

## RIGHT TO RESIDE – IS, JSA(IB), ESA(IR) & SPC – EFFECT OF UT DECISION

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### INTRODUCTION

- 1 The purpose of this memo is to
  1. inform DMs about a recent UT decision<sup>1</sup> which deals with the issue of whether
    - 1.1 permanent residence under specified legislation<sup>2</sup> requires three years legal residence, or three years physical presence **and**
    - 1.2 the extension<sup>3</sup> of the A8 Worker Registration Scheme (WRS) from 1.5.09 to 30.4.11 was disproportionate and unlawful **and**
  2. instruct DMs to apply the Secretary of State’s power to stay making decisions in certain lookalike cases<sup>4</sup> **and**
  3. instruct DMs how the FtT should be advised of dealing with lookalike cases where a DM's decision has already been made and an appeal is received.

## THE UT DECISION

### Background

- 2 The claimant, an A8 national from Latvia, came to the UK in 2008. The claimant was required under the Worker Registration Scheme (WRS) to register her work, but only did so from 20.8.10 when a WRS registration card and certificate were issued to the claimant. Her employments before that date were not covered by a WRS certificate. The claimant continued to work until 25.11.12, when she retired. She applied for SPC with effect from 8.11.12, seeking to rely on a right of permanent residence as a worker who ceased activity under specified legislation<sup>1</sup>.

*1 Directive 2004/38/EC Art 17(1)(a), Imm (EEA) Regs, reg 5(2)(a) & 15(1)(c);*

- 3 On 18.12.12, the DM made a decision that the claimant was not entitled to SPC from 8.11.12 because she did not have a right to reside in the UK. The claimant appealed that decision on the basis that she had worked for the preceding 12 months and had resided in the UK for 3 years, so had a permanent right to reside as a worker who had ceased activity<sup>1</sup> ([see DMG 073420](#)). It was argued on behalf of the claimant that the extension of the WRS for the period from 1.5.09 to 30.4.11 was incompatible with EU law. On 19.11.13, the FtT ruled that it did not have the jurisdiction to decide that ground.

*1 Imm (EEA) Regs, reg 5(2) & 15(1)(c); Directive 2004/38, Art.17(1)(a)*

### What the UT decided

- 4 The UT decided to remake the FtT's decision which encompassed the substantive matter of the legality of the extension to the WRS, but also permitted the claimant to introduce a further point relating to the quality of residence required for the purposes of acquiring permanent residence<sup>1</sup>.

*1 Imm (EEA) Regs, reg 5(2) & 15(1)(c); Directive 2004/38, Art.17(1)(a)*

- 5 The UT held that permanent residence under Article 17(1)(a) of the Directive only required 3 years physical presence rather than legal residence, noting that the wording of that Article refers only to 'residence'. Whereas in contrast, Article 16 refers to 'legal residence'. The UT's reasoning refers to the provision within the predecessor

to Article 17 i.e. Regulation 1251/70, that used the same wording and was not at that time, a derogation from another right requiring legal residence.

- 6 The UT acknowledges that the WRS, when introduced in 2004, was held by the majority in the House of Lords case of *Zalewska*<sup>1</sup> to be proportionate. However the UT found that in the present case, *Zalewska* did not provide an answer to whether it was proportionate to extend it in 2009. The UT Judge concluded that the extension of the WRS was disproportionate and unlawful.

*1 Zalewska (AP) (Appellant) v Department for Social Development (Respondents) (Northern Ireland)*

- 7 The Secretary of State has been granted permission to appeal the UT decision by the Court of Appeal, and a hearing is currently listed for February 2017. The Annex to this Memo certifies this in writing.

## STAYING LOOKALIKE CASES

- 8 The DM should stay<sup>1</sup> making a decision on a claim to JSA(IB), ESA(IR), IS or SPC in respect of any case where the issue involves
1. the quality of residence required for acquiring permanent residence under specified legislation<sup>2</sup> **and/or**
  2. the period used towards the acquisition of permanent residence includes the extension period of the A8 WRS i.e. 1.5.09 to 30.4.11.

*1 SSA 98, s.25(5); 2 Directive 2004/38, Art.17(1)(a); Imm (EEA) Regs, reg 5(2)(c)*

- 9 Equally, if a claimant applies for a revision or supersession of a disallowance on the grounds that the UT decision means that they are entitled to benefit, the DM should stay<sup>1</sup> making a decision in response.

*1 SSA 98, s.25(5)*

- 10 The claimant should be notified that the DM has decided to use the staying power and so will not make a decision on the claim (or in response to the application for revision or supersession) until the result of the Court of Appeal judgment is known.
- 11 Full guidance on Staying can be found in Chapter 4 of the Suspension and Termination Guide. This can be found in the list of “Our Publications” on the DMA (Leeds) intranet site or on DWP’s internet site. The notification letter is DL/SUSTERM 9. DMs are alerted to the guidance relating to hardship at paragraphs 4100 et seq within Chapter 4.

- 12 There is no right of appeal against a decision to stay<sup>1</sup>.

*1 SS CS (D&A) Regs, Sch 2 para 7*

## **APPEALS**

- 13 Where a lookalike case has already had a DM's decision and an appeal is received against that decision, the appeal should be referred to the FtT in the normal way, but the FtT should be advised of the lead case and that they may wish to use their case management powers<sup>1</sup> to stay proceedings and defer further action pending the outcome of the Court of Appeal judgment.

*1 Tribunal Procedure (First-tier Tribunal)(SEC) Rules 2008, Rule 5(3)(j)*

- 14 Similarly, where an appeal is pending before a FtT and the Judge raises the question of whether the UT decision of *TG* applies in a case, the DM should
1. advise the FtT that the Secretary of State is appealing the UT decision in the Court of Appeal **and**
  2. invite the FtT to use their case management powers<sup>1</sup> to stay proceedings and defer further action pending the outcome of the Court of Appeal judgment.

*1 Tribunal Procedure (First-tier Tribunal)(SEC) Rules 2008, Rule 5(3)(j)*

## **DIFFICULT CASES**

- 15 DMs may encounter cases where it is difficult to decide whether the case in front of them is a genuine lookalike case. Such cases can be referred to DMA (Leeds) for advice.

## **ANNOTATIONS**

The number of this Memo (DMG 2/16) should be noted against the following DMG paragraphs-

073350 (Heading); 073415; 073418 (Heading); 073500 (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 [Memo DMG 03/13](#) - Obtaining legal advice and guidance on the Law.

**DMA Leeds: February 2016**

## **ANNEX – SECRETARY OF STATE’S CERTIFICATE**

In accordance with section 25(5)(c) of the Social Security Act 1998 and Regulation 21(4)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, the Secretary of State for the Department for Work and Pensions hereby certifies in writing that there is an appeal pending against the following decision of the Upper Tribunal (Administrative Appeals Chamber) made by a Judge of the Upper Tribunal on 30 January 2015 and sent to the Department on 13 February 2015.

***TG v Secretary of State for Work and Pensions (PC) [2015] UKUT 0050 (AAC);  
CPC/1026/2014***

Signed on original on 11.02.2016 by

Rosie Green

On behalf of the Secretary of State for Work and Pensions

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