK insurance only. Before becoming incapable of work a person was insured in the UK for 52 weeks and was insured in Italy for 208 weeks. The total insurance is 260 weeks.

The claimant is **under** pension age, therefore the **theoretical** rate of UK ESA Main Phase is £99.85 (the standard main phase rate of £67.50, plus, in this example, the support component of £32.35)

The **actual** rate of pro rata Main Phase ESA is £19.97. That is 1/5 of £99.85.

## Date from which pro-rata invalidity benefit is payable

C4169 The CJEU has held<sup>1</sup> that pro-rata main phase ESA must be paid by the UK from the first day of entitlement to another Member State's Type B invalidity benefit even if this is before the end of the assessment phase.

*1 Leyman v Institut National d'Assurance Maladie-Invalidite (INAMI) Case C-3/08*



## Up-rating of pro-rata main phase ESA

C4170 The pro-rata fraction is not recalculated when the rates of benefit are increased due to normal up-rating<sup>1</sup>. The amount of up-rated benefit is calculated by applying the pro-rata fraction to the up-rated full ESA rate.

*1 Reg (EC) 883/04, art 59(2)*

### Example

On becoming entitled to UK main phase ESA, the pro-rata fraction was calculated to be 52/260 (see paragraph C4168). This meant that the actual rate of main phase ESA was £19.87. At the next general up-rating of benefit rates, the rate of main phase ESA (including the care component) was increased from £99.85 to £105.05. The pro-rata fraction remains the same but the actual rate being paid increases from £19.97 to £21.01.

The new calculation of the actual rate of main phase ESA is

52 (UK insurance)

----- x £105.05 = £21.01

260 (total insurance)

C4171 – C4174

## Pro-rata calculation – exceptions to the normal rules

### Not entitled to invalidity benefit in all European Economic Area countries

C4175 There may be occasions where a person has been subject to the legislation of a number of EEA states but where they do not satisfy (or no longer satisfy) the national conditions of entitlement for invalidity benefits under the legislation of one or more of these states. Where this is the case, in making any calculation under the main rule, periods of insurance in the EEA State(s) which do not satisfy the conditions of entitlement are not to be included<sup>1</sup>.

*1 Reg (EC) 883/04, Art 50(2)*

### Example

In the two relevant income tax years immediately before the relevant benefit year, George has resided and paid insurance in the UK (10 weeks), Germany (40 weeks); Greece (50 weeks) and (Italy 5 weeks). However it has been established that George does not satisfy the conditions of entitlement for the Italian "invalidity benefit". In calculating the pro-rata amount of ESA in accordance with stage 3 in paragraph C4168 above the DM did not include the periods of insurance in Italy.

## Insured in one country for less than one year

C4176 Subject to C4177, in completing stage 1 (adding together all the periods of insurance) and stage 3 (making the pro-rata calculation) of paragraph C4168, periods of insurance (or residence) completed under the legislation of another EEA state are not to be taken into account where<sup>1</sup>

1. the period is less than one year **and**
2. applied on its own the period does not produce a right to an invalidity benefit under the legislation of that EEA state.

*1 Reg (EC) 883/04, Art 57(1)*

C4177 However, if the effect of applying paragraph C4176 would be to relieve all of the EEA states where the person was insured (or resided) of their obligation to pay invalidity benefits, benefits will be provided exclusively under the legislation of the EEA state where the person was last insured as if all the periods of insurance (or where appropriate residence) had been completed under that EEA state's legislation<sup>1</sup>.

*1 Reg (EC) 883/04, Art 57(3)*

C4178 – C4179

## Entitled to an old age pension in another European Economic Area country

### Introduction

C4180 Because EEA countries have different ages for entitlement to old age benefits a person may become entitled to an old age benefit in one EEA country before reaching the minimum age for entitlement in another EEA country where insurance has been paid.

### Person subject only to Type A legislation

C4181 A person who has been successively or alternately subject to the legislation of two or more EEA States and who has completed periods of insurance or residence exclusively under type A legislation is entitled only to the benefits from the EEA State whose legislation was applicable when the incapacity for work leading to the invalidity began<sup>1</sup>.

*1 Reg (EC) 883/04, Art 44*

C4182 If<sup>1</sup> the claimant has completed periods of insurance under UK legislation and

1. the claimant is entitled to invalidity benefits from another EEA State in accordance with paragraph C4181 **and**
2. those invalidity benefits are converted to old age benefits **and**

3. the claimant is not yet entitled to old age benefits under UK legislation

the UK will need to calculate and pay invalidity benefits until the claimant attains UK pension age. The rate payable will be a pro rata calculated in accordance with paragraphs C4166 to C4168.

*1 Reg (EC) 883/04, art 48(3)*

### **Rate of pro-rata main phase ESA**

C4183 All the insurance up to the date the person became incapable of work should be included in the pro rata calculation.

C4184 – C4189

## **Effect of EU Law – ESA under the youth conditions**

### **Introduction**

C4190 With effect from 1.5.12 no further claims for ESA (Cont) could be made under the youth conditions. However some claimants who were entitled to ESA on the basis of satisfying the youth conditions prior to that date will continue to be entitled to ESA after 6.4.13.

C4191 In a judgment<sup>1</sup> dated 21.7.11, the Court of Justice of the European Union dealt with a case of a British national (LS) who was severely disabled. She moved with her parents to Spain in 2000. DLA has been paid to her for a period starting in April 1992 and continued to be paid to her in Spain in accordance with the EU co-ordination rules. In 2005, the claimant's mother claimed IB(Y) on her behalf. The claim was refused by a DM on the grounds that the claimant did not satisfy the condition that she be present in GB. The DM's decision was confirmed by a FtT. The mother then appealed to the UT, which referred various questions to the CJEU.

*1 Case C-503/09 LS v Secretary of State for Work and Pensions*

C4192 The CJEU held that

1. IB (Y) was payable at short term and long term rates but, decided that it was a benefit payable in respect of a permanent or long-term disability and thus had the character of an invalidity rather than a sickness benefit.
2. IB(Y) was an invalidity benefit, where a claimant came within the scope of the EU regulations concerning the co-ordination of social security, those regulations precluded the application of a requirement that the claimant be ordinarily resident in the UK.
3. The Treaty<sup>1</sup> precludes a Member State from making the award of such a benefit subject to a condition of past presence of the claimant in that State to the exclusion of any other element enabling the existence of a genuine link

between the claimant and that Member State's social security system to be established.

*1 TFEU Art 21*

C4193 The CJEU then went on to list the factors that applied in LS's case and to hold that, taken together, these demonstrated that she had a genuine and sufficient link to the UK's social security system.

C4194 In view of the similarities between ESA under the youth conditions and IB(Y) the CJEU's judgment applies to ESA(Y).

C4195 – C4199

## **Effect of the judgment on ESA (Y)**

C4200 As no new claims can be made for ESA under the youth conditions, the judgment will affect only situations where a claimant who is entitled to ESA(Y) moves to reside permanently in another EEA state and seeks to continue to receive the benefit abroad.

C4201 The DM will first of all need to decide whether the claimant is within the personal scope of the EU co-ordination regs (see paragraph C4115 to C4118). The DM will then need to decide whether the claimant has a genuine and sufficient link to the UK's social security system.

## **Meaning of "Genuine and Sufficient Link"**

C4202 The phrase is not defined, but the LS judgment<sup>1</sup> gives some indications of the factors to take into account. DMs will have to make a balanced judgement based on all the facts of the case. Among the relevant factors which may be considered are

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

**Note:** where the claimant has a spouse's or survivor's 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.

- 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 a result of that work

**and**

- 3. Family factors:** for example where the claimant is an adult dependant child of a person who is receiving a UK pension. Where the claimant is the spouse or civil partner of a person with a genuine and sufficient link with the UK then

that will be a relevant but not conclusive 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 decide how much weight to give to each relevant factor in coming to an overall determination of whether there is a genuine and sufficient link to the UK.

*1 Case C-503/09 LS v Secretary of State for Work and Pensions;*

C4203 If the DM decides that the claimant **does not** have a genuine and sufficient link to the UK's social security system, the DM can decide that there is no entitlement while the claimant resides in another EEA state.

C4204 If however there is a genuine and sufficient link the DM will need to go on to consider the EU rules about the payment of invalidity benefits set out in paragraph C4150 et seq.

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