

## **DMG Chapter 07 - Part 01: Common Subjects 070000 - 071699**

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# Common Subjects 070000 - 070309

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## Agreements referred to in Chapter 07 - Part 1

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### European legislation referred to in Chapter 07 - Part 1

Full title	Abbreviation
Council Regulation (EEC) No. 1612/68	Reg (EEC) 1612/68
Council Regulation (EEC) No. 1251/70	Reg (EEC) 1251/70
Council Regulation (EEC) No. 1408/71	Reg (EEC) 1408/71
Council Regulation (EEC) No. 574/72	Reg (EEC) 574/72
Council Regulation (EEC) No. 1390/81	Reg (EEC) 1390/81
Council Regulation (EEC) No. 2793/81	Reg (EEC) 2793/81
Council Directive 76/207/EEC	Directive 76/207/EEC
Council Directive 79/7/EEC	Directive 79/7/EEC
European Economic Area Agreement	EEA Agreement
Treaty establishing the European Economic Community	Treaty of Rome

### Agreements referred to in Chapter 07 - Part 1

Country description	Full title	Short
Australia	The Social Security (Australia) Order 1992 No. 1312	SS (Australia) Order 92
	The Social Security (Australia) Order 2000	SS (Australia) Order 00
Denmark	The Family Allowances, National Insurance and Industrial Injuries (Denmark) Order 1960 No. 211	FA, NI & II (Denmark) Order 60

<b>Country description</b>	<b>Full title</b>	<b>Short</b>
Gibraltar	The Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1974 No. 555	FA, NI & II (Gibraltar) Order 74
Various	The Social Security (Reciprocal Agreements) Order 2012 No. 360	SS (Reciprocal Agreements) Order 12
None Specified	The Family Allowances, National Insurance and Industrial Injuries (Refugees) Order 1956 No. 1698	FA, NI & II (Refugees) Order 56
	The Family Allowances, National Insurance and Industrial Injuries (Stateless Persons) Order 1965 No. 1540	FA, NI & II (Stateless Persons) Order 65
Northern Ireland	The Social Security (Northern Ireland Reciprocal Arrangements) Regulations 2016 No. 0287	SS (N Ireland Reciprocal Arrangements) Regs
	The Child Benefit (Northern Ireland Reciprocal Arrangements) 1977 No. 7	CHB (N Ireland Reciprocal Arrangements) Regs 77

# Introduction 070000 - 070009

070000 This part of the Chapter is divided into two main sections

**1.** general section **and**

**2.** common terms.

070001 The general section contains guidance on

**1.** EC (see DMG 070010 - 070300)

**2.** Agreements (see DMG 070310)

**3.** Whether EC or RA apply (see DMG 070320 - 070341)

**4.** Equal Treatment (see DMG 070350 - 070520)

**5.** NI Appeals (see DMG 070530)

**6.** Overlap under EC provisions and reciprocal agreements (see DMG 070540 - 070599) **and**

**7.** Offsets, abatement and earnings (see DMG 070600 - 070629).

070002 The common terms section contains guidance in alphabetical order on terms or subjects that are common to the international volume of the Chapter. In some cases the guidance on several subjects has been linked together to form reasonably sized topic groups. In other cases a larger subject has been set aside in its own topic group.

070003 Detailed guidance on the international aspects of each benefit is given later in the Chapter. The guidance for each benefit contains all the guidance on the international aspect for that benefit. The benefits are in alphabetical order and contain guidance on the following benefits

**1.** AA

**2.** BB

**3.** Dependency increases

**4.** DLA

**5.** ESA

**6.** Family benefits

**7. GA**

**8. IB**

**9. IS**

**10. II**

**11. CA**

**12. JSA**

**13. MB**

**14. RP**

**15. SDA**

**16. SPC**

**17. WB and**

**18. WFP**

070004 Any reference to BB, WB or WPA should be read as a reference to BSP as from 6.4.17<sup>1</sup>.

1 The Social Security (Reciprocal Agreements) Order 17, Sch 1, para 2 & 3; Pensions Act 14, part 5

070005 - 070009

## European Community Law 070010 - 070019

070010 This section of the Chapter contains general guidance on the application of EC law. It contains guidance on

- 1.** general principles (see DMG 070020)
- 2.** countries covered by EC law (see DMG 070040)
- 3.** people covered by EC law (see DMG 070050 - 070120)
- 4.** derived rights (see DMG 070130)
- 5.** benefits covered (see DMG 070150)
- 6.** decision making under EC law (see DMG 070180)
- 7.** joining the EEA (see DMG 070200)
- 8.** prevention of discrimination (see DMG 070220)
- 9.** competency (see DMG 070230) **and**
- 10.** claims (see DMG 070260).

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# General principles 070020 - 070039

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070020 **[See Memo DMG 32/10]** European Community Law contains three main principles

- freedom of movement for workers<sup>1</sup> (see DMG 070027). This is provided through arrangements for adding together, for the purpose of acquiring and retaining right to benefits, all periods taken into account under the laws of other European Economic Area countries and paying benefits to persons in other European Economic Area countries
- the prevention of discrimination on the grounds of nationality<sup>2</sup> (see DMG 070220) **and**
- equal treatment for men and women<sup>3</sup> (see DMG 070028).

1 Treaty of Rome, Art 51; 2 Art 6; 3 Directive 79/7/EEC

070021 There are two main Social Security provisions in European Community legislation

- Regulation (EEC) 1408/71, which sets out the provisions relating to benefit entitlement **and**
- Regulation (EEC) 574/72, which in general sets out the procedure for implementing the provisions.

070022 European Community provisions do not create a harmonized Social Security system common to all European Economic Area countries. European Community provisions coordinate the national Social Security systems of European Union countries so that a worker moving within the European Economic Area may

- be constantly protected against the risks covered by European Community provisions (see DMG 070150) **and**
- maintain rights acquired in one European Economic Area country when moving to another European Economic Area country.

070023 The Social Security schemes of each European Economic Area country are not affected, except

that their scope is extended beyond the boundary of national territory.

## **Types of European Community law**

070024 There are two kinds of European Community legislation

- regulations (see DMG 070025) **and**
- directives (see DMG 070026).

070025 European Community regulations apply directly and are part of United Kingdom law<sup>1</sup>. No amendment to United Kingdom law is necessary for a person to be able to rely on their provisions.

1 European Communities Act 72, s 2(1)

### **Example**

United Kingdom law provides that a person is disqualified for receiving long term Incapacity Benefit if that person is absent from Great Britain (070641). However, European Community provisions provide that a person within the personal scope of European Community provisions can continue to receive long term Incapacity Benefit whilst that person is in another European Economic Area country. That person can continue to receive long term Incapacity Benefit by relying directly on European Community law, although there is no provision allowing the continued receipt of long term Incapacity Benefit in United Kingdom law.

070026 Directives are binding upon each European Economic Area country but each country chooses how to implement them<sup>1</sup>.

1 Treaty of Rome, Art 189

## **Freedom of movement**

070027 The purpose of European Community provisions<sup>1</sup> is to ensure the free movement of workers. European Community provisions must always be read in the light of this principle.

1 Reg (EEC) 1408/71; Reg (EEC) 574/72

## **Equal treatment for men and women**

070028 The equal treatment Directive<sup>1</sup> required European Community countries to ensure that within six years of being notified of the Directive their laws conformed to the principle of equal treatment for men and women<sup>2</sup>. That six years period ended on 22.12.84.

070029 The Directive applies to all European Economic Area countries.

070030 Detailed guidance on the effects of the Directive is at DMG 070350 - 070520.

## **Interpretation of European Community law**

### **Court of Justice of the European Union**

070031 The Court of Justice of the European Union (CJEU) is the final authority on the interpretation and validity of European Community law<sup>1</sup>.

1 European Communities Act 72, s 3(1)

070032 Questions on the interpretation or effect of European Community provisions are questions of law. They should be decided in accordance with the principles laid down by the CJEU<sup>1</sup>.

1 European Communities Act 72 s 3(1)

### **Administrative Commission decisions**

070033 The Administrative Commission of the European Community gives decisions on the interpretation of Social Security provisions. Countries may take them into account<sup>1</sup>. They are referred to in the guidance in this chapter. A decision maker needing a copy of an Administrative Commission's decision should contact the international section of Headquarters (DMA) Leeds.

1 Reg (EEC) 1408/71, Art 80 & 81

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# Countries where European Community regulations apply 070040 - 070049

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## European Economic Area (EEA)

070040 EU Regulations<sup>1</sup> apply to the whole of the EEA<sup>1</sup>. The EEA includes the EU and three non EU States which are party to the EEA agreement. The Regulations also apply to Switzerland which is party to a separate agreement with the EU. But see the notes below the table for details of how the Regulations may differ between the EU States, the three EEA states and Switzerland.

*1 EC countries*

Austria (Joined the EU on 1.1.95)

Belgium

\*\*\*Bulgaria (Joined the EU on 1.1.07)

\*\*\*\*Croatia (Joined the EU on 1.7.13)

\*\*Cyprus (Joined the EU on 1.5.04)

\*Czech Republic (Joined the EU on 1.5.04)

Denmark excluding the Faroes Islands, and including Greenland from 1.4.73 to 31.1.85 but not after that (see DMG 070041)

\*Estonia (Joined the EU on 1.5.04)

Finland	(except the Al�nd Islands) (Joined the EU on 1.1.95)
France	including Corsica, Guadeloupe, Martinique, Reunion and French Guiana, but excluding Monaco
Germany	(unified from 3.10.90)
Greece	(from 1.1.81) including Crete and the Greek islands
*Hungary	(Joined the EU on 1.5.04)
Ireland	
Italy	including Sicily, Sardinia and Elba, but excluding the Vatican City and San Marino
*Latvia	(Joined the EU on 1.5.04)
*Lithuania	(Joined the EU on 1.5.04)
Luxembourg	
**Malta	(Joined the EU on 1.5.04)
Netherlands	Excluding the Dutch Antilles
*Poland	(Joined the EU on 1.5.04)
Portugal	(from 1.1.86) including Madeira and the Azores
***Romania	(Joined the EU on 1.1.07)
*Slovakia	(Joined the EU on 1.5.04)
*Slovenia	(Joined the EU on 1.5.04)
Spain	(from 1.1.86) including the Balearic Islands, the Canary Islands and the Spanish enclaves of Ceuta and Melilla
Sweden	(joined the EU on 1.1.95)

United Kingdom including Gibraltar (see DMG 070044), but excluding the Isle of Man and the Channel Islands.

\*N.B. Certain nationals of these states had benefit restrictions applied for a period of seven years from date of accession (A8 countries). Those restrictions were lifted with effect from 1.5.11.

\*\*These countries have no restrictions and all EC law applies from date of accession.

\*\*\*These countries (A2 countries) had benefit restrictions applied, initially for a period from 1.1.07 to 31.12.13. Restrictions ended with effect from 1.1.14 (see DMG 073551 et seq)

\*\*\*\*Benefit restrictions apply to Croatia, initially for five years from the date of accession (1.7.13) i.e. up to 30.6.18 (see DMG 073650 et seq).

## **2 Non EU countries party to the EEA Agreement**

Iceland

Liechtenstein (joined the EEA on 1.5.95)

Norway

**Note:** The new EU co-ordination regulations<sup>1</sup> applied to these three countries from 1.6.12.

1 Reg (EC) 883/04 and Reg (EC) 987/09

## **3 The Swiss Agreement**

The EU regulations relating to the co-ordination of social security apply to Switzerland by virtue of the Swiss Agreement. The new EU co-ordination regs<sup>1</sup> apply to Switzerland from 1.4.12.

1 Reg (EC) 883/04 & Reg (EC) 987/09

## **Greenland**

070041 Greenland was in the European Community from 1.4.73 to 31.1.85. Any rights which were

- acquired **or**
- in the process of being acquired

by European Community nationals other than Danish nationals, who worked in Greenland between 1.4.73 and 31.1.85, are not affected by Greenland leaving the European Community.

070042 DMG 070041 applies equally to rights acquired or in the process of being acquired between these dates by European Community nationals who worked in a European Economic Area country other than Denmark and who reside in Greenland<sup>1</sup>.

1 Reg (EEC) 1661/85, Art 2

070043 Although Greenland has left the European Community, certain European Community regulations<sup>1</sup> continue to apply with effect from 20.6.85.

1 Reg (EEC) 1408/71, Art 22(1)(a) & (3); Reg (EEC) 574/72, Art 21 & 23

### **Example**

European Community nationals who are entitled to United Kingdom short term Incapacity Benefit or Maternity Allowance and who

- need medical treatment whilst in Greenland **or**
- are authorized to go to Greenland to receive treatment

qualify for those benefits as if they were in a European Community country.

### **Gibraltar**

070044 For the purpose of certain European Community regulations<sup>1</sup> Gibraltar is part of the United Kingdom. But the reciprocal Agreement with Gibraltar provides<sup>2</sup> that, except for Child Benefit, the United Kingdom and Gibraltar are treated as separate countries (see DMG 070331).

1 Reg (EEC) 1408/71; Reg (EEC) 574/72; 2 FA, NI & II (Gibraltar) 74 Order, Sch, para 2

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# Personal scope 070050 - 070059

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## Introduction

070050 [\[See Memo DMG 32/10\]](#) In order to be covered by EC provisions<sup>1</sup> a person must come within their personal scope. Set out below are the categories of people who come within the personal scope of EC provisions.

1 Reg (EEC) 1408/71, Reg (EEC) 574/72

070051 A person is within the personal scope of EC provisions if that person

1. is an employed or self employed person<sup>1</sup> (see DMG 070060)
2. has been subject to the legislation of at least one EEA country (DMG 070230 and 070831) and either is a national of a EEA country or is a stateless person (see DMG 070100) or refugee residing in the territory of a EEA country<sup>2</sup> (see DMG 070110).

1 Reg (EEC) 1408/71, Art 2(3); 2 Art 2(1)

070052 From 1 June 2003 a national of a third country (a person who is not a national of a EEA country or a stateless person or a refugee) is also within the personal scope of the EC provisions provided that they are

1. legally resident in a Member State **and**
2. in a situation which is not confined in all respects within a single Member State.

Council Regulation (EC) 859/2003, Art 1

070053 Third country nationals cannot benefit from the EC provisions for any date prior to 1 June 2003 but periods of insurance, employment, self employment or residence completed under the legislation of a Member State before 1 June 2003 should be taken into account to determine entitlement from that date.

Arts 2(1) & (2)

070054 Requests for supersession from third country nationals should be treated in the same way as those from a national of a new Member State (DMG 070200).

070055 The following are also within the personal scope of EC provisions

**1.** members of the family of people covered by EC provisions (see DMG 070051 and 070130)<sup>1</sup>. This includes members of the family who are not EEA nationals<sup>2</sup>

**2.** survivors of people covered by EC provisions<sup>3</sup>.

1 Reg (EEC) 1408/71, Art 2(1); Case 1/88, Baldi; 2 Case 40/76, Kermaschek v. Bundesanstalt für Arbeit; Case 308/93, Bestuur Van De Sociale Verzekeringsbank v. Cabanis Issarte; 3 Reg (EEC) 1408/71, Art 2(1)

070056 Also a survivor is covered by EC provisions if

**1.** the survivor is a national of a EEA country **or**

**2.** a refugee or stateless person residing in a EEA country **and**

**3.** the deceased was not a national of a EEA country, refugee or stateless person<sup>1</sup>.

1 Art 2(2)

### **Civil Servants**

070057 Civil Servants are within the personal scope of EC provisions if they are or have been subject to the legislation of a EEA country (see DMG 070230)<sup>1</sup>.

1 Art 2(3)

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# Personal scope - employed and self-employed people 070060 - 070079

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## Introduction

070060 Before EC provisions were extended on 1.7.82 to cover self employed people<sup>1</sup>, the provisions referred to workers. For all practical purposes worker means the same as employed person. In this guidance the test will for convenience be continued to be referred to as being a worker.

1 R(S) 1/84; Reg (EEC) 1390/81; Reg (EEC) 2793/81

070061 Generally being an employed or self employed person or a worker means being affiliated to a statutory social security scheme of a EEA country.

070062 The national law of any EEA country cannot change the meaning of a worker for the purposes of EC provisions<sup>1</sup>.

1 Re an ex - Civil Servant [1976] 1CMLR 257; Case 75/63, Unger v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten

## Who is a worker

### General meaning

070063 Generally a worker is any person insured under the Social Security legislation of one or more EEA countries<sup>1</sup>. It does not matter that the person may not be currently working<sup>2</sup>.

1 Case 182/87, Algemene Zickenfonds Drenthe-Platteland v Pierek; Case 215/90, Twomey v CAO;  
R(S)3/92;

2 Case 143/79, Walsh v National Insurance Officer; R(G)3/83

**Note:** The definition of a worker for the habitual residence test differs from that used generally in EC provisions. 074316 and 075496 defines worker for the purposes of the habitual residence test.

### **Example 1**

A man works for 20 years in the UK and pays contributions which will entitle him to UK Retirement Pension when he reaches age 65. He stops work and then after an interval of five years goes to live in Spain. Because he has been insured in the UK he is within the personal scope of EC provisions and can therefore be entitled to UK Retirement Pension in Spain without any adjustment.

### **Example 2**

A person who worked as an employed earner for six years, as a self employed person for 20 years and then is out of work for 18 months is a worker<sup>1</sup>.

1 Re Medical expenses incurred in France [1977] 2CMLR 317; R(S) 1/78

070064 A person is a worker if that person satisfies the contribution conditions for entitlement to benefit.

070065 A person who is subject to UK legislation (070230) but has never been liable to pay Class 1 or 2 contributions is not a worker<sup>1</sup>. A person who is liable to pay contributions is a worker<sup>2</sup>.

1 Re an Italian Widow [1982] 2CMLR 128, CP/90/79;

2 Case 84/77 Caisse Primaire d'assurance maladie d'Eure et Loir v Alicia Tessier

## **Person never worked in a European Economic Area country**

070066 A person who has never worked in the UK or any other EEA country is not a worker.

## **Employed or self-employed earner under United Kingdom legislation**

070067 A person is a worker for EC provisions if that person is an employed or self employed earner under UK legislation<sup>1</sup>. This means that although a person may not be liable to pay contributions because their earnings are below the lower earnings limit, that person is within the personal scope of EC provisions because under UK law they are treated as an employed or self employed earner.

1 Reg (EEC) 1408/71, Annex I, Point O; SS CB Act 92, s 2(1)(a) & (b)

## **Family benefits**

070068 An exception to the general rule in 070063 is the calculation of family benefits where the family of the worker does not reside in the competent state but another EEA country (see DMG 070233)<sup>1</sup>.

Under this provision the person must be currently employed.

## **Directive 79/7/EEC**

070069 The conditions which must be satisfied for a person to be a worker under EC provisions<sup>1</sup> are different from the worker test which applies to the equal treatment Directive (see DMG 070390).

1 Reg (EEC) 1408/71; Reg (EEC) 574/72

## **Treated as a worker in all European Economic Area countries**

070070 A person accepted as a worker in one EEA country is treated as a “worker” in all EEA countries<sup>1</sup>.

1 Case 99/80, Galinsky v Insurance Officer; R(P)1/81

070071 - 070079

# Personal scope - national of a European Economic Area country

## 070080 - 070099

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### Introduction

070080 For EC provisions to apply to a person that person must be a national of a EEA country. But see DMG 070052. EC provisions also apply to a survivor (see DMG 070053) who is a national of a EEA country.

### Example

A citizen of the USA is not within the personal scope of EC provisions even though that person may have been insured in a EEA country<sup>1</sup>.

1 R(S) 8/83

070081 Each EEA country decides whether a person is a national of that country.

### British nationals

070082 With effect from 1.1.83 the UK defined who are British nationals for the purposes of EC provisions<sup>1</sup>. British nationals are

1. British citizens (including persons from other countries who are granted British citizenship)
2. persons who are British subjects under British Nationality Act<sup>2</sup> and have the right of abode in the UK and are therefore exempt from immigration control<sup>3</sup> **and**
3. citizens of British Dependent Territories who are citizens because of their connection with Gibraltar.

070083 Citizens of other British Dependent Territories who have become citizens because of their connection with a territory other than Gibraltar are not included in the definition.

070084 Commonwealth citizens are not British nationals unless they are within the definitions in DMG 070082.

## **Channel Islanders and Manxmen**

### **General**

070085 People from the Channel Islands and the Isle of Man are not covered by European Community provisions relating to freedom of movement and services<sup>1</sup>. An exception to this general rule is set out at DMG 070087.

1 Act of Accession Protocol No 3, Art 2

### **Who is a Channel Islander or Manxman**

070086 A Channel Islander or Manxman is any person who is a British citizen because that person, a parent or grandparent was born, adopted, naturalised or registered in either the Channel Islands or the Isle of Man.

### **Treated as being a United Kingdom national**

070087 A person is not regarded as a Manxman or Channel Islander if

- that person, a parent or grandparent was born, naturalised or registered in the UK **or**
- that person has at any time been ordinarily resident (see DMG 070769) in the UK for five years<sup>1</sup>.

1 Art 6

070088 The effect of DMG 070087 is that many people from the Isle of Man or the Channel Islands can be treated as UK nationals for the purposes of EC provisions.

## **Nationals of other European Economic Area countries**

### **Danish nationals**

070089 EC Provisions do not apply to Danish nationals resident in the Faroe Islands<sup>1</sup>. EC provisions do apply to Danish nationals resident in Greenland from 1.4.73 to 31.1.85<sup>2</sup>.

1 Art 4; 2 Reg (EEC) 1661/85, Art 2

070090 From 20.6.85 Danish nationals resident in Greenland are covered for short term IB and MA<sup>1</sup> if

**1.** their condition needs emergency medical treatment during a stay in another EEA country **or**

**2.** that person is authorised by the Social Security authorities in Greenland to go to the territory of another EEA country to receive treatment<sup>2</sup>.

1 Reg (EEC) 1661/85, Art 3; 2 Reg (EEC) 1408/71, Art 22(1)(a) & (c)

### **Nationals of Cyprus**

070091 The accession of Cyprus to the EU affects only those areas of Cyprus which are under the effective control of the Government of the Republic of Cyprus and the Eastern Sovereign Base of the UK<sup>1</sup>. However, individuals who come from the north of Cyprus and/or from the Turkish Cypriot community may still be recognised as citizens of the Republic of Cyprus; and if so, they would have Community law rights. The decision on whether such citizenship is given, and thus the rights that come with it, must be taken by the Republic of Cyprus. As a consequence, individuals formerly resident in the north of Cyprus and/or from the Turkish Cypriot community must provide documentation from the Republic of Cyprus in order to show entitlement to Community law rights.

1 Treaty of Accession, Protocol 10

### **Loss of nationality**

070092 If a person has been a national of a EEA country and has given up or lost that nationality and ceased to be a national of a EEA country then EC Regulations continue to apply to any rights which were acquired when the person was a EEA national<sup>1</sup>.

1 Case 10/78, Belbouab v Bundesknappschaft

070093 The nationality of a worker must be decided by considering the period when the person was following an occupation which established entitlement to benefit (when that person was insured). It is not decided by considering the person's status at the date of claim<sup>1</sup>.

1 Case 10/78, Belbouab v Bundesknappschaft

070094 A person is not a EEA national if that person was at the time of being insured a national of a country which was not yet a member of the EEA and that person stopped being a national of that country before it joined the EEA<sup>1</sup>.

1 Case 105/89, Ibrahim Buhari Haji v Inasti

070095 - 070099

## **Personal scope - stateless persons 070100 - 070109**

070100 Stateless persons are people who are not considered as a national by any state (070081)<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 1(e); Convention of the Status of Stateless Persons, Art 1;  
FA, NI & II (Stateless Persons) Order 65, Sch 1, Art 1

070101 Stateless persons can obtain a document issued by authorities of the state in which they are residing confirming that person's status as a stateless person.

070102 To be covered by EC provisions a stateless person must be residing in a EEA country.

070103 - 070109

## **Personal scope - refugees 070110 - 070119**

070110 A refugee is a person who

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or unwilling to return to it”<sup>1</sup>.

1 Convention on the Status of Refugees, Art 1; Reg (EEC) 1408/71, Art 1(d); FA, NI & II (Refugees)  
Order 56, Sch 1, Art 1

070111 Refugees can obtain a document confirming their status.

070112 - 070119

## Personal scope - member of the family 070120 - 070129

### [Member of the family - SF Funeral Payments 070122 - 070129](#)

070120 A member of the family is any<sup>1</sup> person defined or recognised as a member of the family or designated as a member of the household

1. by the legislation under which there is entitlement to SS benefits **or**
2. where medical treatment is required<sup>2</sup> by the legislation of the EEA country in whose territory that person resides.

1 Reg (EEC) 1408/71, Art 1(f); 2 Art 22(1)(a) & 31

070121 There is no provision in UK legislation defining who is a member of the family. In the absence of any statutory definition a member of the family is

1. any child or adult dependant for whom an increase of benefit could be payable<sup>1</sup> **or**
2. any child, where a benefit could be payable to an adult for that child (for example GA and CB)<sup>2</sup>.

1 SS CB Act 92, s 80 - 90 & Sch 7, para 4(1) - 6(1); SS Ben (Dep) Regs; Reg (EEC) 1408/71; Reg (EEC) 574/72;

2 SS CB Act 92, s 143(1) & (2); SS (AA) (No. 2) Regs, reg 8; Mob A Regs, reg 21

## Member of the family - SF Funeral Payments

070122 A payment of a SF funeral payment can be considered if the claimant is a member of the family of, and living with, a migrant worker<sup>1</sup>. Members of the family of a migrant worker are<sup>2</sup>

1. the worker's spouse or civil partner **and**
2. the worker's children, grandchildren, great grandchildren etc who are under 21 or are dependants **and**
3. the worker's parents, grandparents, great grandparents etc if they are dependants **and**
4. the worker's parents in-law, grandparents in-law, great grandparents in-law etc if they are dependants **and**
5. any other member of the family, other than those in **1.** to **4.**, who is dependent on the worker or who was living with the worker before coming to the UK.

070123 Where the migrant worker has died, the claimant will continue to be a member of the family of a migrant worker if

**1.** before his death the worker

**1.1** had retired on or after pension age and was employed for the twelve months before retirement or had resided continuously for three years in the UK **or**

**1.2** had ceased employment as an employed person in the UK because of permanent incapacity **and**

**1.2.a** had resided in the UK for a continuous period of two years **or**

**1.2.b** is entitled to a UK pension because the incapacity was due to an industrial injury or disease **or**

**2.** the worker had, at the date of death, resided continuously in the UK for at least two years **or**

**3.** the worker died as the result of an accident at work or an occupational disease **or**

**4.** the surviving spouse or surviving civil partner is a UK national, or would be except for losing UK nationality on marriage to or the formation of a civil partnership with the worker<sup>1</sup>.

1 Reg (EEC) No. 1251/70, Art 3

070124 - 070129

# Derived rights 070130 - 070149

[Introduction](#) 070130 - 070131

[Derived rights before 30.4.96](#) 070132 - 070133

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## Introduction

070130 [\[See Memo DMG 32/10\]](#) EC regulations<sup>1</sup> distinguish between

1. employed and S/E persons (workers) (see DMG 070051) **and**
2. members of their family (see DMG 070055), and their survivors (see DMG 070056)<sup>2</sup>.

1 Reg (EEC) 1408/71, Art 2(1); 2 Case 40/76, Kermascheck v Bundesanstalt fur Arbeit

070131 Employed and S/E workers have their own rights under EC provisions. Members of families and survivors only have rights because they are the survivors or members of the family of a worker.

## Derived rights before 30.4.96

070132 Before 30.4.96 a person was covered by EC provisions if that person was

1. a member of the family of a worker or survivor **and**
2. entitled to a derived right benefit or for whom a derived right benefit is being paid.

070133 DMG 070134 sets out which benefits are derived rights benefits. DMG 070135 sets out which benefits are not derived rights benefits.

## Derived rights benefits

070134 The following are derived rights benefits

1. benefits in kind for sickness and maternity, for example medical treatment, **and**

## 2. the following RP categories

- Category A - where entitlement is as a result of the substitution of the contributions of a former spouse<sup>1</sup> or former civil partner
- Category B
- Category C for a woman where entitlement is based on the husband's entitlement<sup>2</sup>
- widow's and bereavement benefits

3. benefits for children, CHB, GA, Child's Special Allowance (GA and Child's Special Allowance, only where the deceased father or mother, from whom the entitlement arises, was a worker)<sup>3</sup>

4. dependency increases for members of the family. These increases are still derived right benefits although the personal benefit is not a derived right benefit (see DMG 070135).

1 SS CB Act 92, s 48; 2 s 78(2); 3 Case 1/88 Adalino Baldi v Caisse de compensation pour Allocations Familiales de l'Union des classes Moyennes

### Example

An increase of IBLT paid for a dependant wife is a derived right benefit. If that dependant was entitled to personal IBLT, that benefit is not a derived right. It does not depend upon the husband's entitlement to IB.

## Not derived rights benefits

070135 The following benefits are not derived rights benefits

- IBST and MA
- IBLT and SDA<sup>1</sup>
- ESA
- Category A, Category C (personal) and Category D RP
- DisB
- JSA
- AA<sup>2</sup> and

## **Derived rights after 30.4.96**

070136 Apart from JSA<sup>1</sup> (see DMG 070137) after 30.4.96 a person is within the personal scope of EC provisions if that person is a member of the family of a worker or a survivor. It is not necessary to be entitled to a derived right benefit<sup>2</sup>.

1 Case 40/76, Kermaschek v Bundesanstalt für Arbeit; Reg (EEC) 1408/71, Art 67-71; 2 Case 308/93, Cabanis-Issarte v Bestuur van de Sociale Verzekeringsbank

## **Jobseeker's Allowance**

070137 A person cannot rely on the European Community provisions or unemployment benefit as a member of the family of a worker<sup>1</sup>. This includes exporting contribution based Jobseeker's Allowance and aggregation of contributions.

1 Case 40/76, Kermaschek v Buudesaustalt für Arbeit

070138 - 070149

# Benefits covered by the European Community 070150 - 070179

[General](#) 070150 - 070166

[Government declaration on benefits](#) 070167 - 070179

## General

070150 [\[See Memo DMG 32/10\]](#) EC regulations apply to the following branches of social security<sup>1</sup>

- sickness and maternity benefits (see DMG 070152)
- invalidity benefits (see DMG 070155)
- old age benefits (see DMG 070158)
- survivor's benefits (see DMG 070160)
- benefits for accidents at work and occupational diseases (see DMG 070162)
- death grants (see DMG 070163)
- unemployment benefits (see DMG 070164) **and**
- family benefits and family allowances (see DMG 070165).

1 Reg (EEC) 1408/71, Art 4(1)

070151 Whether a benefit is covered by EC provisions must be decided by considering the factors relating to each benefit and in particular

- its purpose **and**
- the conditions of entitlement<sup>1</sup>.

Whether a EE Area country describes a benefit as being or not being an Social Security benefit is not decisive in deciding how that benefit is treated.

1 Case 9/78, Gillard

## Sickness and maternity benefits<sup>1</sup>

070152 For the UK this means

- IBST<sup>2</sup> or ESA(Cont) in the assessment phase **and**
- MA<sup>3</sup>
- AA, CA, and DLA (Care Component)<sup>4</sup>.

Guidance on sickness and maternity benefits under EC Regulations is at DMG 073860 and DMG 075560.

1 Reg (EEC) 1408/71, Art 4(1)(a); 2 SS CB Act 92, s 30A; R(S) 4/74;  
3 SS CB Act 92, s 35; R(G) 3/83; 4 ECJ decision C299/05

070153 SSP and SMP are not treated as sickness and maternity benefits under EC provisions. They are both treated as pay<sup>1</sup>.

1 Case 342/93, Gillespie.

070154 EC provisions also cover benefits in kind (such as medical treatment). Benefits in kind are outside the jurisdiction of the adjudicating authorities.

### **Invalidity benefits**

070155 For the UK this means

- IBLT (see DMG 073900)<sup>1</sup> or ESA(Cont) (main phase)
- SDA<sup>2</sup> **and**
- in certain circumstances, AA<sup>3</sup> and DLA (see DMG 071735).

1 SS CB Act 92, s 30A(5); R(S) 1/80; R(S) 9/81; 2 SS CB Act 92, s 68; R(S) 7/81; R(S) 1/84;  
3 SS CB Act 92, s 64; Reg (EEC) 1408/71, Annex VI, Point O para 5 & 11; R(A) 4/75; R(A)2/78

070156 In the UK IBLT or ESA(Cont) (main phase) are benefits paid because a person is incapable of, or has limited capability for, work. In other EEA countries IVB is not an incapacity benefit. In those countries a person may be entitled to IVB although that person is able to work<sup>1</sup>. Guidance on invalidity benefits under EC Regulations is at DMG 073900.

1 R(S) 13/83

070157 Increases of IBLT and SDA for child dependants<sup>1</sup> are family benefits and not invalidity benefits (see DMG 070165).

## Old age benefits

070158 For the old age benefits<sup>1</sup> UK this means

- RP of any category<sup>2</sup> (including Additional Pension)<sup>3</sup>
- age addition<sup>4</sup>
- GRB<sup>5</sup> **and**
- Christmas bonuses (but these are not for the decision making authorities<sup>6</sup>).

Guidance on RP under EC Regulations is at DMG 075750.

1 Reg (EEC) 1408/71, Art 4(1)(c); 2 SS CB Act 92, s 20(1)(f) & 63(f); R(P) 2/84;  
Re an Italian Widow [1982] 2 CMLR 128, CP/90/79; 3 SS CB Act 92, s 44; Reg (EEC)1408/71, Annex VI,  
Point O, para 15; 4 SS CB Act 92, s 7 & 9; 5 NI Act 65, s 36-37 as continued in force by SS (GRB) (No 2)  
Regs, reg 3, 4 & Sch 1-3; Reg (EEC) 1408/71, Annex VI, Point O, para 8;  
6 SS CB Act 92, s 150(1) & Sch 6, s 2(2) & (3)

070159 Increases of RP for child dependants are family benefits not old age benefits (see DMG 070165).

## Survivors' benefits<sup>1</sup>

070160 For the UK, from 6.4.17 this means BSP<sup>2</sup>. Before this date, this means BB (apart from bereavement payment) and widows benefits. These are

- WMA<sup>3</sup>
- WP<sup>4</sup> (including AP)
- WPA<sup>5</sup>
- Bereavement Allowance<sup>6</sup>
- IDB widows' **and** widowers' benefits<sup>7</sup>.

1 Reg (EEC) 1408/71, Art 4(1)(d); 2 Pensions Act 14 (Commencement No. 10) Order, art 2(1)(b);  
BSP Regs, reg 1(2); 3 SS CB Act 92, s 37; 4 s 38; 5 s 39A; 6 s 39B; 7 Sch 7, paras 15-17.

Guidance on survivors' benefit under EC Regulations is at DMG 077030.

070161 GA and Child's Special Allowance paid for surviving children<sup>1</sup>, are family allowances, not survivors' benefits (see DMG 070166). An increase of WMA for a dependant child is a family allowance not a survivors' benefit.

1 SS CB Act 92, s 56 & 77

### **Benefits for accidents at work and occupational diseases<sup>1</sup>**

070162 For the UK this means

**1.** Dis B

**2.** REA<sup>2</sup>

**3.** CAA<sup>3</sup>

**4.** Hospital Treatment Allowance (where there is transitional entitlement)<sup>4</sup>

**5.** ESDA<sup>5</sup> and

benefits under the Old Cases Act<sup>6</sup>.

Guidance on II benefits under EC Regulations is at DMG 074379.

1 Reg (EEC) 1408/71, Art 4(1)(e); 2 SS CB Act 92, Sch 7, para 11; 3 s 104(1) & (2);  
4 Sch 7, para 10(2) & (3); 5 s 105; 6 Sch 8, para 7(1); Workmens  
Compensation (Supp) Scheme; P B & MD Ben Scheme

### **Death grants<sup>1</sup>**

070163 From 6.4.17 death grants are part of BSP. Prior to this date, UK bereavement payment<sup>2</sup> is classed as a death grant covered by EC provisions.

1 Reg (EEC) 1408/71, Art 1(v), 4(1)(f); 2 SS C&B Act 92, s 36

### **Unemployment benefits<sup>1</sup>**

070164 For the UK this means contribution based JSA<sup>2</sup>. Guidance on JSA is at DMG 075330.

1 Reg (EEC) 1408/71, Art 4(1)(g); 2 JS Act 95, s 1(2)(i); Reg (EEC) 1408/71, Annex IIa

### **Family benefits and family allowances**

070165 Family benefits are benefits in cash or kind intended to meet family expenses<sup>1</sup>. There are no family benefits in the UK which are administered by DWP.

070166 Family allowances are periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family<sup>1</sup>. For the UK the only family allowance administered by DWP is CDI of WMA (transitional) or WPA.

1 Reg (EEC) 1408/71, Art 1(u)(ii)

## **Government declaration on benefits**

070167 Member States must specify<sup>1</sup>

- 1.** the legislation and schemes covered by EC provisions<sup>2</sup>
- 2.** the minimum benefits referred to in Article 50 **and**
- 3.** benefits in Article 77 and 78.

1 Reg (EEC) 1408/71, Art 5; 2 Art 4

070168 The latest UK declarations for Social Security benefits specify

**1.** Great Britain “Article 4” benefits<sup>1</sup>

**1.1** Social Security Act 75 of 20.3.75 (excluding s 37 and 37A) and amending legislation

**1.2** Parts I and Industrial Injuries of Social Security Pensions Act 75 of 7.8.75 (excluding s 22) and amending legislation

**1.3** Industrial Injuries and Diseases (Old Cases) Act 75 of 20.3.75

**1.4** Part I of the Social Security and Housing Benefits Act 82 of 28.6.82 and amending legislation and for family benefits specifies

**1.5** Child Benefit Act 75 of 7.8.75<sup>2</sup>.

**2.** Special non-contributory benefits<sup>3</sup>

**2.1** DLA (Mobility Component) from 1.6.92

**2.2** ESA(IR) from October 2008

**2.3** IS

**2.4** JSA(IB) from October 1996.

## 2.5 SPC from May 2005

### 3. Minimum benefits referred to in Article 50

None.

### 4. Benefits referred to in Articles 77 and 78

#### 4.1 CHB

#### 4.2 Child dependency allowances

#### 4.3 Child's Special Allowance

#### 4.4 GA.

1 Reg (EEC) 1408/71, App 1; 2 R(F) 2/83; 3 Reg (EEC) 1408/71, Art 4(2)a, 10A, Annex IIa;

070169 EC Regulations<sup>1</sup> do not apply to social and medical assistance<sup>2</sup>, nor do they apply to war pensions. SF payments are generally not included however SF funeral payments have been found to be a "social advantage"<sup>3</sup> and must, therefore, be available to migrant workers on the same terms as to national workers<sup>4</sup>.

1 Reg (EEC) 1408/71; Reg (EEC) 574/72; 2 Reg (EEC) 1408/71, Art 4(6);  
Case 1/72 Fita Frilli v Belgian State; Case 187/74 Odette Callemeyn v Belgian State;  
Case 63/73 Vito Inzirillo v Caisse d'Allocations Familiales do l'Arrondissement de Lyon;  
Case 139/82 Piscitello v INPS; Case 249/83 Hoeckx v Openbaar Centrum voor Maatschapelijk Welzijn;  
Case 122/84 Scrivner v Centre Public D'Aide Sociale de Chastre;  
3 Case C 237/94, John O'Flynn v The Adjudication Officer; 4 Regs (EEC) Nos 1612/68 & 1251/70

070170 - 070179

# Adjudication under European Community legislation 070180 - 070199

[Application of European Community legislation](#) 070180

[Referring questions to the Court of Justice of the European Union \(CJEU\)](#) 070181 - 070184

[Questions for the DM](#) 070185 - 070188

[Supersession](#) 070189 - 070199

## Application of European Community legislation

070180 **[See Memo DMG 32/10]** EC regulations apply directly and are part of UK law (see DMG 070025). Adjudicating authorities must take into account all relevant EC provisions and case law when deciding claims and questions<sup>1</sup>.

1 Treaty of Rome, Art 234; European Communities Act 72, s 2(1); R(S)1/78

## Referring questions to the Court of Justice of the European Union (CJEU)

070181 Where there is some doubt over the correct interpretation of EC legislation on an individual case, a national court (for example, the UT, Court of Appeal, or Supreme Court) can refer a question to the ECJ for a preliminary ruling<sup>1</sup>.

1 Art 234

070182 As a general rule, where an appeal can be made to a higher court from the authority presently considering the case

1. it is better to give a decision on the question at that level **and**
2. leave the higher court to make the reference<sup>1</sup> to the ECJ.

Therefore, if the question of a referral arises during the course of a FtT appeal, the DM should first ask the tribunal to decide the matter without referring the question to the ECJ at that stage.

1 R(S) 5/83

070183 If the tribunal refuse to decide the question before them, the DM should ask for an adjournment so that legal advice and representation can be arranged. If the tribunal adjourn, the DM should

immediately refer the papers to the EC section at, Decision Making and Appeals, Leeds (part of Legal Group), who will involve lawyers at an early stage.

070184 If the FtT refuse to adjourn, the DM should

1. ask for the request and refusal to be included in the note of evidence **and**
2. immediately refer the papers to. Decision Making and Appeals, Leeds.

## **Questions for the DM**

070185 In addition to questions that the DM would normally decide under UK law (see DMG Volume 1) the DM decides whether

1. a person is within the personal scope of EC provisions<sup>1</sup> **and**
2. a benefit is within the scope of EC provisions<sup>2</sup>.

1 Reg (EEC) 1408/71, Art 2; 2 Art 4

070186 The DM can also decide which EEA country is the competent state (see DMG 070246).

## **Entitlement to benefits from other European Economic Area countries**

070187 The decision maker cannot decide entitlement to Social Security benefits of other EEA countries (see DMG 070188). This applies even if the question about entitlement to benefit arises in the UK.

### **Example 1**

A person entitled to invalidity benefit from another EEA country is living in the UK and fails to attend for medical examination. The DM cannot decide whether that person remains entitled to IVB from the other country.

### **Example 2**

A doubt arises whether a person entitled to exportable unemployment benefit from another EEA country is available for employed earners employment. The DM cannot decide whether that person remains entitled to the other countries unemployment benefit<sup>1</sup>.

1 Reg (EEC) 574/72, Art 83

## **Northern Ireland**

070188 There are special arrangements which allow DMs in GB and Northern Ireland to deal with

reviews and appeals relating to decisions taken in the other country<sup>1</sup> (see DMG 070530). This does not apply where the decision relates to a claimant in another EEA country<sup>2</sup>.

1 SS (N Ireland Reciprocal Arrangements) Regs, Sch, para 3; 2 R(S) 5/85

## Supersession

070189 In addition to the usual grounds for revision/supersession the following changes to EC provisions may give grounds for supersession because there has been a relevant change of circumstances<sup>1</sup>

**1.** changes to EC law

**2.** the accession of a new country to the EU and the application of EC provisions to that country **and**

**3.** a change to the UK's declaration of the UK legislation covered by EC provisions<sup>2</sup>.

1 SS CS (D&A) Regs, reg 6(2)(a); 2 Reg (EEC) 1408/71, Art 5

070190 The uprating of another country's benefit is not a relevant change of circumstances<sup>1</sup>. It should be treated in the same way as uprating under UK legislation<sup>2</sup>.

1 SS A Act 92, s 155; R(P) 2/84; 2 SS A Act 92, s 155; R(P) 2/84

070191 DMG 070200 contains guidance on supersession where EC provisions first apply to a country.

070192 - 070199

# Joining the European Economic Area 070200 - 070219

[Introduction](#) 070200 - 070203

[Application for supersession](#) 070204

[Backdating of claims and supersession](#) 070205 - 070219

## Introduction

070200 When a country joins the EC or EEA and becomes subject to EC law entitlement to benefit may be superseded, as set out in DMG 070201 - 070203<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 94 & 95

070201 A decision may be superseded (see DMG 070204) where a person has not been awarded benefit or it has been awarded at a reduced rate because

1. of the nationality of the claimant **or**
2. the claimant is residing outside of GB<sup>1</sup>.

1 Art 94(4) & 95(4)

070202 All periods of insurance, employment or residence which were completed in a country before EC provisions applied can be taken into account in deciding entitlement to benefit<sup>1</sup>.

1 Art 94(2) & 95(2)

070203 A person is not entitled to benefit by using these provisions before EC provisions applied in that country<sup>1</sup>.

1 Art 94(1)

## Application for supersession

070204 An award of benefit which was made before EC provisions applied can be superseded if an application is made by the person concerned<sup>1</sup>. Reconsideration cannot be undertaken at the initiative of the authorities of a EEA country<sup>2</sup>.

## **Backdating of claims and supersession**

070205 A decision may be superseded from the date that EC provisions first applied in that country provided that an application is made within two years<sup>1</sup>. Backdating for two years overrides the UK's usual restrictions on backdating entitlement to and payment of benefit<sup>2</sup>.

1 Reg (EEC) 1408/71, Art 94(6) & 95(6); 2 SS A Act 92, s 1(2); SS CS (D&A) Regs, reg 7

### **Example**

John Smith has been absent from GB in Sweden since November 1993. The Invalidity Benefit that he was receiving whilst in GB has been disqualified because of the absence. Sweden joins the EEA on 1.1.94 and from that date EC provisions apply. On 20.11.95 he applies for review of the disqualification of IVB because EC provisions<sup>1</sup> means that IVB can continue to be paid whilst he is absent in Sweden. The DM supersedes the disqualification and IVB is paid from 1.1.94.

1 Reg (EEC) 1408/71, Art 10(1)

070206 If the application is not made within two years of EC provisions applying the normal restrictions on supersession apply<sup>1</sup>.

1 Art 94(7) & 95(7)

070207 - 070219

# Discrimination 070220 - 070229

[Introduction](#) 070220 - 070223

[Place of birth](#) 070224

[Residence conditions](#) 070225 - 070229

## Introduction

070220 **[See Memo DMG 32/10]** Any discrimination on the grounds of nationality is forbidden<sup>1</sup>. A person is entitled to SS benefits under the same conditions as a national of a country if that person is

1. within the scope of EC provisions (see DMG 070050) **and**
2. habitually resident (see DMG 072770) in an EEA country<sup>2</sup>.

1 Treaty of Rome, Art 6; 2 Reg (EEC) 1408/71, Art 3(1); R(S) 2/93

070221 Discrimination may be either direct or indirect.

## Indirect discrimination

070222 Indirect discrimination occurs when a provision which although on the face of it treats nationals and non-nationals the same

1. does, in effect, treat the non-nationals less favourably<sup>1</sup> **or**
2. is liable to treat non-nationals less favourably<sup>2</sup>.

1 Case 41/84, Pinna v Caisse d'allocations familiales de la Savoie; Case 279/89, Commission v United Kingdom; 2 Case 237/94, O'Flynn v the adjudication officer

070223 The principles for deciding indirect discrimination on the grounds of sex also apply to indirect discrimination on the grounds of nationality<sup>1</sup>.

## **Place of birth**

070224 The provisions preventing discrimination also cover conditions which are linked to the person's place of birth<sup>1</sup>. A condition which specifies a place of birth indirectly discriminates against non UK nationals.

1 R(A) 2/78

## **Residence conditions**

070225 Residence conditions for entitlement to non-contributory benefits are not affected by the provisions preventing discrimination if those conditions do not depend upon the nationality of the claimant.

070226 - 070229

# Whose legislation applies 070230 - 070259

[Introduction](#) 070230 - 070232

[Deciding whose legislation applies](#) 070233 - 070241

[Civil Servants and members of armed forces](#) 070242 - 070244

[Showing that a person is subject to a country's legislation](#) 070245

[Who decides which legislation applies](#) 070246 - 070259

## Introduction

### General rule

070230 **[See Memo DMG 32/10]** In general a person is only subject to the legislation of one European Economic Area country<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 13(1)

### Additional voluntary insurance

070231 Although a person is subject to the insurance of one European Economic Area country that person may voluntarily decide to be insured in another European Economic Area country for the purposes of entitlement to

- invalidity benefit
- retirement pension **and**
- widow's benefits<sup>1</sup>.

1 Art 15(3)

070232 Where a person is voluntarily insured the competent state may not be the country where the person was last insured.

## Deciding whose legislation applies

### General rule

070233 An employed or self employed person is subject to the legislation in the country where that person is employed or self employed. That person is subject to that country's legislation even if

- that person resides in another European Economic Area country **or**
- the employer's registered office or place of business is in another European Economic Area country<sup>1</sup>.

1 Art 13(2)(a) & (b)

### Subject to country where person resides

070234 A person is subject to the legislation of the country where that person resides if

- the legislation of one EEA country no longer applies **and**
- that person has not become subject to the legislation of another EEA country<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 13(2)(f)

070235 A person stops being subject to United Kingdom legislation under DMG 070234 at the latest of

- the day residence is transferred to another EEA country<sup>1</sup> **or**
- the day employment or self employed ended during which that person was subject to United Kingdom legislation<sup>2</sup>. This applies whether the work was permanent or temporary **or**
- the last day that short term Incapacity Benefit, Maternity Benefit or contribution based Jobseeker's Allowance was paid if entitlement to that benefit<sup>3</sup> began before residence was transferred to another EEA country<sup>4</sup>, or, if later, immediately followed employment or self employed in another EEA country during which the person was subject to United Kingdom benefit<sup>5</sup>.

1 Annex VI, S O, para 19(a); 2 para 19(b); 3 para 19(c); 4 para 19(c)(i); 5 para 19(c)(ii)

### Posted to another European Economic Area country

070236 An employed or self employed person remains subject to the legislation of the country where the employer is based or where that person works, if that person is posted or goes to another EEA country **and**

- the work is not expected to last more than twelve months (see DMG 070237) **and**

- that person has not been sent to replace somebody who has completed a posting<sup>1</sup>.

1 Art 14(1)(a) & 14a(1)

070237 A person can still be subject to the legislation of the country where the employer is based if

- due to unforeseen circumstances, the posting lasts more than twelve months **and**
- the country where the person is working before the end of the first twelve months, decides to extend the period for a further period of not more than twelve months<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 14(1)(b) & 14a(b)

### **Employed in two or more countries**

070238 An employed or self employed person is subject to the legislation of the country of residence where that person

**1.** works, at least partly, in that country **or**

**2.** works for several employers who have their registered offices or business in several different countries<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 14(2)(b)(i) & 14a(2)

070239 An employed person is subject to the legislation of the country where the registered office or business employing him is located if that person does not reside in any of the countries of employment.

070240 A self employed person who does not reside in any of the countries in which that person is working, is subject to the legislation of the country where the main work is carried out<sup>1</sup>.

1 Art 14a(2)

### **Employed on a ship**

070241 A person employed on board a ship flying the flag of a EEA country is subject to the legislation of that country<sup>1</sup>.

1 Art 13(2)(c)

## **Civil Servants and members of armed forces**

### **Civil Servants**

070242 Civil Servants, and people treated as Civil Servants, are subject to the legislation to which the

administration employing them is subject<sup>1</sup>.

1 Art 13(2)(d)

### **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**

070243 A member of the armed forces is subject to the legislation of the country in whose forces that person is serving<sup>1</sup>.

1 Art 13(2)(e)

### **Agreements between European Economic Area countries**

070244 The Secretary of State<sup>1</sup> may agree with the institutions of other EEA countries that the normal rules for deciding which legislation applies will not apply to certain categories of people or to certain people<sup>2</sup>.

1 Reg (EEC) 1408/71, Art 1(1); 2 Art 17

### **Showing that a person is subject to a country's legislation**

070245 To be subject to the legislation of a EEA country a person must

- 1.** in GB, have paid class 1 or 2 contributions **or**
- 2.** in other EEA countries, have contributed to the SS scheme of that country **or**
- 3.** in countries where entitlement to benefit depends upon residence not insurance, have been employed or self employed whilst resident in that country.

### **Who decides which legislation applies**

070246 Which EEA country is the competent state can be decided by either the DM or the Secretary of State depending upon the circumstances being considered.

070247 The DM can decide which state is competent where there is

- 1.** no question reserved for the Secretary of State<sup>1</sup> **or**
- 2.** a question reserved for the Secretary of State, but there is no dispute about that question.

070248 If it is not clear which is the competent state the DM must ask HMRC where the person would be liable to pay contributions. The DM's decision on competency should then be based on the decision made by HMRC.

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## Claims - general 070260 - 070269

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### Place for claim

070260 **[See Memo DMG 32/10]** A claim for benefit may be made to the institution of any EEA country<sup>1</sup>. There are special rules for

- 1.** RP and WB where a person is residing inside the EEA (see DMG 070270) or outside the EEA (see DMG 070272) **and**
- 2.** invalidity benefits (see DMG 070281 - 070284) **and**
- 3.** family benefits (see DMG 070300).

1 Reg (EEC) 1408/71, Art 86(1)

070261 The claim received in the other EEA country will be passed on to the competent country (see DMG 070230)<sup>1</sup>.

1 Art 86(1)

### Example

In August a UK national is on holiday in France. On 6 August that person has an accident and requires emergency medical treatment. A claim for SB (ESA(Cont)) is made to the French authorities on 8 August. That claim is passed by the French authorities to the DWP in the UK.

The date of claim is the date that it was received by the French authorities, 8 August (see DMG 070263).

070262 A decision on entitlement to the UK benefit claimed will be made by the DM in the UK.

### Date of claim

070263 The date of claim is the date it was received in the appropriate institution (see DMG 070266) to which it was sent by the claimant<sup>1</sup>.

## **Initial investigations - RP, WB, and ESA**

070264 Upon receiving a claim the institution of that country must

- 1.** carry out the initial investigation of the claim<sup>1</sup> **and**
- 2.** notify details of the claim to all countries where the person has been insured<sup>2</sup>.

1 Reg (EEC) 574/72, Art 41(1); 2 Art 41(2)

070265 The DM's decision on the claim is sent to the country of claim. That country notifies the claimant of the decision. The time limit for making an appeal is calculated from the date that the claimant is notified by the country of claim<sup>1</sup>.

1 Art 48

### **Example**

On 13 July a man in Italy sends a claim for RP to the Italian authorities. On 1 November the Italian authorities pass that claim on to the UK. The UK makes enquiries about his contribution record and on 15 March the DM decides that he is entitled to UK RP based on his UK record but not based on his Australian insurance record. That decision is passed to Italy who on 21 May notify the claimant of the decision. He has three months from the date that notification was posted to him to appeal.

## **Appropriate institution**

070266 For the UK the appropriate institution is the DWP<sup>1</sup>.

1 Annex 2, Point L, Para 2 & Annex 3, Point L

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# Claims for retirement pension and widow's benefit 070270 - 070279

[Person residing in the European Economic Area](#) 070270 - 070271

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## Person residing in the European Economic Area

070270 Where a person is residing in the EEA a claim must be made to the institution of the

1. EEA country in which the person is residing<sup>1</sup> **or**
2. country to whose legislation the person was last subject (see DMG 070233)<sup>2</sup>.

1 Reg (EEC) 574/72, Art 36(1); Case 108/75 Balsamo v Institut National d'Assurance Maladie Invalidité;  
2 R(S) 3/82

070271 A person who is habitually resident in GB sends the claims to the DWP (see DMG 070266)<sup>1</sup>.

1 Reg (EEC) 574/72, Annex 3, Point L

## Person residing outside the European Economic Area

070272 Where a person is residing outside the EEA the claim must be made to the EEA country to whose legislation that person was last subject<sup>1</sup>.

1 Art 36(3)

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# Claims for Invalidity Benefit 070280 - 070299

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[Claims from persons subject only to type A legislations](#) 070281 - 070283

[IBLT and SDA: type B claims](#) 070284 - 070287

[Claim treated as a claim for short term Incapacity Benefit or long term Incapacity Benefit](#) 070288

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## Introduction

070280 The procedure for claiming IVB depends upon the type of IVB being claimed. Guidance on claims for type A IVB is at DMG 070281. Guidance for claims to type B IVB is at DMG 070284. ESA(Cont) was introduced for new claimants on 27.10.2008 to replace IB. ESA(Cont) in the assessment phase is treated as a SB, and thereafter as an IVB (main phase).

## Claims from persons subject only to type A legislations

### Place for claiming

070281 A person who has been subject to type A legislation only may send a claim to either the institution of the

- 1.** country to whose legislation that person was subject (see DMG 070233) at the date incapacity started
- or**
- 2.** country of residence<sup>1</sup>.

1 Reg (EEC) 574/72, Art 35(1)

070282 If the claim is made to the country of residence the claim will be forwarded to the institution in the responsible country.

### Example

A person was last employed and insured in GB, but at the time of claiming IBLT that person was residing

in Ireland. The claim for UK IBLT may be made by either sending the claim

- 1.** directly to the DWP **or**
- 2.** to the responsible Irish institution. They will forward the claim to the DWP (see DMG 070285).

### **Date of claim**

070283 The date of claim is the later<sup>1</sup> of the date

- 1.** the claim was made to the institution in the country of residence **or**
- 2.** that entitlement to IBST ended.

1 Art 35(1)

### **Example**

A person is residing in Ireland and claims UK IBLT (see DMG 070282). The claim is made to the relevant Irish institution who then pass it on to the UK. The date of claim is the date that the claim was received by the Irish institution.

## **IBLT and SDA: type B claims**

### **Place for claiming**

070284 A person who has been subject to type B legislation must, subject to the exception in DMG 070285, send the claim to the institution of the country where that person is residing<sup>1</sup>.

1 Reg (EEC) 574/72, Art 36(1); Case 108/75 Balsamo v Institut National d'Assurance  
Maladie - Invalidité; R(S) 3/82

### **Example**

If a person has been subject to both type A and B legislations but does not satisfy the conditions for entitlement to type B benefit, the claim may be made to the institution of the

- 1.** country to whose legislation that person was subject (see DMG 070233) at the date incapacity started **or**
- 2.** country of residence<sup>1</sup>.

1 Reg (EEC) 574/72, Art 35(1)

070285 If the person has not been subject to the legislation of the country of residence the claim is sent to the country where the person was last insured either by

1. the institution of the country where the person was last residing<sup>1</sup> **or**

2. the claimant<sup>2</sup>.

1 Art 36(1); 2 Art 36(2)

### **Person residing outside the European Economic Area**

070286 Where a person is residing outside of the EEA the claim must be made to the EEA country to whose legislation that person was last subject<sup>1</sup>.

1 Art 36(3)

### **Date of claim**

070287 The date of claim is the date it was received to the appropriate institution (see DMG 070266)<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 86(1); Case 41/77, F v NI Commissioner ex parte Warry; R(S)1/80

## **Claim treated as a claim for short term Incapacity Benefit or long term**

### **Incapacity Benefit**

070288 A claim for invalidity benefit in another European Economic Area country may be treated as a claim for either short term Incapacity Benefit or long term Incapacity Benefit<sup>1</sup>.

1 R(S) 13/83; Case 50/82 Coppola v Insurance Officer

## **Conditions of entitlement not satisfied immediately**

070289 A decision disallowing a claim for long term Incapacity Benefit does not dispose of the claim<sup>1</sup> if

- there is an existing claim for invalidity benefit in another European Economic Area country **or**
- the person is entitled to invalidity benefit in another European Economic Area country.

1 R(S) 13/83

070290 If the conditions for entitlement are later satisfied long term Incapacity Benefit can be awarded without a fresh claim being made.

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## Claims for family benefits 070300 - 070309

070300 A claim for family benefits made to a country which is not the competent state (see DMG 070230) is treated as made on the date that this first claim is made if<sup>1</sup>

- a claim is made to the competent state **and**
- that second claim is made within one year of the first claim being disallowed or date payment of benefit ended in the first European Economic Area country.

1 Reg (EEC) 1408/71, Art 86(2)

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## **Agreements with other countries 070310 - 070349**

### **Subpages**

- General principals 070310 - 070319
- Whether European Community provisions or reciprocal agreements apply 070320 - 070329
- Reciprocal agreements 070330 - 070349

## General principals 070310 - 070319

[General principles](#) 070313 - 070319

070310 The UK has reciprocal agreements with both EEA countries and other countries. Lists of the countries with which the UK has agreements are at

- DMG 070330 for EEA countries **and**
- DMG 070333 for non-EEA countries.

Those lists also set out which benefits are covered by the agreements.

070311 In general a person covered by EC provisions cannot rely on a reciprocal agreement for entitlement to benefit (see DMG 070320).

070312 Detailed guidance on the effects of those agreements is set out in the section of the Chapter dealing with each benefit. ESA(C) is not covered by any reciprocal agreement with EEA countries despite provisions being made for IB. However certain non EEA countries now have a reciprocal agreement with the UK for ESA(C)<sup>1</sup> see DMG 070333.

1 SS (Reciprocal Agreements) Order 12

## General principles

### Adjudication under reciprocal agreements

070313 The provisions of agreements apply directly and are part of UK law. The DM may amend UK law as far as is necessary to give effect to the provisions of an agreement<sup>1</sup>.

1 SS A Act 92, s 179(2)

### Example 1

A person entitled to UK RP is absent from GB and residing in Barbados. Under UK law the rate of RP would be frozen at the rate being paid when the person was last resident in the UK. However, the restriction of the rate of benefit is overridden by the provisions of the UK-Barbados agreement.

### Example 2

A person entitled to long term IB is absent from GB in Jamaica. The absence is not temporary and under UK law payment of long term IB would be disqualified. However, under the provisions of the UK-Jamaica agreement payment of IBLT may continue.

070314 A claim may be made in either the UK or the other country with which the UK has an agreement. The date of claim is the date that the claim was received in the appropriate institution of the country to which it was sent by the claimant. If necessary the claim will be sent to the authorities of the other country.

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# Whether European Community provisions or reciprocal agreements apply 070320 - 070329

[When European Community provisions apply](#) 070320 - 070321

[When reciprocal agreements continue to apply](#) 070322 - 070329

## When European Community provisions apply

070320 EC provisions replace agreements between EEA countries<sup>1</sup> (see DMG 070321)

1. for any person within their personal scope<sup>2</sup>, **and**
2. where the right to benefit was acquired on or after EC provisions applied<sup>3</sup>.

This means that a person within the scope of EC provisions cannot generally rely on a reciprocal agreement for benefit entitlement.

1 Reg (EEC) 1408/71, Art 6; 2 Art 2; 3 Case 82/72, Walder; Case 475/93, Thévenon

### Example

A French national worked in France from 1964 to 1977 and in Germany from 1977 to 1992. His claim for invalidity pension made in 1992 was decided only under EC provisions without using the Franco-German SS agreement. This is because the claimant did not move from France to Germany and pay German insurance contributions until after EC provisions applied. When EC provisions took effect the claimant could no longer rely on the Franco-German agreement.

070321 The only exceptions to the general rule in DMG 070320 are set out in DMG 070322 - 070338.

## When reciprocal agreements continue to apply

070322 Agreements between EEA countries continue to apply if the person is not within the personal scope (see DMG 070050) EC provisions<sup>1</sup> and comes within the scope of the individual agreement.

1 Reg (EEC) 1408/71, Art 2; Case 9/80 Galinsky; R(P) 1/81

### Right acquired under a reciprocal agreement

070323 Agreements between EEA countries can continue to apply if the provisions of an agreement help a claimant more than EC provisions and the right to use the reciprocal agreement was acquired before

**1.** EC provisions applied to the UK on 1.4.73, **or**

**2.** the other country joined the EC<sup>1</sup>.

1 Case 227/89, Rönfeldt; Case 475/93, Thévenon

### **Example**

A German national worked and paid insurance in Germany from 1941 to 1957 and was insured in Denmark from 1957 to 1971. From 1971 he again worked in Germany. The claimant was helped by the SS agreement between Germany and Denmark because at the time he returned to Germany, Denmark was not a member of the EC (Denmark joined the EC on 1.4.73).

### **Agreement with France**

070324 UK teachers in France under the cultural convention can claim

**1.** IBLT, **or**

**2.** UK IISB

for injuries which occur during their work in France<sup>1</sup>.

1 Reg (EEC) 1408/71, Annex III A, para 45

### **Faroës and Greenland**

070325 The agreement with Denmark<sup>1</sup> continues to apply to both the Faroës and Greenland. Greenland left the EC on 1.2.85 (see DMG 070041).

1 FA, NI & II (Denmark) Order 60

### **Countries joining the European Union or European Economic Area**

070326 The provisions of reciprocal agreements can continue to apply when a country joins either the

**1.** EU, **or**

**2.** the EEA.

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## Reciprocal agreements 070330 - 070349

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### Agreements with European Economic Area countries

070330 The following table shows the benefits which are covered in agreements with EEA countries. There are no reciprocal agreements with provisions for ESA.

	RP	WB prior to 6.4.17	GA	IBST	IBLT	JSA	MB	Dis B	IDB	CHB	AA	BSP from 6.4.17
<b>Austria</b>	X	X	X	X	X	X	X	X	X	X	-	X
<b>Belgium</b>	X	X	X	X	X	X	X	X	X	X	-	X
<b>Cyprus</b>	X	X	X	X	X	X	X	X	X	-	-	X
<b>Denmark</b>	-	X	X	X	X	X	X	X	X	X	X	X
<b>Finland</b>	X	X	-	X	X	X	X	X	X	X	-	X
<b>France</b>	X	X	-	X	X	X	X	X	X	X	-	X
<b>Germany</b>	-	X	X	X	X	X	X	X	X	X	X	X
<b>Iceland</b>	X	X	X	X	X	X	-	X	X	-	-	-
<b>Ireland</b>	X	X	X	X	X	X	X	X	X	-	-	X

<b>Italy</b>	X	X	X	X	X	X	X	X	X	X	-	-	X
<b>Luxembourg</b>	X	X	X	X	X	-	X	X	X	X	-	-	X
<b>Malta</b>	X	X	X	X	X	X	-	X	X	X	-	-	-
<b>Netherlands</b>	X	X	X	X	X	X	X	X	X	X	-	-	X
<b>Norway</b>	X	X	X	X	X	X	X	X	X	X	X	X	X
<b>Portugal</b>	X	X	X	X	X	X	X	X	X	X	X	-	X
<b>Spain</b>	X	X	X	X	X	X	X	X	X	X	X	-	X
<b>Sweden</b>	X	X	X	X	X	X	X	X	X	X	X	-	-

070331 There is no agreement with Greece or Liechtenstein. The agreement with Gibraltar<sup>1</sup> provides that, except for CHB, the UK and Gibraltar are treated as separate EEA countries.

1 FA, NI & II (Gibraltar) Order 74, Sch, para 2

070332 Although Northern Ireland is part of the UK, there is an agreement between GB and Northern Ireland. This is because benefits in Northern Ireland and GB are separate<sup>1</sup> and administered under different SS legislation.

1 R(S) 5/85

## Agreements with other countries

070333 The following table shows the benefits which are covered in the agreements with countries which are not part of the EEA.

	RP	WB <sub>prior</sub>	GA	IBST	IBLT	JSA	MB	Dis	IDB	CHB	AA	DLA	ICA	ESA	BSP <sub>from</sub>
	to 6.4.17													6.4.17	
												(C)			
<b>Barbados</b>	X	X	X	X	X	-	X	X	X	X	-	-	-	X	-
<b>Bermuda</b>	X	X	-	-	-	-	-	X	X	-	-	-	-	-	-
<b>Canada</b>	X	-	-	-	-	X	-	-	-	X	-	-	-	-	-

<b>Guernsey</b>	X	X	X	X	X	X	X	X	X	X	X	X	-	X	X
<b>Isle of Man</b>	X	X	X	X	X	X	X	X	X	X	X	X	X	-	-
<b>Israel</b>	X	X	X	X	-	X	X	X	X	-	-	-	-	-	X
<b>Jamaica</b>	X	X	X	-	X	-	-	X	X	-	-	-	-	X	X
<b>Jersey</b>	X	X	X	X	-	X	X	X	X	X	X	X	-	X	X
<b>Mauritius</b>	X	X	X	-	-	-	-	X	X	X	-	-	-	-	-
<b>New Zealand</b>	X	X	X	X	-	X	-	-	-	X	-	-	-	-	X
<b>Philippines</b>	X	X	-	-	-	-	-	X	X	-	-	-	-	-	X
<b>Switzerland</b>	X	X	X	X	X	-	-	X	X	X	-	-	-	-	-
<b>Turkey</b>	X	X	X	X	X	-	X	X	X	-	-	-	-	X	X
<b>USA</b>	X	X	X	X	X	-	-	-	-	-	-	-	-	X	X
<b>Yugoslavia</b>	X	X	-	X	X	X	X	X	X	X	-	-	-	X	X

**NOTE:** For ESA(C) this is only relevant where IB was converted to ESA and the claimant is transitionally protected<sup>1</sup>.

1 ESA Transitional Provisions, HB and CTBt) (Existing Awards) (No. 2) Regulations 2010

070334 Following the break-up of Yugoslavia the reciprocal agreement between the UK and 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 **and**
5. Slovenia.

**Note:** Croatia acceded to the EU on 1.7.13.

070335 The EC has Association Agreements with

**1.** Turkey.

070336 The EC also has Cooperation Agreements with

**1.** Algeria

**2.** Morocco

**3.** Switzerland (From 1.6.03)

**4.** Tunisia.

### **Benefits not covered**

070337 SF payments, ESA, JSA IB, and IS are not covered by any of the agreements.

070338 JSA<sup>1</sup> can be paid whilst a person is absent from GB in either Northern Ireland or the Isle of Man. In the other agreements the JSA provisions only concern the satisfaction of the contribution conditions.

1 SS (RA) Order 95

### **Australia**

070339 Until 28.2.01 the UK had a Reciprocal Agreement with Australia<sup>1</sup>. The Agreement enabled permanent residents of the UK to satisfy the contribution test for benefits by treating periods of residence in Australia as periods for which NI contributions were paid. The benefits affected were RP, WB, IB and JSA (cont). In addition for the purposes of CHB and GA, periods of residence in Australia could be treated as periods of residence in UK.

1 SS (Australia) Order 1992

070340 New legislation<sup>1</sup> came into force on 1.3.01 terminating that Agreement which ceased to have any effect on UK legislation. All claims for benefit received after 28.2.01 where the claimant had previously resided in Australia should be assessed on UK contribution records or periods of actual residence in UK only.

1 SS (Australia) Order 2000

### **Transitional provisions**

070341 There are transitional provisions which protect entitlement to benefit for persons assisted by

the Agreement on 28.2.01 see Annex 3 for details. Arrangements have also been made to assist in claims for RP and BB which will still be processed by International Pension Centre (IPC).

## **New Zealand**

070342 In the agreement with New Zealand<sup>1</sup> where there are references to the legislation to which the agreement applies, such references shall be altered to include a reference to Part 5 of the Pensions Act 2014<sup>2</sup>.

1 SS (New Zealand) Order 1983; 2 The Social Security (Reciprocal Agreements) Order 17, Sch 3, para 1(a)

070343 Article 11 of the agreement with New Zealand<sup>1</sup> shall be altered so that it applies for the purpose of entitlement to BSP<sup>2</sup> in the following way

**1.** a person who is ordinarily resident in New Zealand when their spouse or civil partner dies is to be treated as ordinarily resident in Great Britain at that time **and**

**2.** paragraph (4) is to be disregarded<sup>3</sup>.

1 SS (New Zealand) Order 1983; 2 Pensions Act 2014, part 5:

3 The Social Security (Reciprocal Agreements) Order 17, Sch 3, para 1(b)

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# Equal Treatment 070350 - 070529

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## Introduction

070350 This part of the Chapter gives guidance on the effects on Social Security of EC Directives providing for equal treatment between men and women.

## Equal treatment Directives

070351 The EC can issue Directives<sup>1</sup> which require all EEA countries (see DMG 070040) to achieve certain objectives. The following Directives are the more common ones involving equal treatment for men and women in Social Security matters.

- Directive 76/207 (see DMG 070352)
- Directive 79/7 (see DMG 070354) **and**
- Directive 86/378 (see DMG 070358).

1 Treaty of Rome, Art 189

## Directive 76/207/EEC

070352 This is the equal treatment Directive. It provides equal treatment for men and women in

- access to employment, including promotion
- vocational training **and**
- working conditions<sup>1</sup>.

070353 Generally it does not apply directly to Social Security<sup>1</sup> but it does provide for Social Security matters to be covered by later Directives<sup>2</sup>.

1 Art 1(2); 2 Directive 79/7/EEC

## **Directive 79/7/EEC**

070354 This is the Social Security Directive but it is commonly known as "the equal treatment Directive". In this guidance, unless otherwise stated, "the Directive" means Directive 79/7.

070355 Directive 79/7 came into force on 23.12.84 and its purpose is the progressive implementation of equal treatment in Social Security matters<sup>1</sup>. This means that there should be no discrimination whatsoever on grounds of sex, either directly or indirectly<sup>2</sup>.

1 Directive 79/7/EEC, Art 1; 2 Art 4

070356 It applies to

- the working population (see DMG 070390) **and**
- retired or invalided workers (see DMG 070395)<sup>1</sup>.

1 Art 2

070357 Directive 79/7 does not apply to

- all benefits<sup>1</sup> (see DMG 070400) **or**
- all provisions for entitlement to benefit<sup>2</sup> (see DMG 070420).

1 Art 3(1)(a); 2 Art 7(1)

## **Directive 86/378**

070358 This Directive provides for equal treatment between men and women in occupational Social Security schemes.

## **Who decides whether there is discrimination**

070359 The adjudicating authorities decide whether any provision discriminates. This includes

questions concerning contribution conditions which are normally for the Secretary of State to decide<sup>1</sup>.  
But see DMG 070373 for objective justification.

1 R(P) 1/96; SS A Act 92, s 17

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# What discrimination means 070370 - 070389

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## Introduction

070370 Equal treatment means that women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation (and vice versa)<sup>1</sup>. There is discrimination if the same rules are not applied. Discrimination may be direct or indirect.

1 Case 384/85, Jean Borrie Clarke v CAO

## Direct discrimination

070371 Direct discrimination means that different rules are applied to men and women.

### Example

To be entitled to Retirement Pension the claimant must have reached pension age. Pension age is 65 for a man but only 60 for a woman. This provision discriminates directly against men (see DMG 070422 which explains why discrimination is permitted in this instance).

**Note:** The difference in pension ages can also discriminate directly against women by preventing them from retaining benefits over age 60 when men can retain them.

## Indirect discrimination

070372 Although the same rules may be applied to both men and women, those rules may have a different impact on them. The difference in treatment is indirect discrimination<sup>1</sup>.

1 R(U) 10/88; R(U)3/92; R v S of S for Education ex parte Schaffter [1987] IRLR53

070373 Indirect discrimination occurs when

- it can be shown that, although a provision applies equally to both men and women, it effects considerably more of one sex than the other<sup>1</sup>
- the Secretary of State cannot objectively justify that difference in impact by using arguments unconnected with the sex of the claimant<sup>2</sup>.

1 R v S of S for Employment, ex parte Seymour-Smith [1995] ICR 889;  
 2 R v S of S for Education ex parte Schaffter [1987] IRLR53; R(G) 2/91; Jones v CAO [1990] 533;  
 Case 280/94, Posthuma - van Damme v Bestuur van de Bedijfsvereniging voor Detailhandel  
 Ambachten en Huisvrouwen, para 26

070374 It is up to the claimant to show that a provision discriminates indirectly. However, if it is shown that a provision does discriminate, the onus is then on the Secretary of State to prove that the different impact is objectively justified<sup>1</sup>.

1 CFC/019/1990

## Objective justification

070375 In justifying a policy the Secretary of State must show that the means chosen

- meet a necessary aim of social policy **and**
- are suitable for attaining that aim **and**
- are necessary for achieving that aim<sup>1</sup>.

1 Case 171/88, Rinner-Kuhn v Fww Special Gebaudereinigung

070376 It is not enough to show that there was no intention to discriminate<sup>1</sup>. However, social policy is for each European Economic Area country to decide. As a result in justifying a policy European Economic Area countries have a broad margin of discretion to choose the measures which are necessary to achieve their social policy<sup>2</sup>.

1 Case 170/84, Bilka-Kaufhaus GmbH v Geber von Hartz;

2 Case 317/93, Inge-Nolte v Landesversicherungsanstalt

070377 The European Court of Justice can take one of the following approaches when deciding a case involving objective justification. They can decide that

- the provision is obviously unjustifiable; **or**
- it is obviously justified; **or**

- detailed examination needs to be carried out by the national court; **or**
- the reasons presented to them do not objectively justify the provision but leave the question for the national court to decide in case any further reasons are put forward.

070378 - 070389

# People covered by the Directive 070390 - 070399

[Introduction](#) 070390

[Working population](#) 070391 - 070394

[Retired persons](#) 070395 - 070399

## Introduction

070390 The Directive applies to two categories<sup>1</sup>

- 1.** the working population, including employed and self employed persons, employed and self employed persons whose activity is interrupted by illness, accident or involuntary unemployment, persons seeking employment **and**
- 2.** retired or invalided employed and self employed persons.

1 Directive 79/7/EEC, Art 2

## Working population

070391 A person is not a member of the working population if that person has

- 1.** never worked and never sought employment **or**
- 2.** been employed but such employment has been interrupted by something other than illness, accident etc, for example marriage or motherhood (see DMG 070393) **or**
- 3.** ceased work and is not seeking employment<sup>1</sup>.

1 Case 48/88, Achterberg te Riele, 106/88, Bernsen Gustin & 107/88, Egberg-Reuvers v Sociale Verkeringsbank

070392 A claimant's own statement and the absence of any contributions record should be accepted as evidence that the claimant has never worked and is not covered by<sup>1</sup> the Directive. But people who have never worked, for example school leavers, may still be workers if they are seeking work<sup>2</sup>.

1 Directive 79/7/EEC, Art 2; 2 Case 317/93, Inge Nolte v Landesversicherungsanstalt Hannover

070393 In considering whether a person's working activity has been interrupted for one of the reasons

listed in DMG 070401, the following points should be considered

- 1.** A person who gave up work for domestic reasons, for example to look after children, but who later becomes incapable of work by reason of illness or accident, is not covered because the employment was not interrupted for one of the reasons in DMG 070400<sup>1</sup>.
- 2.** A person who gave up work to look after children is covered if that person starts seeking work and then becomes incapable of work because of illness or accident<sup>2</sup>.
- 3.** A person claiming an Incapacity Benefit or Severe Disablement Allowance (see DMG 070393) some time after the interruption of employment will need to provide evidence that incapacity for work (although not necessarily the same cause of incapacity) has been continuous since the interruption began.
- 4.** A woman who, because she is pregnant, has temporarily given up work is covered if she always intended to return to work (not necessarily to the same job) but cannot do so only because she has given birth to a disabled baby.
- 5.** Carer's Allowance is a statutory scheme providing protection against sickness<sup>3</sup>. Where a person gave up work to care for a disabled person it should be accepted, for the purposes of a claim for Carer's Allowance, that the employment has been interrupted by sickness (see DMG 070400).
- 6.** A person who, without pay, looks after a spouse is not covered if that person did not give up work or give up looking for work in order to care for that spouse<sup>4</sup>. This applies whatever the extent of the caring that the spouse undertakes.

1 Case 31/90, Elsie Rita Johnson, para 19; 2 para 20 & 21;

3 Case 150/85, Drake v CAO; R(G) 2/86 and ECJ decision C 299/05;

4 Case 77/95, Züchner v Handelskrankenkasse Bremen

070394 People who are not working but who claim to be seeking employment must prove that they are available for and actively seeking employment. The following should be considered in deciding whether a person is seeking work<sup>1</sup>.

- 1.** Evidence that a person is receiving Jobseeker's Allowance or unemployment credits.
- 2.** Whether job applications have been sent to potential employers, and whether there is evidence of interviews for jobs.
- 3.** Whether the claimant has registered with employment agencies.

1 Case 31/90, Elsie Rita Johnson, para 22

## Retired persons

070395 The Directive does not apply to retired persons who were not employed when they became entitled to an old age pension. The exception to this is where the employment was interrupted immediately before then, by

1. sickness
2. invalidity
3. old age
4. an accident at work
5. an occupational disease **or**
6. unemployment<sup>1</sup>.

1 Case 48/88, Achterberg-te-Riele, 106/88, Bernsen-Gustin & 107/108, Egbers-Reuvers v Sociale Verzekeringsbank

070396 - 070399

# What the Directive covers 0070400 - 70409

[JSA and ESA](#) 070403 - 070409

070400 The Directive applies to statutory schemes which cover the following<sup>1</sup>

- sickness
- invalidity
- old age
- accidents at work and occupational diseases
- unemployment.

It also covers increases of the above benefits for dependent children and for people caring for children. For JSA and IB it also applies to increases for dependent husbands or wives (see DMG 070426)<sup>2</sup>.

1 Directive 79/7/EEC, Art 3(1)(a); 2 SS CB Act 92, s 82 & 86A.

070401 The following UK benefits are covered<sup>1</sup>

- Sickness

SSP

IBST

ESA (assessment phase)

AA

CA

DLA (Care Component)<sup>2</sup>

- Invalidity

IBLT

- ESA (main phase)

- Old age

RP

Graduated Retirement Benefit

Age addition.

• Accidents at work

Dis B

REA.

• Unemployment

Unemployment Benefit (up to 6.10.96)

JSA (from 7.10.96).

• Increases of benefit

Increases of the above benefits for adult and child dependants are also included. But some increases are exempted from the effect of the Directive (see DMG 070427).

1 Directive 79/7/EEC, Art 3; 2 ECJ decision C 299/05;

070402 The Directive also applies to social assistance in so far as it supplements<sup>1</sup> or replaces the schemes set out in DMG 070400. (See DMG 070411 for further guidance).

1 Directive 79/7/EEC, Art 3(1)(b)

## **JSA and ESA**

070403 Both JSA(Cont) and JSA(IB) are covered by the Directive. Both parts of JSA are paid because a person is unemployed and therefore both are covered by the Directive. Similarly both ESA(Cont) and ESA(IR) are covered by the Directive.

Hockenjas v. Secretary of State [2001] EWLA CIV 264; [2001] 2 CMLR 51

070404 - 070409

# What the Directive does not cover 070410 - 070419

[Introduction](#) 070410

[Income Support](#) 070411 - 070419

## Introduction

070410 The Directive does not apply to survivor's benefits, family benefits<sup>1</sup> or maternity benefits<sup>2</sup>. This means that the following UK benefits are not covered

- Survivors benefits

WB

IDB

- Family benefits

CHB

GA

Child's Special Allowance

Family Credit (but see DMG 070413)

- Maternity benefits

MB

SMP.

1 Directive 79/7/EEC, Art 3(2); 2 Art 4(2)

## Income Support

### Introduction

070411 For the UK, social assistance may mean IS. Social assistance is only covered by the Directive<sup>1</sup> if it is intended to supplement or replace other benefits covered by the Directive (see DMG 070401).

1 Directive 79/7/EEC, Art 3(1)

070412 IS provides protection against poverty, it does not protect against any of the risks set out in DMG 070400<sup>1</sup>. This means that the Directive does not apply to IS.

1 Case 63/91, Sonia Jackson & 64/91, Patricia Cresswell; R(IS) 10/91

070413 - 070419

# When the Directive does not apply 070420 - 070439

[Pension age](#) 070422 - 070425

[Increases for husband or wife or civil partner](#) 070426 - 070439

070420 EEA countries can exclude the following areas from the effect of the Directive<sup>1</sup>.

1. Pension age for RP purposes **and** its consequences for other benefits (see DMG 070422 et seq).
2. Special Retirement Pension provisions for persons who have interrupted their employment to bring up children (for example home responsibilities protection).
3. Old age or invalidity benefits awarded to a wife or a civil partner on the husband's or other civil partner's insurance.
4. Increases of benefit for invalidity, old age, industrial accidents and occupational diseases awarded for a dependent wife or civil partner (see DMG 070427).
5. The consequences of an option to pay reduced contributions taken up by married women or widows before the Directive came into force.

1 Directive 79/7/EEC, Art 7(1)

070421 In deciding whether the provisions are excluded it is necessary to consider<sup>1</sup>

1. the aim of the exclusion **and**
2. whether the exclusion is within the limits of what is appropriate and necessary for achieving that aim (the principle of proportionality).

1 R(U) 10/88; CA, HL & ECJ, S of S v Thomas/Cooze/Beard/Murphy & Morley; R(G) 3/89

## Pension age

070422 Pension age means

1. age 65 for a man **and**
2. age 60<sup>1</sup> for a woman.

The difference in pension age for men and women is discriminatory<sup>2</sup>. However, the Directive<sup>3</sup> clearly allows such discrimination. This means that the Directive has no effect on the different pension ages for entitlement to RP<sup>4</sup> (see also DMG 070460). Pension age for women will gradually increase to age 65 between 2010 and 2020.

1 SS CB Act 92, sec 122; 2 R(U) 10/88; R(P) 3/90; 3 Directive 79/7/EEC, Art 7(1)(a); 4 R(U) 10/88

070423 In some cases the conditions for entitlement to, or payment of, benefits other than RP are linked to the RP ages. The Directive applies to those conditions of entitlement if the link is a possible consequence of the different pension ages<sup>1</sup>.

1 Directive 79/7/EEC, Art 7(1)(a); Case 92/94, S of S & CAO v Graham, Connell & Nicholas

070424 For the Directive not to apply a strong link must be established between

1. the permitted discriminatory provisions for RP **and**
2. the discriminatory provisions for the other benefits<sup>1</sup>.

This can only be done when there is a necessary link between the conditions for entitlement and the different pension ages for men and women for RP purposes.

1 CA, HL & ECJ, S of S v Thomas/Cooze/Beard/Murphy & Morley; R(G)3/89

070425 A link to the different pension ages for men and women may be allowed if it is necessary to avoid illogicality, unfairness or absurdity<sup>1</sup>.

1 R(G) 3/89

## **Increases for husband or wife or civil partner**

070426 For some benefits there are different conditions of entitlement for increases for a wife when compared to increases for a husband. Where there are different rules for men and women there is direct discrimination<sup>1</sup>.

1 R(P) 3/88

070427 Both men and women can claim an increase of RP for their spouses<sup>1</sup>. However, for a woman to be entitled to an increase for her husband the additional conditions imposed are that she must

1. have been entitled to an increase of IB for her husband immediately before she became entitled to Category A RP **and**
2. satisfy conditions of residence and earnings without interruption.

070428 Although those provisions are discriminatory, EEA countries are allowed<sup>1</sup> to exclude from the scope of the Directive dependency increases of

**1.** invalidity

**2.** old age

**3.** accidents at work

**4.** occupational diseases<sup>2</sup>.

See DMG 070401 for the UK benefits affected.

1 Case 420/92, Elizabeth Bramhill; R(P) 2/96; 2 Directive 79/7/EEC, Art 7(1)(d); R(P) 3/88

070429 - 070439

## How the Directive works 070440 - 070449

070440 If the Directive applies but United Kingdom legislation does not provide for equal treatment, the provisions of the Directive override any inconsistent United Kingdom legislation<sup>1</sup>. In practice this means that the adjudicating authorities will consider which of the differing provisions are more favourable and apply them to the party being discriminated against<sup>2</sup>.

1 R(S) 2/88; Case 384/85, Jean Borrie Clarke v CAO; 2 Case 377/89, Cotter & McDermott v  
Minister for Social Welfare

### Example

The Severe Disablement Allowance transitional provisions which "passport" a person entitled to non-contributory Invalidity Pension before 29.11.84 through to Severe Disablement Allowance after that date, discriminated against women because of the additional household duties test. That test made it more difficult for women to establish entitlement to non-contributory Invalidity Pension. The transitional arrangements perpetuate that discrimination. As a result the transitional provisions were extended to women whose only reason for not being entitled to non-contributory Invalidity Pension was because of the additional household duties test.

070441 In amending national legislation to provide equal treatment for men and women<sup>1</sup>, a European Economic Area country can specify any conditions, providing that from 23.12.84 those conditions apply equally to men and women. This is so even if the new conditions are harder to satisfy. This is known as "levelling down".

1 Case 280/94, Posthuma - Van Damme v Bestuur de Bedrijfsvereniging voor Detailhandel  
Ambachten en Huisvrouwen

070442 - 070449

# Effect of the Directive - general 070450 - 070459

[Time for claiming](#) 070450 - 070453

[Payment of arrears](#) 070454 - 070455

[Overlapping benefits](#) 070456 - 070459

## Time for claiming

### Introduction

070450 For most benefits there is a specified time for claiming<sup>1</sup>. If the benefit is not claimed within that time entitlement to part of the benefit claimed is lost<sup>2</sup>.

1 SS (C&P) Regs; 2 SS A Act 92, s 1

070451 The time limits for claiming may continue discrimination<sup>1</sup>. Whether this is the effect will depend upon the circumstances of each individual case.

1 Case 31/90, Johnson v CAO

### Example

A woman reached age 60 on 13.6.75 but was not entitled to Cat A RP at that time because of the “married woman's half-test” This test was abolished from 22.12.84<sup>1</sup>. However the claimant did not make a claim until 25.1.86, at which time Cat A was only allowed from 25.1.85. In this case the provisions for claiming did not discriminate directly and did not perpetuate any previous discrimination. The loss of benefit was caused by the claimant's delay in claiming<sup>2</sup>.

1 SS Act 85; 2 R(P) 4/88

### Non-contributory Invalidity Pension-Severe Disablement Allowance transitional provisions

070452 The discrimination contained in the NCIP scheme was perpetuated by

1. the transitional provisions between NCIP and SDA (see DMG 070499) **and**
2. the UK's time limits for claiming (see DMG 070503).

070453 This means that in deciding whether the transitional provisions can help a woman in establishing

entitlement to SDA, the time limits for claiming can be set aside.

### **Example**

On 10.8.92 a woman claimed SDA stating that but for the discriminatory household duties test she would have been entitled to NCIP immediately before 29.11.84. She has been continuously incapable of work since 23.12.84 (the date the Directive took effect). The DM set aside the time limits for claiming and decided that the claimant could take advantage of the transitional provisions and be "passported" on to SDA. However, SDA was awarded from 10.8.91 only, twelve months before the date of claim.

### **Payment of arrears**

070454 A EEA country can limit the amount of arrears paid to a person by using national time limits<sup>1</sup>. This can be done even where arrears are payable because it has been decided that a provision contravenes the Directive<sup>2</sup>.

1 SS A Act 92, sec 1 & SS Act 98, s 27; 2 Case 338/91, Steenhorst-Neerings; Case 410/92, Johnson v  
CAO

070455 A EEA country cannot rely on national time limits where those limits have the effect of preventing a person from any opportunity of relying on the Directive<sup>1</sup>.

1 Case 208/90, Emmott

### **Overlapping benefits**

070456 Where a dependency benefit is payable for the same period as a personal benefit, the dependency increase will be adjusted<sup>1</sup>.

1 SS (OB) Regs, reg 10

070457 Although the overlap between CA and an increase of IBLT indirectly discriminates (see DMG 070372) against women, that discrimination is not affected by the Directive. This is because the Secretary of State is justified in imposing an upper limit on the amounts paid to any one person (the effect of the overlapping benefits rules)<sup>1</sup>.

1 R(G) 2/91

070458 - 070459

# Effect of the Directive - Retirement Pension 070460 - 070469

[Introduction](#) 070460 - 070461

[Giving up entitlement to Retirement Pension](#) 070462 - 070469

## Introduction

070460 The exemptions in the Directive<sup>1</sup> allow countries to have different pension ages for men and women for Retirement Pension purposes<sup>2</sup>. Apart from the United Kingdom the following countries have different pension ages for men and women.

1. Austria - men 65, women 60.
2. Italy - men 60, women 55.
3. Portugal - men 65, women 62.

1 Directive 79/7/EEC, Art 7(1)(a); 2 R(U) 10/88; R(P) 3/90

070461 The Directive requires countries to periodically examine the different pension ages for men and women<sup>1</sup>. The United Kingdom is introducing a common pension age of 65 to be introduced gradually from 2010 to 2020 (see DMG Chapter 75, Annex 1).

1 Art 7(2)

## Giving up entitlement to Retirement Pension

070462 A woman who has taken her Retirement Pension may wish to give up her Retirement Pension entitlement ("de-retire"). She cannot de-retire if she is aged 65 or over<sup>1</sup>. A man can de-retire until he is 70. This difference is not contrary to the Directive because the different ages at which men and women can de-retire are linked to the different pension ages at which men and women can become entitled to Retirement Pension.

1 SS CB Act 92, s 54

070463 A woman may also want to de-retire so that she will become entitled to a benefit which will qualify her for an Income Support premium. The Directive does not apply to this situation because the purpose of the woman de-retiring is to qualify for a benefit which is not covered by the Directive (see DMG 070410)<sup>1</sup>.

070464 - 070469

## **Effect of the Directive - Sickness and Invalidity Benefit 070470 - 070479**

070470 The rate of SB and IVB paid to a person at pension age was linked to the potential rate of RP<sup>1</sup>. The link between the rate of SB or IVB paid to a woman at age 60 and her potential rate of RP was not contrary to the Directive<sup>2</sup>. A man could not have the rate of his SB or IVB linked to his potential rate of RP until he reached pension age.

1 SS CB Act 92, s 31(6) & 33(4); 2 Directive 79/7, Art 7(1)(a);  
Case 92/94, S of S & CAO v Graham, Connell & Nicholas

070471 Sickness and invalidity benefits were replaced by IB and then ESA (Cont) (see DMG 070480).

070472 It was also not contrary to the Directive to have different ages for men and women for

**1.** becoming entitled to IVA<sup>1</sup>

**2.** entitlement to SB or IVB to end. A woman stopped being entitled to SB or IVB at age 65, a man's entitlement stopped when he was 70.

1 SS CB Act 92, s 47; Case 92/94, S of S & CAO v Graham, Connell & Nicholas

070473 - 070479

## **Effect of the Directive - ESA and Incapacity Benefit 070480 - 070489**

070480 ESA and IB, like SB and IVB (see DMG 070470), are benefits paid because people are incapable of work (an income replacement benefit). The ECJ's decision on IVB<sup>1</sup> also applies to ESA and IB. As a result the conditions for entitlement to ESA or IBST and IBLT (including transitional awards) which are linked to the different pension ages are not contrary to the Directive.

1 Case 92/94, S of S & CAO v Graham, Connell & Nicholas

070481 - 070489

# Effect of the Directive - Severe Disablement Allowance and Invalid Care Allowance 070490 - 070519

[Pension age](#) 070490 - 070491

[Retiring age](#) 070492 - 070493

[Entitled to Severe Disablement Allowance or Invalid Care Allowance from 28.10.94](#) 070494 - 070498

[Severe Disablement Allowance transitional provisions](#) 070499 - 070519

## Pension age

070490 A person over pension age before 28.10.94 continues to be entitled to Severe Disablement Allowance and Invalid Care Allowance if that person was entitled immediately before reaching that age<sup>1</sup>. This condition was linked to the different pension ages for men and women. As a result it discriminated against women.

1 SS CB Act 92, s 68(4)(d) & 70(5)

## Example

A woman aged 63 when she claims Severe Disablement Allowance or Invalid Care Allowance would not be entitled because she is over age 60. But a man of the same age would be entitled.

070491 These provisions are not a necessary consequence of the different pension ages for men and women. As a result when deciding whether a woman is entitled to Invalid Care Allowance or Severe Disablement Allowance before pension age, pension age should be treated as 65 for both men and women<sup>1</sup>. This applies where

- the woman is covered by the Directive (see DMG 070390) **and**
- pension age was before 28.10.94 (see DMG 070497).

See DMG 070494.

1 CA & House of Lords S of S v Thomas/Cooze/Beard/Murphy & Morley; Case 328/91, S of S v Thomas/Cooze/Beard/Murphy & Morley

## Retiring age

070492 A person over retiring age before 28.10.94 continues to be entitled to Severe Disablement Allowance or Invalid Care Allowance if that person was entitled immediately before reaching retiring age. Entitlement continues even though that person

- is no longer incapable of work<sup>1</sup> **or**
- is no longer caring for a disabled person and is gainfully employed<sup>2</sup>.

Before 28.10.94 retiring age was age 70 for a man and 65 for a woman<sup>3</sup>. The different retiring ages discriminated against men.

1 SS (Severe Disablement Allowance) Regs, reg 5; 2 SS (ICA) Regs, reg 11;  
3 SS CB Act 92, s 68(13) & 70(10)

### Example

A woman aged 66 who was entitled to Invalid Care Allowance immediately before age 65 will continue to be entitled to Invalid Care Allowance when she stops caring. A man of the same age would not be entitled to Invalid Care Allowance if he stops caring because his retiring age is defined as age 70.

070493 This discrimination is not excluded from the effect of the Directive<sup>1</sup>. In this case it is men who are being discriminated against and their retiring age must be changed to treat them the same as women. For both men and women retiring age should be regarded as 65 for the purpose of Severe Disablement Allowance and Invalid Care Allowance.

1 Directive 79/7/EEC, Art 7(1)(a)

## Entitled to Severe Disablement Allowance or Invalid Care Allowance from 28.10.94

070494 From 28.10.94 a person continues to be entitled to Severe Disablement Allowance or Invalid Care Allowance after age 65<sup>1</sup> if that person

- reached age 65 after 28.10.94 **or**
- was 65 before 28.10.94 but is not covered by the Directive.

1 SS CB Act 92, sec 68(4)(d), 11(a)(i), (13), 70(5) & (6)

070495 Entitlement under these provisions does not rely on a person being covered by the Directive (see DMG 070490).

070496 The earliest date from which Severe Disablement Allowance or Invalid Care Allowance can be

awarded under these provisions is 28.10.94. To be entitled before that date a person must still rely on the Directive (see DMG 070490).

### **Women 65 before 23.12.84**

070497 A woman

- who reached pension age 65 before 23.12.84 **and**
- whose claim for either Severe Disablement Allowance or Invalid Care Allowance was disallowed because she was not entitled immediately before pension age is not helped by the Directive.

This is because the Directive did not take effect until 23.12.84. Therefore the decision to disallow was correctly made at the date it was given.

070498 A woman in this situation is entitled to Severe Disablement Allowance or Invalid Care Allowance<sup>1</sup> from 28.10.94 if all the conditions for entitlement to Severe Disablement Allowance (or if she reached age 65 before 29.11.84, non-contributory Invalidity Pension) or Invalid Care Allowance were satisfied immediately before reaching age 65, with the following exceptions

- she did not have to be entitled immediately before pension age **and**
- she need not have made a claim.

1 SS (SDA) Regs, reg 4A; SS (ICA) Regs, reg 10A

## **Severe Disablement Allowance transitional provisions**

### **General**

070499 Housewife's non-contributory Invalidity Pension was replaced by Severe Disablement Allowance from 29.11.84. Claimants entitled to non-contributory Invalidity Pension on both 9.9.84 and 28.11.84 became entitled to Severe Disablement Allowance from 29.11.84 without having to satisfy the 80% disablement test<sup>1</sup>.

1 SS (SDA) Regs, reg 20(1)

070500 For a married woman to be entitled to non-contributory Invalidity Pension she had to satisfy an additional household duties test. That additional condition discriminated against women. The effect of that discrimination was continued by the transitional provisions because more men than women were entitled to non-contributory Invalidity Pension and, therefore, more men than women gained by this provision<sup>1</sup>.

1 R(S) 2/88; Case 384/85 Clarke v CAO

070501 For periods before 13.1.94 (see DMG 070497) a woman can rely on the Directive. For periods on or after 13.1.94 a woman can become entitled to Severe Disablement Allowance by using the revised transitional provisions<sup>1</sup> (see DMG 070508).

1 SS (SDA) Regs, reg 20(1A)

### **Periods before 13.1.94**

070502 For periods before 13.1.94 a woman can rely on the Directive to establish entitlement to Severe Disablement Allowance via the transitional provisions (see DMG 070495)<sup>1</sup>.

1 reg 20(1)

070503 In deciding whether a woman can use the transitional provisions, the UK's time limits on claiming<sup>1</sup> can be set aside<sup>2</sup>. This is because the combined effect of the transitional provisions and the time limits for claiming continued the discrimination against women contained in the non-contributory Invalidity Pension scheme

1 SS A Act 92, s 1(2)(b); 2 Case 31/90, Johnson v CAO

### **Example**

A woman claims Severe Disablement Allowance on 25.4.89. She does not satisfy the 80% disabled test but would have been entitled to non-contributory Invalidity Pension but for the household duties test. The earliest date of entitlement is 25.4.88<sup>1</sup>, accordingly she is not entitled on 29.11.84 (the relevant day for considering the transitional test). However, the time limit on claiming is set aside, therefore the claimant can use the transitional provisions to establish entitlement to Severe Disablement Allowance. The award of Severe Disablement Allowance is restricted to 25.4.88, twelve months before the date of claim (see DMG 070499).

1 SS A Act 92, s 1

### **Claims**

070504 Where Severe Disablement Allowance is claimed following the European Court of Justice decision<sup>1</sup>, and the conditions in the transitional provisions are satisfied, the decision maker should accept good cause for the delay in claiming. However, the award of benefit should be restricted to twelve months before the date of claim<sup>2</sup> (but see DMG 070453).

1 Case 31/90, Johnson v CAO; 2 SS A Act 92, s 1(2)(b)

### **Reconsideration**

070505 Where a claim for Severe Disablement Allowance was disallowed because

- the claimant failed the 80% test **and**
- continuous incapacity has been accepted from 29.11.84

the decision maker should revise/supersede the original disallowance on the ground that there has been an error of law<sup>1</sup>. This is because the transitional provisions for allowing people entitled to non-contributory Invalidity Pension to become entitled to Severe Disablement Allowance discriminated against women contrary to the Directive. However, the earliest date from which benefit can be awarded is 11.7.91, the date of the European Court of Justice judgment<sup>2</sup>.

1 sec 25(2); 2 s 69

### **Incapacity for work**

070506 To be entitled to Severe Disablement Allowance by using the transitional provisions, the claimant must show that she has been continuously incapable of work since 29.11.84. It is unrealistic to expect claimants to get medical statements from their doctor for this period. In the absence of any other evidence, the DM should rely upon the claimant's own statements. This should include

- current evidence of incapacity
- statements on when incapacity began and what her illness is and what she was doing immediately before becoming ill.

Unless there is some reason to doubt<sup>1</sup> this evidence the decision maker should accept the claimant's statement that she has been continuously incapable of work since 29.11.84.

1 R(I) 2/51; R(SB) 33/85

### **Pension age**

070507 In deciding whether a woman satisfies the transitional provisions pension age is treated as 65 (see DMG 070491). The decision maker should consider a woman's age before 10.9.84 or 29.11.84 when deciding whether she was under 65 when entitlement began.

### **Periods on or after 13.1.94**

070508 From 13.1.94 a woman can be entitled to Severe Disablement Allowance without having to satisfy the 80% disablement test if she

- would have been entitled to non-contributory Invalidity Pension before 29.11.84 but for the additional entitlement condition that she also had to be incapable of normal household duties **and**
- has been continuously incapable of work since 29.11.84<sup>1</sup>.

070509 A woman can be entitled to Severe Disablement Allowance using the transitional provisions<sup>1</sup> even though she was more than 65 years old on 29.11.84 (see DMG 070506).

1 reg 20(1A)

070510 - 070519

## Effect of the Directive - Jobseeker's Allowance 070520 - 070529

070520 The provisions<sup>1</sup> which adjust the payable amount of Jobseeker's Allowance because a person is receiving an occupational pension are not contrary to the Directive. This is because they either

- do not discriminate against men<sup>2</sup>. The correct comparison is between an equal number of men and women aged 60 to 65 who are out of work, available for employment, entitled to Jobseeker's Allowance and receiving an occupational pension. Everybody in that group has their rate of benefit reduced<sup>3</sup>. Any difference in treatment is caused by the different ages for Retirement Pension **or**
- indirectly discriminate against men<sup>4</sup> because a substantially greater number of men than women will be affected. But discrimination is permitted because it is one of the "possible consequences"<sup>5</sup> for Jobseeker's Allowance of the different pension ages for men and women<sup>6</sup>.

1 SS CB Act 92, s 30(1); 2 R(U) 3/92; 3 R(U) 3/92; 4 R(U) 10/88(T);  
5 Directive 79/7/EEC, Art 7(1)(a); 6 R(U) 10/88(T)

070521 - 070529

## Northern Ireland 070530 - 070539

[In Great Britain or Northern Ireland](#) 070531 - 070532

[When the agreement applies](#) 070533 - 070539

070530 [\[See memo DMG 1/17\]](#) A decision made in Great Britain or Northern Ireland can be revised, superseded or heard on appeal in whichever of the two countries the claimant is<sup>1</sup>.

1 SS (N Ireland Reciprocal Arrangements) Regs 76, Sch, para 3(1);  
Child Benefit (N Ireland Reciprocal Arrangements) Regs 77, Sch 1, para 3

### Example

A person claims DLA whilst in Great Britain but is disallowed. That person moves to Northern Ireland and the appeal can be heard in Northern Ireland.

### In Great Britain or Northern Ireland

070531 For a revision, supersession or appeal to take place in the other country, the person must be "in" that country. A casual presence is not enough<sup>1</sup>.

1 R(S) 5/85

070532 If the person is not "in" that country, the revision, supersession or appeal must be decided in the country where the original decision was made.

### When the agreement applies

070533 The agreement applies to most benefits however reviews or appeals cannot be undertaken for UC, Pension Credit, Christmas Bonus, Income Support, Social Fund (maternity and funeral expenses), Family Credit, Statutory Sick Pay or Statutory Maternity Pay.

070534 - 070539

## Overlapping Benefits 070540 - 070599

070540 The amount of benefit paid to a person may be adjusted where that person is entitled to both United Kingdom benefits and benefits from

- another European Economic Area country (see DMG 070040) **or**
- a country with which the United Kingdom has an agreement (see DMG 070330 - 070333).

070541 Subject to some exceptions, the benefits are adjusted by

- deciding that only one country (the "competent" state) will pay the benefit (see DMG 070550) **or**
- the effect of the Overlapping Benefit Regulations (see DMG 070560) **or**
- the provisions of reciprocal agreements (see DMG 070590).

070542 The guidance in DMG 070550 - 070594 sets out the general principles for making adjustments. Detailed guidance on the effects on individual benefits is in the particular part of the Chapter dealing with that benefit.

070543 - 070549

### Subpages

- Entitled to benefit from only one country - European Community 070550 - 070559
- Overlap under European Community provisions 070560 - 070569
- Meaning of benefits of the same kind 070570 - 070579
- European Community benefits not overlapping 070580 - 070589
- Overlap under reciprocal agreements 070590 - 070599

# Entitled to benefit from only one country - European Community

## 070550 - 070559

[General](#) 070550 - 070552

[Insured in only one European Economic Area country](#) 070553 - 070559

### General

070550 With some exceptions a person is only

- entitled to benefit from one European Economic Area country (the competent state - see DMG 070230) **or**
- insured in one European Economic Area country for any period (see DMG 070553).

070551 However, European Economic Area countries can with some exceptions (see DMG 070580) make provisions to adjust the benefits it pays where those benefits overlap with benefit paid by another European Economic Area country<sup>1</sup>.

1 Case 325/93 Union Nationale des Mutualités Socialistes v Aldo Del Grosso

070552 Where a European Economic Area country has such regulations a person cannot rely on European Community provisions to prevent that adjustment being made.

### Insured in only one European Economic Area country

070553 In general a person is insured in only one European Economic Area country for any period<sup>1</sup>. A person cannot therefore use insurance from one period to obtain entitlement to benefits of the same kind (see DMG 070570) from two different countries.

1 Reg (EEC) 1408/71, Art 13

070554 An exception to the general rule set out in DMG 070553 is where a person is

- employed in one European Economic Area country **and**
- self employed in another European Economic Area country<sup>1</sup>.

070555 - 070559

# Overlap under European Community provisions 070560 - 070569

[General](#) 070560 - 070561

[Adjustment of United Kingdom benefits](#) 070562 - 070569

## General

070560 A European Economic Area country can adjust the benefits it pays where those benefits overlap with benefit (070570) paid by another European Economic Area country<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 12(2)

070561 Where regulations in any Enterprise Allowance country provide for an adjustment to be made European Community provisions cannot be used to establish or maintain entitlement to that benefit<sup>1</sup>.

1 Art 12(1)

## Adjustment of United Kingdom benefits

070562 Although United Kingdom benefits could be adjusted where a person receives benefit from another European Economic Area country, no regulations have been made.

### No adjustment

070563 As a result United Kingdom benefits are not adjusted where

- a United Kingdom benefit based only on United Kingdom insurance and a benefit from another European Economic Area country based on that country's insurance are being paid<sup>1</sup> **or**
- a United Kingdom benefit based only on United Kingdom insurance and a benefit from another European Economic Area country are being paid and entitlement to that other country's benefit was obtained by using European Community provisions<sup>2</sup>.

1 Case 112/76, Manzoni; 2 case 279/82, Bundesknappschaft -Verwaltungsstelle Aachen v Jerzak

### Adjustment can be made

070564 United Kingdom overlapping benefit provisions<sup>1</sup> can be used to adjust benefit where<sup>2</sup> European Community provisions have been used to obtain entitlement<sup>3</sup> to United Kingdom benefit. This applies

whether the benefit from the other European Economic Area country has been obtained<sup>4</sup>

- only by using insurance from the other European Economic Area country **or**
- by using European Community provisions.

1 SS (OB) Regs; 2 Reg (EEC) 1408/71, Art 12(2); 3 Case 34/69, Duffy; 4 Case 184/73, Kaufmann

070565 Where European Community provisions have been used to obtain entitlement to United Kingdom benefit an adjustment can also be made to any Adult Dependency Increase.

### **Example**

A person is entitled to pro rata Retirement Pension with an increase for a dependant wife. The dependant is also entitled to a personal benefit based entirely on insurance paid in another European Economic Area country. The Adult Dependency Increase can be adjusted because of that personal benefit.

070566 The other European Economic Area country may have provisions for adjusting their benefit because United Kingdom benefit of the same kind is being paid.

070567 - 070569

# Meaning of benefits of the same kind 070570 - 070579

## General

070570 Benefits are of the same kind when

1. their purpose and subject matter
2. the method of calculation **and**
3. the conditions for entitlement are identical<sup>1</sup>.

DMG 070150 - 070169 lists types of benefits covered by EC regulations. These are generally identified by the reason for which they are paid rather than the name of the benefit.

- 1 Case 171/82 Valentini v. Association pour l'Emploi dans l'industrie et Le Commerce;  
Case 197/85 Office national des pensions pour travailleurs Salaries v. Stefanetti;  
Case 98/94 Schmidt v. Rijksdienst Voor pensionen

070571 Benefits are not of the same kind when they are linked to different

1. insurance records **and**
2. periods of insurance<sup>1</sup>.

- 1 Reg (EEC) 1408/71, Art 46a(i); Case 98/94 Schmidt v. Rijksdienst Voor Pensionen

## Example 1

Unemployment benefit paid by the Irish Republic and JSA (Cont) paid by the United Kingdom are benefits of the same kind. This is because both benefits are

1. paid because a person is unemployed **and**
2. based on that person's own insurance.

## Example 2

Irish Widow's Benefit and UK JSA (Cont) are not benefits of the same kind. This is because WB is paid because a person is a widow. JSA (Cont) is paid because a person is unemployed. Therefore both benefits are not paid for the same purpose.



# European Community benefits not overlapping 070580 - 070589

[General](#) 070580 - 070581

[Pro rata benefits](#) 070582

[Incompatible benefits](#) 070583 - 070589

## General

070580 A EEA country cannot apply its provisions for overlapping its benefits against benefits paid by another EEA country when the person receives benefits of the same kind (070570) which are paid<sup>1</sup> for invalidity, old age, death or occupational disease<sup>2</sup>.

1 Reg (EEC) 1408/71, Art 12(1); 2 Case 325/93 Union National des Mutualités  
Socialists v Aldo Del Grosso

070581 The following are not reduced because they overlap

- supplements paid due to aggregation of invalidity<sup>1</sup>
- conversion of invalidity benefits into old-age pensions<sup>2</sup>
- pro rata invalidity benefits, widows benefits and RP (070582)<sup>3</sup>
- awards of supplements where the minimum rate of benefit is not being paid<sup>4</sup>
- revalorizations of the rate of benefits<sup>5</sup> **and**
- benefits paid because of aggravation of an occupational disease<sup>6</sup>.

1 Reg (EEC) 1408/71, Art 41; 2 Art 43(2) & (3); 3 Art 46; 4 Art 50; 5 Art 51; 6 Art 60(1)(b)

## Pro rata benefits

070582 Benefits paid on a pro rata basis<sup>1</sup> are not adjusted because they overlap with another benefit of the same kind<sup>2</sup>. Each EEA country in which the person has been insured will pay either

- pro rata benefit **or**

- the rate payable only under its own legislation, where higher<sup>3</sup>.

1 Art 46(2); 2 Art 46b(1); 3 Art 46(1); R(S) 9/81 Coppola v Insurance Officer; R(U) 2/78

## Incompatible benefits

070583 Some UK benefits cannot be paid at the same time because the conditions for entitlement are incompatible.

### Example

A person cannot be entitled to both JSA and ESA at the same time. A person is entitled to JSA if capable of work. A person is only entitled to ESA they have limited capability for work.

070584 Although two United Kingdom benefits may be incompatible it does not necessarily mean that a United Kingdom benefit is incompatible with the equivalent other benefit in the other European Economic Area country.

### Example 1

United Kingdom long term Incapacity Benefit is incompatible with United Kingdom Retirement Pension. However, United Kingdom long term Incapacity Benefit is not incompatible with German old age benefit<sup>1</sup> and both benefits can be paid at the same time.

1 [1979] 3 CMLR 382

### Example 2

United Kingdom long term Incapacity Benefit is incompatible with Jobseeker's Allowance. However, Italian invalidity benefit is not incompatible with United Kingdom Jobseeker's Allowance and both benefits can be paid at the same time<sup>1</sup>. This is because a person does not have to be totally incapable of work to be entitled to Italian invalidity benefit.

1 R(S) 9/81; R(S) 13/83

070585 - 070589

# Overlap under reciprocal agreements 070590 - 070599

[Pro rata benefits](#) 070592 - 070594

070590 UK provisions<sup>1</sup> do not provide for UK benefits to be adjusted where another benefit is being paid by a country with which the UK has an agreement. However, in the same way as EC provisions (see DMG 070550), many agreements provide

1. that a person will be entitled to benefits from only one country **or**
2. for an adjustment to be made where a UK benefit and a benefit from another country can be paid at the same time.

1 SS (OB) Regs

070591 Detailed guidance on overlapping benefits under reciprocal agreements is contained in the section dealing with each benefit. Set out overleaf is a table summarising the effects of overlaps for RP, WB, IBST, IBLT, ESA(C) and MA.

## Pro rata benefits

070592 RP, WB and IBLT paid on a pro rata basis (see DMG 076120 - 077220 and DMG 074190) are not adjusted because they overlap with RP, WB or IBLT paid by the other country.

070593 For RP and WB it is only the agreements with the following countries which do not provide for pro rata benefit

1. Canada (the Canada agreement does not apply to WB)
2. Isle of Man (see DMG 076154)
3. New Zealand **and**
4. Northern Ireland (see DMG 076154).

070594 Pro rata IBLT is only paid under the agreements with the following countries

1. Switzerland
2. Turkey **and**

### 3. United States of America.

The table below summarises the effects of overlap under Reciprocal Agreements for RP, WB, IBST, IBLT MB and ESA(C).

	<b>RP</b>	<b>WB</b>	<b>IBST</b>	<b>IBLT</b>	<b>MB</b>	<b>ESA (C)</b>
Barbados	PR	PR	DMG 074221		DMG 075730	DMG 074221
Bermuda	PR	PR	X	X	X	X
Canada	-	X	X	X	X	X
Cyprus	PR	PR	DMG 074223		DMG 075654	X
Isle of Man	DMG 076154	DMG 077254	DMG 074224		DMG 075740	X
Israel	PR	PR	-	-	-	X
Jamaica	PR	PR	DMG 074227	DMG 074225	X	DMG 74225
Jersey & Guernsey	PR	PR	DMG 074228	DMG 074229	DMG 075733	DMG 74228
Malta	PR	PR	DMG 074230	DMG 074231	X	X
Mauritius	PR	PR	X	X	X	X
New Zealand	-	-	DMG 074240	X	X	X
Northern Ireland	DMG 076154	DMG 077254	DMG		DMG	DMG

			074241		075740	74241
Philippines	PR	PR	X	X	X	X
Switzerland	PR	PR	X	X	X	X
Turkey	PR	PR	-	PR	DMG 075741	DMG 74244
United States of America	PR	PR	-	PR/ DMG 074245	-	DMG 74245
Yugoslavia	PR	PR	DMG 074250	DMG 074248	-	DMG 74248

**Notes:** PR Pro rata benefit is paid under these agreements

- No provisions for overlap

X Benefit not covered by the agreement with that country

070595 - 070599

## Offsets, abatements and earning 070600 - 070629

070600 The amount of arrears payable following a decision awarding benefit on reconsideration or appeal is offset where

- a United Kingdom benefit has been awarded to a person under United Kingdom legislation alone **and**
- a later decision awards benefit taking into account European Community provisions<sup>1</sup>.

1 SS A Act 92, sec 5(1)(a); SS (POR) Regs, reg 5

070601 This applies even though entitlement to the second benefit arises only because of European Community provisions<sup>1</sup>.

1 Re a car accident in West Berlin [1979] 2 CMLR 42

070602 DMG 070601 also applies where

- the first benefit was awarded under European Community provisions **and**
- the second benefit was awarded under United Kingdom legislation alone.

070603 - 070609

### Subpages

- Recovery of Income Support 070610 - 070619
- Earnings and occupational pension 070620 - 070629

## Recovery of Income Support 070610 - 070619

070610 Income Support may be recovered from arrears of benefit paid by another European Economic Area country if it would not have been paid if that benefit had been paid at the correct time<sup>1</sup>.

1 SS A Act 92, sec 74(2) & (3); Reg (EEC) 574/72, Art 111(3)

070611 Income Support can be recovered under United Kingdom legislation alone where the arrears are paid to the United Kingdom authorities and not directly to the claimant. Where Income Support has been paid and the person becomes entitled to another European Economic Area benefit the other European Economic Area country pays the arrears to the United Kingdom. The United Kingdom deducts the appropriate amount of Income Support and forwards the balance to the claimant<sup>1</sup>.

1 R(SB)3/91; Reg (EEC) 574/72, Art 111

070612 Income Support cannot be recovered if the arrears of benefit due from the other European Economic Area country are paid directly to the claimant<sup>1</sup>.

1 R(SB) 3/91

070613 To recover Income Support from arrears paid by another European Economic Area country

- the benefit paid by the other European Economic Area country must be within the scope of European Community provisions (070150)<sup>1</sup> **and**
- it is not necessary that there is entitlement to the benefit paid by the other country only because of European Community provisions<sup>2</sup>.

1 SS (POR) Regs, reg 8(1)(g); Reg (EEC) 1408/71, Art 4(1); R(SB) 3/91;

2 SS (POR) Regs, reg 8(1)(g); R(SB) 3/91

070614 Detailed guidance on above is in Volume 3, Decision Makers Guide - Subjects Common to all Benefits.

070615 - 070619

## Earnings and occupational pension 070620 - 070629

070620 Benefit may (see DMG 070621) be reduced under United Kingdom provisions because of

- earnings in another European Economic Area country **or**
- occupational pension paid because of employment in another European Economic Area country<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 12(2) & (3); R(P) 1/70

070621 An adjustment can be made where the claimant is entitled to benefits of the same kind (see DMG 070570).

070622 Where a person is entitled to pro rata benefit, any reduction because of earnings will also be at a pro rata rate.

070623 - 070629

Common terms - Alphabetical list

## Common terms - alphabetical list 070630 - 071699

070630 This section contains guidance on terms that are common to benefits in Volume 2, Decision Makers Guide - International Subjects. The guidance, which is in alphabetical order covers terms

- used in United Kingdom law
- used in European Community law **and**
- that are common to benefits which have residence or presence in Great Britain as a condition of entitlement.

070631 The decision maker should refer also to 070010-070620 which gives guidance on the general principles for United Kingdom and European Community law. It also explains how entitlement is affected when a person is absent from, or an event occurs outside Great Britain.

070632 - 070639

### Subpages

- Common terms - A 070640 - 070679
- Common terms - B to E 070680 - 070701
- Common terms - F to G 070702 - 070755
- Common terms - I to M 070756 - 070768
- Common terms - O 070769 - 070789
- Common terms - P to R 070790 - 070819
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- Common terms - T to W 070853 - 071699

## Common terms - A 070640 - 070679

[Absence from Great Britain - meaning](#) 070640 - 070642

[Absence from Great Britain for treatment](#) 070643 - 070650

[Absence from GB - being treated](#) 070651 - 070660

[Absence from Great Britain for NHS treatment](#) 070661 - 070669

[Association agreements](#) 070670

[Asylum seeker](#) 070671 - 070679

### Absence from Great Britain - meaning

070640 Absence from GB means being not present in GB<sup>1</sup> (see DMG 070795). A person absent from GB may, in prescribed circumstances (see benefit specific sections) be treated as present.

1 R(U) 16/62; R(F) 4/85 Appendix

070641 Absence from GB is not restricted to persons who in the past have actually been present in GB before going abroad. It can also apply to a person who has never been in GB<sup>1</sup>. But someone who is absent from GB may be resident in GB and vice versa<sup>2</sup> (see DMG 070804).

1 R(U) 16/62; 2 R(U) 18/60; R(P) 2/67

### Calculating the length of absence

070642 A person is absent from GB if that person is absent for the whole day from midnight to midnight. A person who is present in GB for only part of a day, either when leaving or returning, is present in GB on that day<sup>1</sup>.

1 R(S) 1/66

### Example

A person entitled to IBLT leaves GB to go to South Africa at 7.00am on 17.9.96. That person returns to GB at 11.30pm on 30.9.96. The period of absence from GB is from 18.9.96 to 29.9.96. The person is in GB on both 17.9.96 and 30.9.96.

## Absence from Great Britain for treatment

[See DMG 070661 if absence is for NHS Treatment]

### Introduction

070643 A person can avoid losing entitlement to benefit because of being absent from GB if the absence is for the specific purpose of

1. being treated for an incapacity which began before leaving GB<sup>1</sup> **or**
2. being treated for incapacity or a disabling condition which began before leaving GB<sup>2</sup> **or**
3. being treated for illness or disability of mind or body which started before the child's absence began<sup>3</sup> **or**
4. caring for the SDP<sup>4</sup> (see DMG 070657) **or**
5. receiving treatment appropriate to the injury<sup>5</sup>.

1 SS Ben (PA) Regs, reg 2(1)(b); R(S) 2/86; 2 SS (AA) Regs, reg 2(3)(e); SS (DLA) Regs, reg 2(2)(e);

3 CHB (R & PA) Regs, reg 2(2)(c)(iii); 4 SS (ICA) Regs, reg 9(2)(b);

5 SS Ben (PA) Regs, reg 2(1)(bb)

070644 A person may also avoid disqualification of IBST if that person is authorized to go to another EEA country for treatment<sup>1</sup>. Guidance on ESA and absence abroad to receive medical treatment is at DMG 071941.

1 Reg (EEC) 1408/71, Art 22(1)(c)

### Specific purpose

070645 To keep entitlement to benefit the person must show that

1. the absence was for the specific purpose of being treated, caring or receiving treatment **and**
2. he or she intended to be treated before leaving GB<sup>1</sup>.

1 R(S) 2/86; R(S) 1/90

070646 Although the person needs to have intended to obtain treatment before leaving GB it is not necessary to know in advance who will give the treatment<sup>1</sup>.

1 R(S) 3/54

070647 A claimant who goes abroad for a holiday and falls ill after leaving GB is not absent for the specific purpose of being treated<sup>1</sup>. That person would also not satisfy the requirement that the treatment was for an incapacity or disablement condition which began before leaving GB (see DMG 070651).

1 CSS 77/49 (KL)

070648 A tribunal of Commissioners<sup>1</sup> reviewed the meaning of absence for a specific purpose and overturned the interpretation given in a number of earlier decisions. The Commissioners decided that the following decisions<sup>2</sup> should no longer be applied.

1 R(S) 1/90(T); 2 CS 317/49 (KL); CSS 71/49; R(S) 6/61; CS 1/71; R(S) 1/77 & R(S) 1/75

## **CA**

070649 For CA the absence must be for the specific purpose of caring for a SDP who is also absent from GB<sup>1</sup>. The absence of the carer need not be for the sole purpose of caring for the disabled person (but see DMG 070658).

1 SS (ICA) Regs, reg 9(2)(b); R(S) 2/86; R(S) 1/90

070650 To keep entitlement to CA the absence must include caring for the disabled person, and the relevant QB must continue to be payable to the disabled person. It is sufficient that the carer left GB and was accompanied by the disabled person for whom that person continued to care.

### **Example 1**

A disabled person goes abroad for treatment or to be helped by the different climate and is accompanied by the carer. In this situation the condition is satisfied.

### **Example 2**

The carer goes abroad because her husband has gone to another country to work. As a necessary consequence the disabled person is also absent from GB.

In this situation the condition is satisfied because the carer has arranged for the disabled person to accompany her in order to continue to provide care.

### **Example 3**

The carer went to work abroad accompanied by the disabled person, choosing a particular country because its climate would help the disabled person. Although not the sole reason for absence (see DMG 070657) the absence is partly for the benefit of the disabled person and that is sufficient to satisfy the condition.

## **Absence from GB - being treated**

### **Meaning of being treated or receiving treatment**

070651 A person is being treated or receiving treatment<sup>1</sup> if

- 1.** that person is being treated by a medically qualified (see DMG 070661) or other suitably qualified person or agency<sup>2</sup> (see DMG 070662) **and**
- 2.** the treatment is intended to cure (see DMG 070660) or ease the effects of the illness or disability<sup>3</sup>.

1 SS (Ben) PA Regs, reg 2(1)(bb); 2 CS 474/40; R(S) 16/51; R(S) 10/52; 3 R(S) 2/69

070652 It is not necessary for the treatment to cure the illness or condition<sup>1</sup>.

1 CAO & Secretary of State v Ahmed & Others

### **Treated by a doctor**

070653 A person receives treatment if while outside of GB that person sees a doctor about an incapacitating or disabling condition. However if the object of the visit is solely to obtain a doctor's statement or medical certificate, the person may not have been treated, but it should normally be assumed that before the issue of a certificate a doctor will have "treated" him.

### **Not treated by a doctor**

070654 Although treatment will normally be administered by a medical practitioner, a person may be accepted as being treated if receiving treatment from other suitably qualified people. The following can be accepted as being treated (see DMG 070659)

- treatment by a doctor of divinity who is not a medical doctor<sup>1</sup>
- treatment by receiving medicinal baths and massage abroad by persons qualified to give it<sup>2</sup>
- treatment by undertaking remedial exercises under the supervision of a doctor<sup>3</sup>.

1 R(S) 1/65; 2 R(S) 10/51; 3 R(S) 3/54

070655 There are special considerations where incapacity is based on mental, rather than physical, illness or disablement<sup>1</sup>.

1 R(S) 5/61

### **Not being treated**

070656 A person is not being treated if that person

1. is absent from GB for the purpose of convalescence in a warm climate<sup>1</sup>, on a cruise<sup>2</sup> or for the enjoyment of good food, mountain air, a change of atmosphere or rest<sup>3</sup>. The person is not being treated within the meaning of the provisions even if the absence is because of medical advice<sup>4</sup>
2. is outside of GB merely for the purposes of rest and freedom from worry in order to allow nature to continue the cure and recovery<sup>5</sup>
3. takes drugs which were obtained in GB before departure<sup>6</sup>
4. is accompanied by a spouse, relative or friend who is a qualified doctor or visiting a spouse, relative or friend who is a qualified doctor<sup>7</sup> and that person is administering the treatment.

1 R(S) 1/69; 2 R(S) 2/69; 3 R(S) 10/52; 4 R(S) 4/74;

5 R v National Insurance Commissioner, ex parte McMenemey (see App to R(S) 2/69);

6 R(S) 4/74; 7 R(S) 2/69; R(S) 5/61

#### **Intended treatment not received**

070657 A person who does not actually receive treatment may still be accepted as being absent from GB for the specific purpose of being treated. In these cases

1. the person must have intended to be treated **and**
2. the failure to be treated must be due to unforeseen circumstances<sup>1</sup>.

1 R(S) 6/61

#### **Incapacity which began before the person left GB – ESA, IB, SDA and MA**

070658 To avoid losing entitlement to benefit<sup>1</sup>

1. a person must have limited capability for, or be incapable of, work immediately before leaving GB<sup>2</sup> (see DMG 070668) **and**
2. the incapacity or disabling condition which is being treated outside GB must be linked to the incapacity which existed at the date the claimant left GB<sup>3</sup>.

1 SS Ben (PA) Regs, reg 2(1)(b); SS (AA) Regs, reg 2(2)(e); SS (DLA) Regs, reg 2(2)(e);

2 R(G) 5/53; R(S) 19/54; R(S) 2/86; 3 R(S) 2/86

**Note:** To satisfy the conditions above a person does not have to be receiving benefit before leaving GB<sup>1</sup>.

**Example**

A person was incapable of work because of a nervous disorder when leaving GB for the United States of America. Later that person was treated in the United States of America for an internal haemorrhage. That treatment was not for an incapacity which began before the person left GB<sup>1</sup>.

1 R(S) 5/61

070659 A person is not incapable of work if before leaving GB that person was suffering from

1. a medical disorder or an undiagnosed illness<sup>1</sup> or
2. a potentially dangerous condition which did not prevent the claimant from working<sup>2</sup>.

1 R(S) 9/59; 2 R(S) 1/75

**Incapacity which began before the person left Great Britain - DLA and AA**

070660 To avoid losing entitlement to AA or DLA the incapacity or disabling condition which is being treated outside GB must be linked to the incapacity which existed at the date the claimant left GB<sup>1</sup>.

1 CS/317/49

**Absence from Great Britain for NHS treatment**

070661 A person who spends a temporary period absent from GB in order to receive NHS hospital treatment can retain entitlement to IS/JSA or SPC for the whole period of treatment<sup>1</sup>. **This legislation only applies in England and Wales and there is no equivalent for Scotland.** If anyone in Scotland reports a temporary absence abroad to receive NHS hospital treatment DMs should telephone Information and Devolution Policy on 0131 222 5658 for guidance. Guidance for ESA and absence abroad to receive NHS hospital treatment is at DMG 071943.

1 IS (Gen) Regs 1987, reg 4(3A); JSA Regs 1996; reg 50(6AA); SPC Regs 2002, reg 4

070662 The arrangements for treatment are listed below and are those under which a person might be sent from the UK to a hospital abroad for treatment supplied by the NHS and do not include treatment for persons who fall ill whilst abroad.

070663 The period of absence must be for the purpose of receiving treatment at a hospital or other institution outside GB where the treatment is being provided

**1.** under section 3 of the NHS Act 1977 **or**

**2.** pursuant to arrangements made under section 23 of that Act **or**

**3.** pursuant to arrangements made under paragraph 13 of Schedule 2 to the NHS & Community Care Act 1990.

## **IS**

070664 A person who is entitled to IS and goes abroad for treatment will continue to be entitled to IS whilst they are absent from GB if

**1.** they satisfy the conditions of entitlement to income support immediately before the beginning of that period of temporary absence **and**

**2.** the period of absence is for the purpose of being treated under one of the arrangements in DMG 070663.

## **JSA**

070665 A person who is entitled to JSA will be treated as being in GB during a period of absence from GB if

**1.** they were entitled to JSA immediately before the absence commenced **and**

**2.** the period of absence is for the purpose of being treated under one of the arrangements in DMG 070663.

070666 A member of a joint claim couple who satisfies the conditions in paragraph 070665 **2.** above will be treated as being in GB during a period of absence from GB provided that they and the other member of the couple were entitled to JSA immediately before the temporary absence began<sup>1</sup>.

070667 Where a claim for benefit is not determined before the absence commences entitlement during the period of absence will not apply unless the benefit is awarded for the period immediately before the date on which the absence commenced.

070668 DMs should refer to DMG Volume 4 to consider whether a person can be treated as available, ASE, and capable during such periods of absence.

## **SPC**

070669 During a period of absence from GB for the purpose of being treated under one of the arrangements in DMG 070663 a person is treated as being in GB.

## **Association agreements**

070670 These agreements are made between the European Community (see DMG 070040) and non European Economic Area countries. A list of these agreements is at DMG 070335 and guidance is in the benefit specific sections.

## **Asylum seeker**

**[\[See Memo DMG 15/18\]](#)**

070671 A status given to a person seeking asylum from fear of persecution in the country from which they came. A person who is awaiting a decision on an application for asylum is granted temporary admission and is lawfully present in GB<sup>1</sup>, but is still a person subject to immigration control.

1 R(IS) 2/06

070672 - 070679

## **Common terms - B to E 070680 - 070701**

[British nationals](#) 070680

[Central point of contact](#) 070681

[Competency](#) 070682

[Cooperation agreements](#) 070683

[Domicile](#) 070684 - 070686

[Derived rights](#) 070687 - 070689

[European Economic Area](#) 070690 - 70691

[European Union](#) 070692

[Exceptional leave, Humanitarian Protection and Discretionary leave](#) 070693 - 070700

[Export](#) 070701

### **British nationals**

070680 With effect from 1.1.83 the UK defined nationals wherever it is used in EC provisions (see DMG 070082).

### **Central point of contact**

070681 A liaison officer for the Home Office. For example, the Central Point of Contact may telephone the Home Officer to establish a person's application for asylum.

### **Competency**

070682 Competency means deciding which EEA country is responsible for paying benefit. In general a person is only subject to the legislation of one country. Full guidance is at DMG 070230.

### **Cooperation agreements**

070683 These agreements are made between the EC and non EC countries. A list of these agreements is at 336 and guidance is in the benefit specific sections.

## Domicile

070684 For guidance on Domicile please see DMG Vol 3, paras 10157 to 10164.

070685 - 070686

## Derived rights

070687 EC regulations<sup>1</sup> distinguish between

1. employed and S/E persons (workers) (see DMG 070051) **and**
2. members of their family (see DMG 070055) and their survivors<sup>2</sup> (see DMG 070056).

1 Reg (EEC) 1408/71, Art 2(1); 2 Case 40/76, Kermascheck v Bundesanstalt für Arbeit;  
Case 308/93, Bestuur van De Sociale Verzekeringsbank v Cabanis Issarte

070688 Employed and S/E workers have their own rights under EC provisions. Members of families and survivors only have rights because they are the survivors or members of the family of a worker. These are known as derived rights.

070689 Detailed guidance is at DMG 070130.

## European Economic Area

070690 The EEA came into force on 1.1.94 with the aim of promoting better trade and economic relations between

1. EC countries **and**
2. certain EFTA countries (see DMG 070040)<sup>1</sup>.

1 European Economic Area Agreement, Art 126

070691 This means that most EC provisions on Social Security apply to EEA countries (see DMG 070040)<sup>1</sup>. In addition there can generally be no discrimination against EFTA countries included in the EEA and their nationals<sup>2</sup> (see DMG 070220).

1 Art 129; 2 Art 28

## European Union

070692 The EU was set up on 1.11.93 to provide closer union between EC countries. The EU does not replace the EC. It cannot enter into legal obligations and legislation remains a matter for the EC. The EU consists of

1. the EC
2. the EC Single Market
3. European Atomic Energy Community
4. intergovernmental cooperation on a common foreign and security policy **and**
5. intergovernmental cooperation in the fields of justice and home affairs.

## **Exceptional leave, Humanitarian Protection and Discretionary leave**

070693 Up to 31.3.03 the HO could grant exceptional leave to enter or remain in the UK to a person who did not satisfy the criteria for refugee status. People granted exceptional leave to enter or remain in the UK are treated as if they satisfy the residence test for non-contributory benefits (see DMG 072986 et seq).

070694 Exceptional leave was granted to a person on compelling humanitarian grounds and is not a guarantee of the right of permanent residence. This practice was separate from the refugee process. If a person with exceptional leave applies to the HO for an extension of the period of leave before its expiry, the period of exceptional leave will automatically be extended until the HO makes a decision on the application for extension<sup>1</sup>.

1 Immigration (Variation of Leave) Order 1976

070695 Evidence of exceptional leave to enter or remain in the UK will normally be in the form of a letter from the HO. The terms used by the HO are

1. exceptional leave to enter or remain **or**
2. leave to enter or remain granted on an exceptional basis.

Both terms have the same effect for benefit purposes.

070696 From 1.4.03 exceptional leave was replaced by two new categories of leave to enter or remain in the UK outside the immigration rules. In addition to evidence of exceptional leave claimants may produce letters from the HO confirming the grant of Humanitarian Protection or discretionary leave.

070697 Humanitarian Protection outside the immigration rules was granted only to those people who, though not granted refugee status would, if they were returned to their country of origin, face a serious risk to life or person. Humanitarian Protection outside the immigration rules was granted for up to three years (or five years from 30.8.05) after which the person could apply for settlement in the UK provided that there was a continuing need for protection. If the need for protection had ended no further leave was granted.

070698 The Secretary of State for the Home Department also has the discretion to grant leave to people who do not qualify for refugee status, Humanitarian Protection or leave under the Immigration Rules. Discretionary Leave is usually granted for two periods of up to three years. Renewal of leave is only granted if the person continues to satisfy the conditions for Discretionary Leave.

070699 From 9.10.06 European legislation<sup>1</sup>, seeking to ensure common criteria for the identification of persons genuinely in need of international protection across EU member states, is transposed into HO legislation<sup>2</sup>. From that date Humanitarian Protection will, where appropriate, be awarded within the immigration rules rather than exceptionally outside the immigration rules. Grant of Humanitarian Protection will normally be for five years.

1 Directive 2004/83/EC; 2 Refugee or Person in Need of International Protection (Qualification) Regs, SI 2006 No 2525

070700 A claimant given

1. exceptional leave to remain **or**
2. leave to remain on an exceptional basis **or**
3. humanitarian protection **or**
4. discretionary leave.

Is not a person from abroad (or a person not treated as in GB for SPC purposes) for as long as the leave lasts, including periods when he has applied in time for an extension of leave.

## **Export**

070701 A term common in EC law where a person wishes to have their benefit “exported” to another country where they live, either permanently or temporarily. For further guidance see benefit specific sections.

## Common terms - F to G 070702 - 070755

[Family benefits](#) 070702

[Family Reunion](#) 070703 - 070710

[Frozen Rates](#) 070711

[Great Britain](#) 070712 - 070755

### Family benefits

070702 Family benefits are all benefits in kind or in cash intended to meet family expenses. For further guidance, see benefit specific sections.

### Family Reunion

070703 A person who has been granted refugee status is entitled to bring his (or her) immediate family to the UK. The family members, as long as they are the same nationality as the refugee, may be granted refugee status if they wish, but if they are not entitled to refugee status, or don't want it, they will still be admitted to join the sponsor. (The sponsor being the refugee they are coming to join).

070704 Only pre-existing families are eligible for family reunion i.e. the spouse and minor children who formed part of the family unit prior to the time the sponsor came to the UK to seek asylum, though occasionally other family members, e.g. elderly parents may be included.

070705 The family members are required to obtain an entry clearance visa before coming to the UK. The visa will be found in the family member's passport and is a sticker with a red stripe across the top. If the family member does not have a passport they will be issued with a "Declaration of identity for visa purposes (GV3)" by the British Embassy abroad. This document gives personal details and the entry clearance visa is affixed at the bottom.

070706 The entry clearance visa will state, line by line

- 1.** the place of issue & the dates between which the visa is valid for entry to the UK
- 2.** whether it is multi or single entry & the VAF (visa application form) number
- 3.** type of visa
- 4.** name of applicant

5. passport number, sex, date of birth and nationality

6. observations (e.g. type of leave, restrictions etc.)

7. number of dependants

8. names of dependants.

070707 In the case of family reunion, the type of visa will generally be shown as "VISA FAMILY REUNION (Sponsor)". In the observations it will state "Indefinite leave to enter the UK" and the name of the sponsor is written in the passport at the side of the visa.

070708 Once a family member with indefinite leave has arrived in the UK they can stay for the rest of their life.

070709 In a family reunion case the entry clearance will show that the family member has been granted indefinite leave without restrictions. **The sponsor is not expected to meet the maintenance and accommodation requirements of the immigration rules so the family member can be entitled to benefits immediately.**

070710

## Frozen Rates

070711 The rate of RP or WB which a person is entitled to is not increased by the general uprating of benefit rates if that person is not ordinarily resident in GB. RP or WB which is not increased by upratings is referred to as being frozen.

## Great Britain

070712 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. UK territorial waters<sup>2</sup> adjacent to GB.

1 Union with Scotland Act 1706 preamble & Art 1; Union with England Act 1707 (Scottish Parliament), Art 1; Interpretation Act 78, Sch 2, para 5; 2 SS CB Act 92, s 172

070713 N Ireland<sup>1</sup>, the Isle of Man<sup>2</sup> and the Channel Islands<sup>3</sup> are not part of GB.

070714 GB does not include

1. British ships on the high seas<sup>1</sup>
2. British owned aircraft flying over the high seas or another State<sup>2</sup>
3. British embassies and other diplomatic establishments abroad<sup>3</sup> **and**
4. British military bases abroad<sup>4</sup>.

1 CP 93/49; R(P) 8/61; 2 R(S) 8/59; 3 R(I) 44/61; 4 R(S) 7/81

### **Meaning of GB territorial waters**

070715 The extent of UK territorial waters adjacent to GB is 12 nautical miles<sup>1</sup> measured from the low-water line along the coast, including the coast of all islands comprised in GB<sup>2</sup>.

1 Territorial Seas Act 1987, s 1(1); 2 Territorial Waters Order in Council 1964, art 2(1)

070716 - 070755

# Common terms - I to M 070756 - 070768

[Invalidity benefits](#) 070756 - 070762

[Maastricht](#) 070763

[Member of the family](#) 070764 - 070765

[Member of the forces](#) 070766 - 070768

## Invalidity benefits

070756 EC law treats SBs and IVBs differently. However, there are no provisions which define what are sickness or IVBs. As a result what are sickness and IVBs must be decided by considering

1. the conditions for entitlement to the benefit **and**
2. the reason for and length of that the benefit is paid for.

070757 DMG 070155 sets out which UK benefits are IVBs.

070758 - 070762

## Maastricht

070763 A term used to refer to the Maastricht Treaty established on 1.11.93. The Treaty established the EU (see DMG 070692).

## Member of the family

070764 A person who is not a worker may still be within the personal scope of EC provisions if that person is the member of the family of a person covered by EC provisions (see DMG 070050).

070765 There is no provision in UK legislation defining who is a member of the family. In the absence of any statutory definition a member of the family is

1. any child or person for whom an increase of benefit could be payable<sup>1</sup> **or**
2. any child, where benefit could be payable to an adult for that child<sup>2</sup>.

1 SS CB Act 92, s 80 - 90 & Sch 7, para 4(1) - 6(1); SS Ben (Dep) Regs; Reg (EEC) 1408/71;

## Member of the forces

070766 Member of the forces includes a person who

- 1.** is over age 16
- 2.** is a member of specific establishments or organizations<sup>1</sup> **and**
- 3.** gives full pay service.

1 SS (Ben) (Members of the Forces) Regs, reg 1(2); SS (Conts) Regs, Sch 6, Part I

070767 It does not include

- 1.** a deserter<sup>1</sup> **or**
- 2.** any person who is serving as a member of any military force of HMF and who entered that force, or was recruited for that force outside the UK, and the depot of whose unit is situated outside the UK<sup>2</sup>.

1 SS (Conts) Regs, reg 1 (2); 2 Sch. 6 Part II

070768 Detailed guidance on members of the forces is in DMG 078060 et seq.

# Common terms - O 070769 - 070789

[Ordinarily resident](#) 070769 - 070789

## Ordinarily resident

### General meaning

070769 Ordinarily resident should be given its ordinary meaning so that a person must be habitually resident (see DMG 073707) and normally resident apart from temporary or occasional absences of long or short duration<sup>1</sup>.

1 R v. Barnet London Borough Council ex parte Shah [1983] 2 WLR16; R(M) 1/85

070770 Ordinary residence means

1. residence in a place with some degree of continuity, apart from accidental or temporary absence **or**
2. residence according to the way in which a person's life is usually ordered<sup>1</sup>.

1 Levene v. Commissioners of Inland Revenue [1928] AC 217; R(F) 1/62

### Lawful residence

070771 A person who is unlawfully in the UK cannot be resident in the UK.

### Deciding ordinary residence

070772 There is no statutory definition of what is ordinarily resident. Each case must be decided on its own facts. Whether an individual is resident (see DMG 070806) or ordinarily resident in GB is primarily a question of fact and degree<sup>1</sup>. A person who is not resident in GB will generally not be ordinarily resident in GB<sup>2</sup>.

1 Commissioners of Inland Revenue v. Lysaght [1928] AC 234;

2 Levene v. Commissioners of Inland Revenue [1928] AC217; R(P)1/78

070773 The DM is not bound by the decision of HMRC on whether a person is ordinarily resident in GB.

070774 In deciding whether a person is ordinarily resident the DM should consider the guidance set out in DMG 070775 - 070786.

## **Residence in Great Britain**

070775 A person must have taken up residence in GB, the intention to become resident is insufficient<sup>1</sup>. However, a person may become ordinarily resident in GB immediately upon arrival if that is where that person intends to make a home for an indefinite period<sup>2</sup>.

1 CG 32/49; 2 Macrae v. Macrae [1949] quoted in R(F) 1/62 & R(P) 1/78

070776 A person who has taken up residence in GB and intends to settle in GB may still be ordinarily resident in GB during a stay in another country<sup>1</sup>.

1 CG 204/49

## **Settled purpose**

070777 Ordinary residence requires a settled purpose. A person may have only one or several reasons for being in a country. For example a person may be in the UK because of education, work, health, family or merely love of the place.

070778 For a person to be accepted as having a settled purpose a sufficient degree of continuity must be shown<sup>1</sup>.

1 R v. Barnet London Borough Council, ex parte Shah [1983] 2 WLR 16; R(M) 1/85

## **A person must reside somewhere**

070779 Other than a nomad, it is impossible that a person does not have ordinary residence anywhere at all<sup>1</sup>.

1 Lewis v. Lewis [1956] 1 WLR 200; R(M) 1/85

## **Nature of accommodation**

070780 The nature of the accommodation is an important factor. For example, a person staying in a hotel for a month is normally regarded as a visitor (see DMG 070772)<sup>1</sup>. A person who stays for a prolonged period in the home of a relative in GB, whilst on a visit from another country, may be held not to be ordinarily resident in GB<sup>2</sup>.

1 R(F) 1/82; 2 R(P) 1/62 and R(P) 4/54

070781 A person who makes a home in a hotel may be ordinarily resident even if the stay is only temporary (see DMG 070853)<sup>1</sup>. A finding of ordinarily resident is even more likely if the home is not a hotel or lodgings but premises owned or rented by the person.

**Possessions**

070782 An important factor is what happens to a person's house and furniture whilst living elsewhere.

If they are retained it is likely that the person is ordinarily resident there and not anywhere else despite any length of time in any other place<sup>1</sup>.

1 R(F) 1/62; R(M) 1/85; Lewis v. Lewis [1956] 1 WLR 200; Stransky v. Stransky [1954]

070783 However, if they are not retained it is likely that the person will be ordinarily resident in the other place despite any shortness of time<sup>1</sup>.

1 R(F) 1/62

**Becoming resident or continuing residence**

070784 It is easier to establish that a person has continued to be, or resumed being, ordinarily resident in a country (especially the country of origin) rather than acquiring an alien ordinary residence<sup>1</sup>.

1 R(F) 1/82; R(M) 1/85

**Links with previous country of residence**

070785 The DM should not place too much emphasis on the links a person may still have with a former country, for example, bank accounts or links with an employer<sup>1</sup>.

1 R(F) 1/62

**Intention to return**

070786 An intention to return to the country from which a person originally came is not significant if the interim period is of some length<sup>1</sup>.

**Example 1**

A person who visits GB for several months every summer but each winter returns to a home abroad, would not be ordinarily resident in GB<sup>2</sup>.

**Example 2**

A person who has settled abroad for health reasons for 1<sup>3</sup>/<sub>4</sub> years is ordinarily resident in the other country<sup>3</sup>.

### Example 3

A family who settles in GB for education purposes for two years may be ordinarily resident in GB<sup>4</sup>.

1 R(F) 1/62; R(M) 1/85; 2 R(P) 1/78; Re an Italian Widow [1982]; 3 R(P) 1/85; 4 R(F) 1/62

070787 - 070789

## Common terms - P to R 070790 - 070819

[Past presence test](#) 070790 - 070792

[Permanent residence](#) 070793 - 070794

[Presence in Great Britain](#) 070795 - 070797

[Public Funds](#) 070798

[Reciprocal agreements](#) 070799

[Refugee](#) 070800 - 070803

[Resident in Great Britain](#) 070804 - 070812

[Right to reside](#) 070813 - 070819

### Past presence test

070790 To be entitled to a benefit a person may have to have been present in GB for a certain length of time (a past presence test).

070791 This condition cannot be satisfied by an unborn child<sup>1</sup>. In order to satisfy the past presence conditions, the person in question must have an independent existence and cannot be an unborn child<sup>2</sup>.

1 R(A) 1/94; 2 R(A) 1/94

070792 Further guidance on the past presence test are in the Chapters giving guidance on individual benefits and DMG 070795.

### Permanent residence

070793 It is not possible to be permanently resident in a country without being resident there. However, a fixed purpose for that residency must be established before a person can be held to be permanently resident.

#### Example

A person leases a flat in Gibraltar and spends each winter there. That person stays with a relative in GB during the summer with the likelihood of inheriting the house in GB, upon the latter's death. That person

is not permanently resident in GB<sup>1</sup>.

1 R(P) 1/82

070794 Permanent residence is different from domicile (see DMG 070684)<sup>1</sup>.

1 R(F) 1/62; R(P) 1/82

## Presence in Great Britain

070795 To be present in or 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 (see DMG 070806).

070796 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

### Example

A British tourist on a fortnight’s holiday in Majorca is not present in GB but is resident in GB.

070797 A person cannot be both present in and absent from GB. But in prescribed circumstances, a person absent from GB may be treated as if still present in GB. See benefit specific section for further guidance on prescribed circumstances. To satisfy the presence conditions a person has to be lawfully as well as physically, in GB<sup>1</sup>.

1 Shah v. Barnet London Borough Council [1983]

## Public Funds

070798 Persons who have limited leave to enter or remain in the UK may have their passport stamped by the immigration authorities as “No recourse to Public Funds”. The term public funds refers to the following benefits

- IS
- JSA(IB)
- SPC
- ESA(IR)
- Accommodation for homeless from LA
- HB & CTB

- CTC
- WTC
- CHB
- AA
- SDA
- CA
- DLA

The Immigration Rules as amended (para 6 HC 395)

## Reciprocal agreements

070799 These agreements are made between the UK and EEA (see DMG 070330) or other countries (see DMG 070333). For further guidance see DMG 070310 and the benefit specific sections.

## Refugee

[\[See Memo DMG 15/18\]](#)

070800 A refugee is a person who

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to return to it”<sup>1</sup>.

1 Convention on the Status of Refugees, Art 1; Reg (EC) 883/04, Art 1(g),  
FA, NI & II (Refugees) Order 56, Sch 1, Art 1

070801 Refugees can obtain, a document confirming their refugee status. If they are resident in the UK they can get a travel document issued by the Home Office under the 1951 Geneva Convention or a statement from the Home Office that the person concerned would be eligible for such a document. Spouses, recognized civil partners, and dependent children under the age of 18 are normally allowed to join a refugee in the UK immediately, and are also granted asylum. Refugees, their spouses or recognized civil partners and dependants who are granted asylum **are not persons subject to immigration control** (see also DMG 070711 et seq).

070802 The Home Office grants refugee status to people who are unable or unwilling to return to their country of origin because of a well founded fear of persecution. Refugees are normally granted asylum with indefinite leave to remain in the UK. From 30 August 2005 they will have been granted limited leave

to enter or remain for five years, rather than indefinite leave.

070803 People who are awaiting a decision on their application for asylum are not refugees. They are asylum seekers. They only become refugees when the Home Office recognizes their status<sup>1</sup>. For further guidance see benefit specific section.

1 Hannah Blakesley v Secretary of State for Works and Pensions [2015]  
EWCA Civ 141 [2015] AACR 17

## Resident in Great Britain

### Introduction

070804 There is no statutory definition of what reside or resident means. Each case must be decided on its own facts. Whether an individual is resident (see DMG 070806) or ordinarily resident in GB is primarily a question of fact and degree<sup>1</sup>.

1 Commissioners of Inland Revenue v. Lysaght [1928] AC 234

070805 In deciding whether a person resides or is resident in a place decision makers should consider the guidance set out in DMG 070806 - 070812.

### Meaning of reside

070806 DMs should refer to the dictionary definition of reside when deciding if a person is resident in Great Britain<sup>1</sup>. Reside means

- to dwell permanently or for a considerable time to have one's settled or usual abode
- to live in, or at, a particular place.

1 R(F) 1/62

### Meaning of residence

070807 Residence means

1. the place where an individual eats, drinks **and** sleeps or where his family eat, drink and sleep<sup>1</sup> **and**
2. resting, dwelling or having an abode in a place.

1 R v. The Inhabitants of North Curry [1825] 4B & C 953, 107 ER 1313, quoted in R(F) 1/62

070808 Residence is different from ordinary residence (see DMG 070769). Ordinary residence means residence in a place with some degree of continuity and apart from accidental or temporary absence<sup>1</sup>.

## Present in Great Britain

070809 A person who is present in GB is not necessarily resident in Great Britain<sup>1</sup>. However, a person cannot be resident in GB without having been physically present in Great Britain<sup>2</sup>.

1 R(P) 2/67; 2 R(P) 1/72

## Resident in more than one place

070810 A person may reside at several places or be resident in more than one country at the same time<sup>1</sup>. This could occur where a person has a permanent home in two countries and regularly spends equal parts of the year in each country<sup>2</sup>.

1 R(G)2/51; Sinclair v. Sinclair [1962] quoted in R(P)1/78; R(P)2/67; 2 Re an Italian Widow 2 CMLR 128

## Short stays in Great Britain

070811 A person is not resident (or habitually resident, see DMG 072770) in GB if that person

1. is a short stay visitor<sup>1</sup> (but see DMG 070812)
2. has come to the UK for an operation **or**
3. has come to the UK for short term medical treatment.

1 R(P) 2/67

## Intention

070812 A person is resident in GB for the period spent here where that person came to GB with the intention of residing here but had to return to a former home after a short stay<sup>1</sup>.

1 R(P) 6/58

## Right to reside

070813 A person's right to reside can be decided by a number of factors. It can depend on

1. a person's status as determined by the HO **or**
2. what rights a person may acquire under European law.

Detailed guidance on the right to reside condition for income-related benefits is in Chapter 7, part 3 of

the DMG (see DMG 073230 et sq.).

070814 Not everyone has an automatic right to reside or remain in GB. Immigration officers employed by the HO are responsible for immigration control. The immigration officer decides whether a person's right to reside or remain is subject to a limitation or condition and endorses the passport or travel document.

070815 Nationals of the following are not subject to limitations or condition

**1.** UK, which includes Northern Ireland

**2.** Channel Islands

**3.** Isle of Man **or**

**4.** Republic of Ireland.

All UK citizens, including foreign nationals granted British citizenship, have a right to reside in the CTA.

070816 - 070819

## Common terms - S 070820 - 070852

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### Secretary of State certificates

#### Introduction

070820 A decision by the Secretary of State may be required when deciding whether a person

1. can avoid disqualification for being absent from GB (see DMG 070821)
2. is treated as present in GB (see DMG 070826)
3. can export JSA (Cont) to another EEA country (see DMG 070828).

#### Avoiding disqualification

070821 To avoid disqualification of IBST (see DMG 073820), IBLT (see DMG 073820), MA (see DMG 075600) and SDA under GB law the Secretary of State must certify that the person will not be disqualified providing one of the other conditions is satisfied<sup>1</sup>. Guidance for ESA and absence abroad is at DMG 071910 et seq.

070822 A person can also avoid disqualification under EC law. To avoid being disqualified for receipt of IISB, IBST and MA whilst absent in another EEA country the Secretary of State must authorise the person to

- 1.** go to another EEA country to receive treatment (see DMG 073872 - 073875, DMG 075600 and DMG 075620 - 075624)
- 2.** return to the country where that person is habitually resident (see DMG 073876 - 073877, DMG 075610 and DMG 075625 - 075628) **or**
- 3.** transfer residence to another EEA country (see DMG 073876 - 073877, DMG 075610 and DMG 075625 - 075626).

070823 Disqualification of IBST and MA can be avoided under the agreements set out in DMG 070824 if the Secretary of State authorises the person to

- 1.** go to the other country for treatment,
- 2.** transfer residence to the other country **or**
- 3.** return to reside in the other country.

070824 DMG 070823 applies to the following agreements

#### **IBST**

- 1.** Barbados (see DMG 073995 - 073996)
- 2.** Cyprus (see DMG 074012 - 074013)
- 3.** Jersey and Guernsey (see DMG 074034 - 074035)
- 4.** Malta (see DMG 074042 - 074043)
- 5.** Turkey (see DMG 074047)

#### **MA**

- 1.** Barbados (see DMG 075651 - 075653)
- 2.** Cyprus (see DMG 075656 - 075657)
- 3.** Jersey and Guernsey (see DMG 075673 and DMG 075670 - 075675).

070825 Under the agreements with Barbados and Jamaica disqualification of IBLT can be avoided if the Secretary of State certifies that the person is likely to remain permanently incapable (see DMG 073997 -

074020). Under the agreement with Turkey the Secretary of State must certify that the person would be entitled to IBLT in the UK.

## Sponsored Immigrants

070826 Persons often referred to as "sponsored immigrants" are those who have been granted permission to come to the UK on the strength of a maintenance undertaking.

070827 These sponsored people are likely to have a visa/entry clearance stating "Settlement/to join... [nephew, son, daughter]". The name of the person they are coming to join will generally be written in the passport next to the visa. The word 'Sponsor' may or may not be used.

070828 However visas issued to a family member of a refugee who arrives in the UK for settlement (see DMG 070711 et seq) include the term 'VISA FAMILY REUNION (Sponsor) should not be taken as excluding the person from benefit on the ground that they are a sponsored immigrant. The word "sponsor here refers to the refugee that the person is coming to join. That refugee "sponsor" is not expected to meet the maintenance and accommodation requirements of the immigration rules and the family member is not a person subject to immigration control (070831 et seq).

## Stateless persons

070829 Stateless persons are people who are not considered to be a national of any country<sup>1</sup>. Under UK legislation they are defined as "persons who are not considered as a national by any State under the operation of its law"<sup>2</sup>.

1 Convention of the Status of Stateless Persons, Art 1; Reg (EEC) 1408/71, Art 1(e);  
2 FA, NI & II (Stateless Persons) Order, Sch 1, Art 1

070830 Stateless persons can obtain a document issued by the authorities of the State in which they are ordinarily resident confirming their status. If they are resident in the UK they can get, either

1. a travel document issued by the HO under the 1954 Convention **or**
2. a statement from the HO stating that the person concerned would be eligible for such a document.

## Subject to immigration control

070831 Legislation<sup>1</sup> was introduced on 3.4.00 which removed entitlement to benefits for any person **subject to immigration control**. These provisions replaced most of the social security legislation relating to PFAs.

1 I & A Act 99, s 115; the Social Security (Immigration & Asylum) Consequential Regs 2000, reg 3(4)

070832 The regulations<sup>1</sup> now define PFA only as a person who is not habitually resident in the CTA (see DMG 072770 et seq).

1 IS (Gen) Regs, reg 21(3) & JSA Regs, reg 85(4)

070833 A PSIC means a person who is not an EEA national and who

1. requires leave to enter or remain in the UK but does not have it **or**
2. has leave subject to the condition 'no recourse to public funds' **or**
3. has leave to enter or remain in the UK given as a result of a maintenance undertaking.

If a PSIC is granted British citizenship, then he is no longer subject to immigration control from the date it is granted.

**Note:** a person granted leave to enter and remain in the UK under the family union provisions are **not** persons subject to immigration control (see DMG 070711 et seq).

070834 The regulations provide for exemptions from the effects of section 115 for certain categories of persons and certain benefits<sup>1</sup>.

1 SS (I&A) CqI Amdt Regs

070835 For JSA(IB), IS, ESA(IR), SF, HB CTB and SPC the exemptions are<sup>1</sup>

1. sponsored immigrants whose sponsor has died
2. sponsored immigrants who have been in the UK for five years
3. nationals of countries which have ratified either ECSMA or CESC and who are lawfully present in the UK.

The exemptions for SPC came into force on 6.10.03.

1 SS (I&A) CqI Amdt Regs, reg 2(1) & Sch Part I

**Note 1:** Countries which have ratified ECSMA and/or CESC include Cyprus, Czech Republic, Estonia, Hungary, Latvia, Macedonia, Malta, Poland, Slovakia and Turkey. Estonia ratified ECSMA on 1.8.04; and CESC was ratified by Latvia on 2.3.02, Croatia on 28.3.03, and Macedonia on 30.4.05. Cyprus, Czech Republic, Hungary, Latvia, Malta, Poland and Slovakia acceded to the EU from 1.5.04.

**Note 2:** Croatia acceded to the EU on 1.7.13. From that date Croatian nationals are EU nationals and cannot be persons subject to immigration control<sup>1</sup> (as defined in DMG 070833).

1 Immigration Act 1988, s 7

070836 For AA, DLA, SDA, CA, SF, CHB<sup>1</sup>, IB under the youth provisions<sup>2</sup>, and ESA under the youth provisions<sup>3</sup> the exemptions are

- 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 SS (I&A) CqI Amdt Regs, reg 2(3) & Sch Part II; 2 SS (IB) Regs, reg 16(5); 3 ESA Regs, reg 11(3)

The countries mentioned in **2.** above are Turkey, Morocco, Algeria, Tunisia, Slovenia and Switzerland. From 1.5.04 Slovenia acceded to the EU.

070837 Persons claiming CHB, DLA and AA are also exempt if they are a national of a country which has a RA with the UK covering the benefit concerned<sup>1</sup>. For further guidance on RAs see DMG 070310.

1 SS (I&A) CqI Amdt Regs, reg 2(3)

## **Person subject to immigration control & EU right to reside**

070838 A person's right to reside in the UK can depend on

- 1.** their status as determined by the Home Office **or**
- 2.** what right a person may acquire under EU law.

There are occasions where a person subject to immigration control can claim public funds (see DMG 070798). This can be, for example, where they are the family member of an EEA national, and the EEA national is exercising a freedom of movement right (see DMG 073250 et seq) (for example, as a worker or a self-employed person), or where they demonstrate a derivative right of residence (for example, Ibrahim/Teixeira) (see DMG 073387). The granting of leave to enter or remain (whether granted with or without recourse to public funds) is made under the Immigration Rules. Where the claimant has been granted leave to enter or remain without recourse to public funds, and that person also has a right to reside under the Imm (EEA) Regs 2016, the condition of having "no recourse to public funds" does not have effect for as long as the person has a right to reside under the Imm (EEA) Regs 2016<sup>1</sup>.

1 Imm (EEA) Regs 2016, reg 43 & Sch 3, para 1

## **Transitional protection**

070839 The regulations include transitional protection<sup>1</sup> for asylum seekers who were entitled (or would have been entitled had they claimed) to benefit immediately before 3.4.00. Previous legislation will continue to apply to these persons until they cease to be asylum seekers.

070840 A person ceases to be an asylum seeker for

**1.** IS, JSA(IB), ESA(IR), HB & CTB when his claim for asylum is recorded by the HO (other than on appeal) as having been decided or abandoned. For these benefits the first recorded decision on the asylum claim will be effective and asylum seeker status cannot be reinstated.

**2.** AA, DLA, ICA, SDA and CHB when

**2.1** his claim for asylum is recorded by the HO as having been decided or abandoned **or**

**2.2** if the claimant appeals against the first decision on his claim for asylum, the final decision is made on the appeal. Payment of benefit should be reinstated if it was terminated before the appeal was made. If the application for reinstatement of benefit is made after the time limit for applying for revision has expired any special circumstances should be taken into account.

## **Subject to the legislation of a Member State**

070841 In general a person is only subject to the legislation of one country. That country is the competent country. Competency means deciding which EEA country is responsible for paying benefit. Full guidance is at DMG 070230 - 070248.

## **Supplements**

### **Family benefits**

070842 Family benefits payable by one EEA country may be suspended (see DMG 070833) where family benefits are also being provided by the EEA country where the members of the family are residing<sup>1</sup>.

1 Reg (EEC) 1408/71, Art 76(1); Reg (EEC) 574/72, Art 10

070843 The rate of family benefits payable by that first country can be suspended up to the amount provided for in their legislation. If the family benefits paid by the country where the family are residing are less than the benefit provided by the other country then a supplement is payable<sup>1</sup>.

1 Case 153/84, Ferraioli v. Deutsche Bundespost

070844 For further guidance see the detailed guidance for family benefits.

### **Sickness benefits**

070845 A person is entitled to a supplement, equivalent to the difference in the rate of benefits paid by

the UK and the Republic of Ireland, where

- 1.** that person is entitled to benefit from only one country **and**
- 2.** the rate of sickness benefit in that country is lower than the rate paid in the other country.

Detailed guidance is at DMG 074260 - 074263.

## **Industrial Injuries benefits**

070846 The country in which a person has been working is responsible for paying a supplement if

- 1.** that person's condition is aggravated because of continued employment in prescribed employment in a EEA country **and**
- 2.** the claimant is receiving Industrial Injuries benefits from a different EEA country.

070847 The supplement is the difference between the amount which would have been payable under that country's legislation before the aggravation and the amount payable after aggravation.

## **Survivors**

070848 For the UK the following are survivors<sup>1</sup>

- 1.** a woman or man<sup>2</sup> whose spouse or civil partner has died **and**
- 2.** a child of someone who has died and benefit is payable for the child<sup>3</sup>.

1 Reg (EEC) 1408/71, Art 1(g); 2 SS CB Act 92, sec 41(1) & 51(1)(a) & Sch 7; 3 sec 56, 70 & 77

070849 A person is a survivor if that person is entitled to survivor's benefits in another EEA country but there is no equivalent benefit in UK. UK survivors benefits are listed at DMG 077073.

070850 - 070852

# Common terms - T to W 070853 - 071699

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## Temporary absence

### Introduction

070853 This part of the Chapter contains guidance on the meaning of temporary absence (see DMG 070855 - 070872). This guidance applies to any provision which uses the word temporary but for EC and overseas adjudication it applies to the following situations

1. temporary absence<sup>1</sup> from GB
2. temporary absence from another person<sup>2</sup> **and**
3. a child's absence from GB<sup>3</sup>.

1 SS Ben (PA) Regs, reg 2; 2 reg 13; 3 reg 13

070854 This part also contains guidance on

1. the application of hindsight by the DM (see DMG 070873 - 070874)
2. the onus of proof (see DMG 070875 - 070876) **and**
3. reviewing the nature of the absence (see DMG 070877 - 070878).

### What is temporary absence

070855 There is no statutory definition of “temporary absence”, apart from definitions contained in some social security agreements with other countries. However the meaning of temporary absence has been considered by both the Commissioner and the Courts.

070856 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

070857 Each case must be decided on its own facts. However, DMG 070859 lists the factors which the DM should consider when deciding whether an absence from GB is temporary.

### **General meaning**

070858 "Temporary absence" does not mean "not permanent"<sup>1</sup>. The decision maker must decide whether an absence is

- 1.** merely temporary **or**
- 2.** not merely temporary<sup>2</sup>.

An absence should not be treated as temporary just because it is not permanent<sup>3</sup>.

1 R(S)1/96; 2 R(I) 37/55; 3 R(S) 1/85

### **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.

070859 In deciding whether an absence is temporary the decision maker should consider

- 1.** the claimant's intention (see DMG 070861 - 070863) **and**
- 2.** the length of the absence (see DMG 070864 - 070869) **and**
- 3.** the purpose of the absence<sup>1</sup> (see DMG 070870 - 070872).

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

070860 Whether an absence is temporary should be decided by considering the facts at the date of decision (see DMG 070873).

### **Intention**

070861 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>.

070862 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.

070863 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**

070864 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

070865 The nature of the absence may change the longer the absence from GB lasts.

070866 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

070867 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 (see DMG 070858)<sup>1</sup>.

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

070868 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

070869 An indefinite absence can still be temporary<sup>1</sup>.

### **Purpose of the absence**

070870 The reason for a person's absence from GB is an important factor.

070871 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.

070872 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**

070873 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 IB 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.

070874 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**

070875 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<sup>2</sup>.

070876 A person is disqualified<sup>1</sup> for receiving SDA, unemployment supplement, MA and IB unless the provisions for avoiding disqualification are satisfied. If the DM is not satisfied<sup>2</sup> that these provisions are satisfied the claimant must be disqualified.

1 SS CB Act 92, s 113(1)(a); 2 SS Ben (PA) Regs, reg 2(1)(b) - (c)

### **Change of circumstances**

070877 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

070878 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

### **Treaty**

070879 There are several Treaties. For SS purposes, the main Treaty is the Treaty of Rome. For further guidance see DMG 070020.

### **United Kingdom**

070880 UK means GB and Northern Ireland<sup>1</sup> and includes the UK territorial waters adjacent to GB and Northern Ireland<sup>2</sup>.

1 Interpretation Act 78, Sch 1; R(S) 5/85; 2 SS CB Act 92, s 172

070881 It does not include the Isle of Man, the Channel Islands or Gibraltar (but see DMG 070044 for circumstances where Gibraltar is specifically included for the purpose of EC law).

070882 UK does not include British

1. ships on the high seas<sup>1</sup>
2. owned aircraft flying over the high seas or another State<sup>2</sup>
3. embassies and other diplomatic establishments abroad<sup>3</sup> **and**
4. military bases abroad<sup>4</sup>.

1 CP 93/49; R(P) 8/61; 2 R(S) 8/59; 3 R(I) 44/61; 4 R(S) 7/81

## **Worker**

070883 Worker status is a term common in EC law (see DMG 070050).

070884 - 071699

## **APPENDIX**

### **EU LEGISLATION - REGULATION (EC) 883/04**

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## **INTRODUCTION**

1. This appendix gives guidance on the key changes introduced by EU legislation, Regulation (EC) 883/04 as amended by Regulation (EC) 988/2009 and implemented by Regulation (EC) 987/2009, which came into force from 1.5.2010<sup>1</sup>.

1 Implementing Reg (EC) 987/2009

## **BACKGROUND**

2. For many years there have been Community provisions on the coordination of the different social security schemes within the EU. They have been updated and extended many times to try to ensure that those moving within the EEA are not disadvantaged as a result of exercising their rights of free movement. Earlier legislation<sup>1</sup> is now replaced by Council Regulation (EC) 883/04 from 1.5.10.

1 Reg (EEC) 1408/71 and Reg (EEC) 574/72

3. The new regulations<sup>1</sup> generally consolidate earlier legislation and re-enforce the basic principles of one applicable legislation, equal treatment, aggregation of periods of insurance, and export of benefits. There are, however, some changes and new measures; and administrative processes are improved to speed up the exchange of information between EEA Member States.

1 Reg (EC) 883/04 & 987/09

4. EU Regulations apply to the whole of the EEA and Switzerland. The EEA includes the EC countries and the three non EU countries (see DMG para 070040). The terms of EU legislation concerning coordination of Social Security systems were extended to include Switzerland from 1.6.02<sup>1</sup>.

1 EU/Swiss Agreement, OJL 114/6 Annex II Art 1

## **CHANGES**

### **Persons Covered**

5. The scope of the Regulation has been extended to include non-economically active persons<sup>1</sup>.

1 Reg (EC) 883/04, Art 2

## **Equal Treatment**

6. New provisions specify more precisely equal treatment of benefits, income, facts or events in another Member State<sup>1</sup>.

1 Art 5

## **Matters Covered**

7. The material scope of the Regulation is extended to include paternity benefits and statutory pre-retirement benefits<sup>1</sup>.

1 Reg (EC) 883/04, Art 3

## **Applicable Legislation**

8. Non-economically active persons will be subject to the legislation of the Member State of residence<sup>1</sup> where the legislation of another Member State is not otherwise applicable, and without prejudice to specific provisions of the Regulation dealing with entitlement to benefits.

1 Art 11(3)(e)

9. A person working for an employer in one Member State, but who is posted by that employer to work in another Member State, will continue to be subject to the legislation of the first Member State provided that period of such work is not expected to exceed 24 months<sup>1</sup> and that he is not sent to replace another person. The maximum period under previous legislation was normally 12 months<sup>2</sup>.

1 Art 12(1); 2 Reg (EEC) 1408/71, Art 14(1)(a)

10. Likewise, someone who normally pursues an activity as a self-employed worker in a Member State but who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State provided the anticipated duration of such activity does not exceed 24 months<sup>1</sup>.

1 Reg (EC) 883/04, Art 12(2)

11. A person who normally works as an employed or self employed person in two or more Member States shall normally be subject to the legislation of the Member State of residence if he pursues a substantial part of his activities in that Member State<sup>1</sup>.

1 Art 13

## **Transitional Provisions**

12. 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 Regulation (EEC) 1408/71. In such circumstances, the legislation determined under Regulation (EEC) 1408/71 shall continue to apply for up to ten years, provided that 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 Regulation (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 Art 87(8)

### **Accidents at Work and Occupational Diseases**

13. Where a person who has contracted an occupational disease has been in prescribed occupations in two or more Member States, the benefits shall be provided exclusively under the legislation of the last of those member states<sup>1</sup>. There is no longer any exception to this rule for pneumoconiosis.

1 Art 38

### **Unemployment Benefits**

14. The new Regulation extends the special rules on aggregation in relation to JSA (Cont). Member States will take into account all periods of unemployment insurance, including self-employed insurance, completed under the legislation of another Member State provided such periods of self-employed insurance are eligible under the legislation of that other Member State<sup>1</sup>.

1 Art 61

15. The new Regulation also allows a competent state to extend, to six months, the period for which entitlement to an unemployment benefit can continue whilst a person is seeking work in another Member State<sup>1</sup>. The UK will not be extending this period, which remains at three months.

1 Art 64(1)(c)

16. Whereas under previous legislation the export provisions could only be invoked once between two periods of employment<sup>1</sup>, there is now no limit on the number of times the export provisions can be used<sup>2</sup>, though still subject to the overall maximum of 3 (or 6) months. The Member State to which the jobseeker has gone will no longer be responsible for making payment of an unemployment benefit: it will be made directly by the competent Member State at its own expense<sup>3</sup>. Unemployed persons who, during their last activity as an employed or self-employed person, resided in a Member State other than the competent Member State, are now allowed to make themselves available for employment in the member State where they were last employed as well as in the competent Member State<sup>4</sup>.

1 Reg (EEC) 1408/71 Art 69; 2 Reg (EC) 883/04, Art 64; 3 Art 64(1)(d); 4 Art 65(2)

17. JSA (IB) however, remains listed as an SNCB in Regulation (EC) 883/04<sup>1</sup>, and claimants can only retain entitlement to JSA (IB) under domestic legislation during temporary absences abroad (see DMG paras 075350 et seq).

1 Reg. (EC) 883/04, Art 70 and Annex X

### **Sickness benefits (which includes AA, DLA (Care) and CA)**

18. In relation to the UK, sickness benefits include ESA(Cont) in the assessment phase, AA, DLA (Care), and CA. The Mobility Component of DLA remains listed as an SNCB<sup>1</sup>. New rules are introduced to prevent overlapping of long term care sickness benefits in cash and in kind<sup>2</sup> where both benefits are provided by the same Member State (whether directly or by reimbursing the State of residence for a benefit in kind).

1 Annex X; 2 Art 34

19. The new Regulation also provides that, where a person is receiving a pension under the legislation of a Member State other than the Member State of residence, the competent state awarding the pension will also be the competent institution to pay a sickness benefit to that pensioner or members of his family<sup>1</sup> unless and until the

Member State of residence (or some other Member State) becomes competent<sup>2</sup>. Member of the family means spouse or civil partner, children under 18, and dependant children over that age<sup>3</sup>.

1 Arts 21, 24, 25 & 29; 2 Art 11; 3 Art 1(i)

20. As part of the drive for improved cooperation between Member States<sup>1</sup>, the DM should make and notify the claimant of any decision on competency for claims to benefits taken in the UK but where the UK is not the competent institution, unless it is clear that the claim was sent to the UK by mistake. The disallowance decision will include a determination that the UK is not the competent state for a claim to that benefit, and give the normal mandatory reconsideration rights.

1 Reg (EC) 987/09 Recital 2

### **Old-Age and Survivors' Benefits**

21. The regulations on aggregating periods of insurance and various pro-rata calculations<sup>1</sup> are generally unchanged.

1 Chapter 5 of Reg (EC) 883/04

22. There is no longer a requirement to automatically recalculate entitlement where conditions required

by the legislation of another Member State to which a claimant has been subject are no longer satisfied<sup>1</sup>.

1 Chapter 5 of Reg. (EC) 883/04, Art 50(2)

### **Invalidity Benefits**

23. Regulations on Invalidity Benefits are in Chapter 4 of Regulation (EEC) 883/04. The relevant UK benefits are ESA(Cont) in the main phase, IB(LT) and SDA. These benefits remain type A benefits, where the rate of benefit does not depend on the length of insurance<sup>1</sup>.

1 Art 44(1)

24. There are no substantive changes in the operation of the coordinating Regulations when compared to the previous legislation<sup>1</sup>, although this is sometimes achieved by special provisions for the application of the legislation of individual Member States<sup>2</sup>.

1 Reg (EEC) 1408/71; 2 UK entries in Annex XI of Reg (EC) 883/04

25. DMs are reminded that the coordination Regulations do not cover ESA(IR) which remains an SNCB. There is provision under domestic legislation<sup>1</sup> for continued entitlement to ESA(IR) during temporary periods of absence abroad (see DMG 071940 et seq).

1 ESA Regs, regs 152, 153, 154 & 155

### **TABLE OF EQUIVALENCES<sup>1</sup>, LISTING THE VARIOUS ARTICLES IN REGULATION (EC) 1408/71, AND THE CORRESPONDING ARTICLES IN REGULATION (EC) 883/2004.**

#### **REG (EEC) 1408/71**

#### **REG (EC) 883/2004**

#### **GENERAL PROVISIONS**

Article 1

Article 1

A 2

A 2

A 3

A 4 & 8

A 4

A 3 & 70

A 5	A 9
A 6 & 7	A 8
A 8	A 8 & 9
A 9	A 6 & 14
A 9a	A 5
A 10	A 5 & 7
A 10a	A 5, 6, & 70
A 11	A 56
A 12	A 10

#### **DETERMINATION OF THE LEGISLATION APPLICABLE**

A 13	A 11
A14 & 14a	A 12 & 13
A 14b	A 11
A 14c, d & e,	A 13
A 14f	no corresponding article in 883
A 15	A 14
A 16	A 15
A 17 & 17a	A 16

#### **SPECIAL PROVISIONS RELATING TO VARIOUS BENEFITS**

##### **Sickness and Maternity Benefits**

A 18	A 6
A 19	A 17 & 21

A 20	A 18 & 28
A 21	A 18
A 22	A 19, 20, & 21
A 22a	no corresponding article in 883
A 23	A 5 & 21
A 24	A 33
A 25 & 25a	no corresponding articles in 883
A 26	A 22
A 27	A 23 & 29
A 28	A 24 & 29
A 28a	A 25 & 29
A 29	A 26
A 30	A 33
A 31	A 27 & 29
A 33	A 30
A 34	A 31
A 34a	no corresponding article in 883
A 35	A 5
A 36	A 35
Invalidity Benefits	
A 37	A 44
A 38	A 6, 45, & 64

A 39	A 5 & 44
A 40	A 5 & 46
A 41	A 47
A 42	no corresponding article in 883
A 43	A 48
A 43a	A 49

**Old Age and Death Benefits**

A 44	A 50
A 45	A 6 & 51
A 46	A 52
A 46a	A 53
A 46b	A 54
A 46c	A 55
A 47	A 5 & 56
A 48	A 57
A 49	A 50
A 50	A 58
A 51	A 59
A 51a	A 60

**Accidents at Work and Occupational Disease Benefits**

A 52, 53, 54, & 55	A 36
A 56	A 5

A 57	A 5 & 38
A 58	A 5 & 36
A 59	A 37
A 60	A 39
A 61	A 5 & 40
A 62	no corresponding article in 883
A 63	A 41
A 63a	no corresponding article in 883

### **Death Grants**

A 64	A 6
A 65	A 42
A 66	A 43
A 66a	no corresponding article in 883

### **Unemployment Benefits**

A 67	A 61
A 68	A 5 & 62
A 69	no corresponding article in 883
A 70	A 64
A 71	A 65
A 71a	no corresponding article in 883
A 72	A 6
A 72 a	A 6 & 67

A 73 & 74	A 67
A 75	A 68a
A 76	A 68
A 76a	no corresponding article in 883
A 77	A 67 & 68
A 78	A 67, 68, & 69
A 78a	A 69
A 79	A 68 & 69
A 79a	A 69

**ADMINISTRATIVE COMMISSION ON SOCIAL SECURITY FOR MIGRANT WORKERS**

A 80	A 71
A 81	A 72

**ADVISORY COMMITTEE ON SOCIAL SECURITY FOR MIGRANT WORKERS**

A 82 & 83	A 75
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**MISCELLANEOUS PROVISIONS**

A 84	A 76 & 77
A 84a	A 76
A 85	A 78 & 80
A 86	A 68 & 81
A 87	A 82
A 88	no corresponding article in 883
A 89	A83

A 91 no corresponding article in 883

A 92 A 84

A 93 A 85

**TRANSITIONAL AND FINAL PROVISIONS**

A 94 A 87

A 95 & 96 no corresponding articles in 883

A 97 A 9

A 98 A 89