



INTERNATIONAL ISSUES – JSA, ESA, IS & SPC

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INTRODUCTION

1 This memo provides guidance on the changes made to the Imm (EEA) Regs 2016 which come into effect from 24.7.18¹. These changes give effect to the following ECJ judgments

1. *Gusa (C-442/16)*
2. *O and B (C-456/12)*
3. *Lounes (C-165/16)*
4. *Chavez-Vilchez and others (C-133/15)*.

Note: For queries that may relate to the retrospective effect of these judgments, please refer the case to DMA Leeds for advice.

1 Immigration (EEA) (Amendment) Regulations 2018, reg 1(2) (SI 2018 No. 801)

2 This memo also advises on changes to guidance in relation to the ending of restrictions for Croatian nationals (see [DMG 073650](#) et seq). These changes come into effect from 1.7.18.

3 This memo also advises on a new type of leave to remain¹ granted by the Home Office which comes into effect from 5.7.18.

1 Immigration Act 2016, s. 67

GUSA (C-442/16)

4 The *Gusa*¹ CJEU ruling was delivered on 20.12.17. This provides that EEA nationals who are no longer working in a self-employed capacity may retain their status as a self-employed person, subject to the guidance in paragraphs 5 to 9 below.

1 Florea Gusa v Minister for Social Protection (case C-442/16)

Relevant Period

- 5 The definition of “relevant period” (073093) is amended¹ to include a self-employed person who retains the status as a self-employed person².

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

Retaining the status of a self-employed person

- 6 A person who is no longer in self-employment continues to be treated as a self-employed person provided¹ that person
1. is temporarily unable to engage in activities as a self-employed person as the result of an illness or accident² **or**
 2. is in duly recorded involuntary unemployment after having worked as a self-employed person in the UK for at least one year provided³ the person
 - 2.1 has registered as a jobseeker with the relevant employment office **and**
 - 2.2 satisfies conditions D and E **or**
 3. is in duly recorded involuntary unemployment after having worked as a self-employed person in the UK for less than one year provided⁴ that person
 - 3.1 has registered as a jobseeker with the relevant employment office **and**
 - 3.2 satisfies conditions D and E **or**
 4. is involuntarily no longer in self-employment and has embarked on vocational training⁵ **or**
 5. has voluntarily ceased self-employment and has embarked on vocational training that is related to the person’s previous occupation⁶.

Note: A person to whom subparagraph 3. applies, only retains their status as a self-employed person for a maximum of six months⁷.

1 Imm (EEA) Regs, reg 6(4); 2 reg 6(4)(a); 3 reg 6(4)(b); 4 reg 6(4)(c); 5 reg 6(4)(d); 6 reg 6(4)(e); 7 reg 6(4A)

Condition D

- 7 Condition D¹ is that the person
1. entered the UK as a self-employed person or in order to seek self-employment **or**

2. is present in the UK seeking employment or self-employment, immediately after enjoying a right to reside as a self-employed person; a self-sufficient person; or a student (disregarding any period during which self-employed status was retained pursuant to paragraph 6 2. or 6 3. above).

1 Imm (EEA) Regs, reg 6(4B)

Condition E

- 8 Condition E¹ is that the person provides evidence of seeking employment or self-employment and has a genuine chance of being engaged.

1 Imm (EEA) Regs, reg 6(4C)

GPOW test

- 9 A self-employed person is added to the list within guidance at [DMG 073092](#) which advises on EEA nationals who cannot have a right to reside for longer than the relevant period unless¹ they
 1. can provide compelling evidence that they are continuing to seek employment **and**
 2. have a genuine chance of being engaged.

This is assessed through the GPOW test.

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

O AND B (C-456/12)

Family members of British citizens

- 10 Additions are made to the current guidance at [DMG 073258](#). As well as the conditions already listed in 073258 1. to 3., in order to acquire a derived right of residence¹, a person must also satisfy the conditions that
 1. they have had the status of “family member” within the meaning of specified legislation² for all or part of their joint residence in a non-UK EEA Member State where the British citizen was exercising Treaty rights³ **and**
 2. genuine family life was created or strengthened during their joint residence in the EEA State⁴.

1 Imm (EEA) Regs, reg 9(2); 2 Directive 2004/38, Art.2(2); 3 Imm (EEA) Regs, reg 9(2)(d); 4 reg 9(2)(e)

LOUNES (C-165/16)

11 The *Lounes*¹ judgment was delivered on 14.11.17. This provides that an EEA national who is also a British citizen may continue to be treated as an EEA national if

1. British citizenship was acquired after exercising Free Movement rights as an EEA national **and**
2. EEA nationality is retained alongside British citizenship **and**
3. they continue to be
 - 3.1 a person with a right of permanent residence **or**
 - 3.2 a qualified person

subject to the requirements being satisfied in paragraphs 12 to 17 below.

1 Toufik Lounes v Secretary of State for the Home Department (Case C-165/16)

Definition of EEA national

12 The definition of EEA national (073262) is amended. It means¹ a national of an EEA state who

1. is not also a British citizen **or**
2. is also a British citizen and who prior to acquiring British citizenship, exercised a right to reside as such a national during their extended right of residence² or right of permanent residence³.

The exception to the above definition, is that a person does not fall within subparagraph 2., if the person's EEA state of nationality became a member state after that person acquired British citizenship.

1 Imm (EEA) Regs, reg 2(1); 2 reg 14; 3 reg 15

Transitional provisions

13 In determining whether a person satisfies the requirements of being a dual national who may continue to be treated as an EEA national, transitional provisions provide that the definition of EEA national (paragraph 12 above) is to be read as if that definition was in force at all relevant times¹.

1 Imm (EEA) (Amendment) Regulations 2018, reg 3(a)

Dual national – EEA national who acquires British citizenship

- 14 A new regulation¹ is inserted into the Imm (EEA) Regulations, to provide the circumstances where a national of an EEA state who is also a British citizen (a dual national), may continue to be treated as an EEA national.

1 Imm (EEA) Regs, reg 9A

Meaning of dual national

- 15 A dual national means¹ a person falling within paragraph 12 2. above.

1 Imm (EEA) Regs, reg 9A(1)

Dual national who may continue to be treated as an EEA national

- 16 A dual national must not have, at any point since having acquired British citizenship, lost their right of permanent residence or their status as a qualified person.

- 17 A dual national¹ must provide evidence that they

1. had acquired a right of permanent residence prior to becoming a British citizen and have not at any time, subsequent to acquiring their British citizenship, lost their right of permanent residence² **or**
2. were a qualified person at the time of acquiring their British citizenship³ and have not at any time subsequent to acquiring British citizenship, lost their status as a qualified person⁴.

1 Imm (EEA) Regs, reg 2(1); 2 reg 9A(3) & (4); 3 reg 9A(2)(a); 4 reg 9A(2)(b)

Transitional provisions

- 18 Transitional provisions¹ specify that the legislation² providing the requirements for a dual national who may continue to be treated as an EEA national (paragraphs 16 and 17 above) is to be treated as if that legislation was in force at all relevant times.

1 Imm (EEA) (Amendment) Regulations 2018, reg 3(b); 2 Imm (EEA) Regs, reg 9A

Example

Mrs B, an Estonian national, arrived in the UK in March 2010 using her Estonian passport. She began full-time employment immediately. In March 2015, Mrs B acquired a right of permanent residence (HO issuing a document certifying this). In April 2016, she acquired her British citizenship, but retained her Estonian citizenship.

On 6.1.18, Mrs B's father (Mr G) arrived in the UK, claiming SPC on 14.4.18 as the dependent family member of Mrs B. Mr G provided evidence of Mrs B's permanent residence document dated March 2015, her valid UK passport and valid Estonian passport, along with a variety of her wage slips in order to show that, since acquiring her right of permanent residence, this had not been lost through an absence from the UK in excess of 2 years.

The DM determines that Mrs B falls within the definition of being an EEA national, as she has exercised free movement rights as an EEA national prior to acquiring her British citizenship. The DM also determines that Mrs B may continue to be treated as an EEA national as she had acquired a right of permanent residence prior to becoming a British citizen, and had not lost that right of permanent residence since acquiring her British citizenship.

CHAVEZ-VILCHEZ AND OTHERS (C-133/15)

Derivative right to reside

19 A person who is not an exempt person may qualify for a derivative right of residence in one or more of the following categories

1. primary carer of a self-sufficient child¹ (see [DMG 073387 1.](#)) **or**
2. person in general education² (see [DMG 073387 2.](#)) **or**
3. primary carer of a person in general education³ (see [DMG 073387 3.](#)) **or**
4. primary carer of a British citizen⁴ (see [DMG 073466](#)) **or**
5. dependent child of a primary carer⁵ (see [DMG 073387 4.](#)).

1 Imm (EEA) Regs 2016, reg 16(2), Case C-200/02 Zhu and Chen v Secretary of State for the Home Department; 2 reg 16(3); NA (Pakistan)(C-115/15); Reg (EEC) 1612/68, art 12;

3 Imm (EEA) Regs 2016, 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;

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

5 Imm (EEA) Regs 2016, reg 16(6)

Primary carer

20 Prior to 24.7.18, guidance at 073385 advises that a person is to be regarded as the primary carer of another person if¹ they are a direct relative or legal guardian of that person and they

1. have primary responsibility for that person's care **or**
2. share equally the responsibility of that person's care with one other person, provided that other person is not an exempt person.

1 Imm (EEA) Regs, reg 16(8)

21 An exempt person is defined¹ at [DMG 073383](#) as

1. a person who has a right to reside in the UK as a result of any provision within the Imm (EEA) Regs (other than a derivative right to reside) **or**
2. a person who has a right of abode in the UK **or**
3. certain persons who are exempt from the requirement to have leave to enter or remain e.g. certain aircrew, seamen or diplomats **or**
4. a person who has indefinite leave to enter or remain in the UK.

1 Imm (EEA) Regs, reg 16(7)(c)

22 *Chavez-Vilchez* holds that, where there is another person who is able and willing to assume or continue primary day to day care of the child, this is a relevant factor, but is not in itself sufficient ground for concluding whether or not an EU citizen would be compelled to leave their own country or the territory of the EU as a whole.

23 In line with *Chavez – Vilchez*, the definition of “primary carer”¹ at [DMG 073385](#) is amended. From 10.5.17, a person is recognised as a primary carer, if

1. they are the sole carer **or**
2. they share equally the responsibility of care with another person (“the joint primary carer”) regardless of whether the joint primary carer is an exempt person².

1 Imm (EEA) Regs, reg 16(8); 2 reg 16(7)(c); 3 reg 16(9)

Best interests of the child

24 The Court held that in determining whether or not a child would be compelled to leave their own country or the territory of the EU, that in the best interests of the child, an assessment must take account of all the specific circumstances, including

1. the age of the child **and**

2. the child's physical and emotional development **and**
3. the extent of the child's emotional ties to both the TCN parent and Union citizen parent **and**
4. the risks, which separation from the TCN parent might entail for the child's equilibrium.

Sharing equal responsibility

25 Two people should be considered to share equally the responsibility for a child when they both have responsibility for the care and welfare of the child, both long-term and on a day-to-day basis. This may include

1. deciding where the child lives
2. choosing what school the child attends
3. providing for the child's education
4. deciding how and where the child spends time outside of school
5. looking after the child's property
6. disciplining the child
7. authorising medical treatment
8. authorising school trips.

This is not an exhaustive list.

26 Two people who spend different amounts of time with a child may still have equal responsibility for that child. Equal responsibility does not mean there has to be evidence of an equal sharing of responsibilities (as this is not always practical). Each case should be considered on its individual merits. In cases of doubt, referrals can be made to DMA Leeds for advice on particular cases.

Example 1

Child resides with mother during the week, and resides with father at weekends. Unless there is evidence to indicate that the father is unable to care for the child at all, it can be accepted that both parents share equal responsibility¹.

1 Imm (EEA) Regs, reg 16(8)(b)(ii)

Example 2

Child resides with the mother full time, but father has regular contact. Whilst the father may not provide the majority of care for the child, the father is actively involved in the child's life and continues to have parental responsibility for the child. Unless there is evidence to indicate that the father is unable to care for the child at all, it can be accepted that both parents share equal responsibility¹.

1 Imm (EEA) Regs, reg 16(8)(b)(ii)

CROATIAN RESTRICTIONS ENDING

- 27 The Republic of Croatia became a member state of the EU on 1.7.13¹. Transitional provisions in the Croatia Treaty² allowed EU Member States to impose certain restrictions on the rights to freedom of movement within the EEA³ and allowed the UK to apply national measures, restricting the access of Croatian nationals to the UK's labour market for a limited period i.e. for five years from 1.7.13⁴.

1 Treaty concerning the accession of the Republic of Croatia, Art 3.2; 2 Act concerning the accession of the Republic of Croatia, Art 18 & Annex V; 3 TFEU Art 45 & Reg (EU) 492/11, Arts 1 to 6; 4 Act concerning the accession of the Republic of Croatia, Art 18 & Annex V, section 2, para 2

- 28 Employment restrictions that have applied to Croatian nationals since 1.7.13 will cease to have effect on 1.7.18¹. From that date all Croatian nationals will have full EU rights in accordance with Directive 2004/38/EC.

1 Croatia (I & WA) Regs 2013, reg 1(2)

Effect on JSA(IB)

- 29 With effect from 1.7.18, guidance at 073680 should no longer be followed. Croatian nationals will have a right to reside¹ as a

1. jobseeker (see [DMG 073084](#) & [073141](#)) or
2. retained worker (see [DMG 072821](#)).

Note: DMs are reminded that JSA(IB) claimants with a right to reside as a jobseeker must be actually habitually resident in the UK (see [DMG 073707](#) et seq).

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

SECTION 67 LEAVE TO REMAIN

- 30 The UK Government is required¹ to make arrangements as soon as possible to relocate and support a specified number of unaccompanied child asylum seekers who have been accepted for transfer from another European state to the UK (commonly known as the “Dubs Amendment”). The number of children must be in addition to the resettlement of children under the Vulnerable Persons Relocation Scheme.

1 Immigration Act 2016, s. 67

Relocation and support of unaccompanied child asylum seekers from Europe

- 31 From 5.7.18 new Immigration Rules¹ are introduced by the Home Office, setting out the basis on which the transfer² of unaccompanied child asylum seekers will be made from another European state to the UK.

1 Immigration Rules, paras 352ZG – 352ZS; 2 Immigration Act 2016, s.67

- 32 Upon arrival to the UK, the child will be granted temporary admission as an asylum seeker (see [DMG 070671](#) & [070803](#)). Following the processing of their asylum seeking application, the Home Office may grant the child

1. refugee status (see DMG [070800](#) et seq) **or**
2. humanitarian protection (see DMG [070693](#) et seq) **or**
3. section 67 leave to remain¹.

1 Immigration Act 2016, s. 67

- 33 Section 67¹ is a new type of leave to remain. Those who hold this status are not refugees, persons granted humanitarian protection, nor asylum seekers. They will not be persons subject to immigration control and will have access to public funds. Consequently they will have access to JSA, IS, ESA & SPC (provided all other entitlement conditions are met). For the purposes of claims to JSA, IS, ESA or SPC, section 67 cases do not fall within the specified category² of person to be exempt from the habitual residence test.

Note: The Home Office have confirmed that the BRP will have ‘SECTION 67 LEAVE’ printed on it to identify this cohort.

1 Immigration Act 2016, s. 67; 2 IS (Gen) Regs, reg 21AA(4); ESA Reg, reg 70(4); JSA Regs, reg 85A(4); SPC Regs, reg 2(4)

Evidence

34 Guidance at [DMG 073199](#) advises that evidence of nationality must be in the form of

1. a valid passport containing the immigration stamp or vignette granting them leave to remain **or**
2. a Biometric Residence Permit (BRP).

Note: A Home Office Immigration Status Document with a residence permit vignette granting leave to remain or a Home Office decision letter granting leave to remain may accompany the passport or BRP.

35 The evidence within paragraph 32 should contain information detailing

1. the type of leave to enter or remain that has been granted (where limited leave to enter or remain has been granted, an expiry date should also be shown) **and**
2. whether the person has been granted recourse to public funds.

Note: Where the claimant declares that they have leave to enter or remain in the UK with recourse to public funds, but are awaiting documentation from the HO to confirm this, the DM should allow the claimant a reasonable timescale to provide supporting evidence before making a decision.

ANNOTATIONS

Please annotate the number of this memo (15/18) against the following DMG paragraphs

070671, 070800 (para heading), [073092](#) (main heading), [073258](#), [073262](#) (para heading), [073385](#) (para heading), [073650](#) (main heading)

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 1S25, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in - Obtaining legal advice and guidance on the Law.

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