

Department for Work and Pensions

DECISION MAKING AND APPEALS (PART OF LEGAL GROUP)

Decision Makers Guide

Volume 2 Amendment 34 – June 2016

1. This letter provides details on Amendment 34; the changes have already been incorporated in to the Intranet and Internet versions of the DMG.
2. PDF amendment packages are also available. These can be printed with the amended pages being reproduced in full. Each page will contain the amendment number in the footer

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

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

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

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

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

Amendment 34 affects abbreviations, Chapter 7 Parts 01. The changes are

- updated to incorporate changes to the reciprocal agreement with NI which now includes ESA in Ch 7 Pt 1.
- New section added – IS - right to reside – worker status and pregnancy – incorporates Memo DMG 5/16 – this memo can now be deleted – new paras 073217 – 073233 and some renumbering and cross reference updating in Chapter 7 pt 3.
- Chapter 7 Pt 6 has been updated to incorporate to Reg (EC) 883/04.

4. The last two amendment packages amending Volume 2 were

Amendment 33 [February 2016]

Amendment 32 [October 2015]

5. **For reference purposes Decision Makers may find it useful to retain deleted pages for a short period after the introduction of this package.**
6. If using a PDF amendment package remove the sheets as stated in the left hand column of the Remove and Insert table below and insert the new sheets as stated in the right hand column (note the record of amendments at the back of the Volume).

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Abbreviations**

LCW – YT (3 pages)

Chapter 7 Pt 01

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077160 – 077204 (5 pages)

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LCW	Limited capability for work
LCWA	Limited capability for work assessment
LCWRA	Limited capability for work related activity
LEA	Local Education Authority
LEC	Local Enterprise Council
LEL	Lower Earnings Limit
LETS	Local Exchange Trading System
LPP	Lone Parent Premium
LPRO	Lone Parent run-on
LQPM	Legally Qualified Panel Member
LRP	Liable Relative Payment
LSC	Learning and Skills Council
LT	Linking Term
LTACP	Living Together as Civil Partners
LTAMC	Living Together as Married Couple
LTAHAW	Living Together as Husband And Wife
MA	Maternity Allowance
MAP	Maternity Allowance Period
MB	Maternity Benefit
MDB	Miscellaneous Diseases Benefit
MG	Maternity Grant
MID	Mortgage Interest Direct
MIRO	Mortgage Interest run-on
MP	Member of Parliament
MPP	Maternity Pay Period
MSC	Maximum Savings Credit
MSP	Member of the Scottish Parliament
NASS	National Asylum Support Service
NCET	National Council for Education and Training
NCIP	Non-Contributory Invalidity Pension
ND	New Deal
NDLP	New Deal for Lone Parents
NDP	New Deal for Partners
NDYP	New Deal for Young People
ND18-24	New Deal for 18-24 year olds
ND25+	New Deal for claimants aged 25 years and over
NHS	National Health Service
NI	National Insurance
NINO	National Insurance Number
NMW	National Minimum Wage

NRP	Non-Resident Parent
NVQ	National Vocational Qualification
OOT	Own Occupation Test
OPB	One Parent Benefit
PA	Personal Adviser
PAYE	Pay As You Earn
PB and MDB	Pneumoconiosis, Byssinosis and Miscellaneous Diseases Benefits scheme
PCA	Personal Capability Assessment
PD	Prescribed Disease
PETA	Personal Expenses Transitional Addition
PFA	Person(s) From Abroad
PIE	Period of Interruption of Employment
PILON	Pay In Lieu Of Notice
PILOR	Pay In Lieu Of Remuneration
PIP	Personal Independence Payment
PIW	Period of Incapacity for Work
PLCW	Period of limited capability for work
PLCWA	Period of limited capability for work assessment
PO	Post Office
POAOB	Payment on Account of Benefit
POA	Power of Attorney
PP	Pensioner Premium
PR	Preserved Right
PSIC	Person Subject to Immigration Control
P/T	Part-Time
PW	Pay-Week
PWC	Person With Care
PWHL	Permitted Work Higher Limit
PWHLs	Permitted Work Higher Limit subsequent period
PWK	Permitted Work
PWLL	Permitted Work Lower Limit
PWP	Permitted Work Period
QB	Qualifying Benefit
QBP	Qualifying Benefit or Pension
QD	Qualifying Days
QEF	Qualifying earnings factor
QI	Qualifying Income
QP	Qualifying Period

QRW	Qualifying remunerative work
QW	Qualifying Week
QWfl	Quarterly Work-focused interview
RA	Retirement Allowance
RBD	Reduced Benefit Direction
RCH	Residential Care Home
REA	Reduced Earnings Allowance
Reg(s)	Regulation(s)
Res A	Residential Allowance
RISWR	Redundant Iron and Steel Employees re-adaptation scheme
RMPS	Redundant Mineworkers Payment scheme
RP	Retirement Pension
RQC	Relevant Qualifying Condition
RVU	Relationship Validation Unit
S	Section (of an Act)
S2P	State Second Pension
SAP	Shared Additional Pension
SAYE	Save As You Earn
SB	Sickness Benefit
SC	Savings Credit
Sch	Schedule (as in an Act)
SCT	Savings Credit Threshold
SDA	Severe Disablement Allowance
SDM	Sector Decision Maker
SDP	Severe Disability Premium
S/E	Self-Employed
Sec	Section (of an Act)
SED	Scottish Education Department
SERPS	State Earnings Related Pension Scheme
Sev DP	Severely Disabled Person
SF	Social Fund
SFFP	Social Fund Funeral Payment(s)
SFO	Social Fund Officer
SHA	Special Hardship Allowance
SI	Statutory Instrument
SIR	Standard Interest Rate
SJP	Supervised Jobsearch Pilot Scheme
SMG	Standard Minimum Guarantee
SMP	Statutory Maternity Pay
SP	State Pensions

SPC	State Pension Credit
SpTA	Special Transitional Addition
SPW	Supported Permitted Work
SRPS	Shipbuilding Redundancy Payment Scheme
SS	Social Security
SS benefits	Benefits payable under SS(CB) Act 92
SSMG	Sure Start Maternity Grant
SSP	Statutory Sick Pay
STCP	Skills Training Conditionality Pilot
Supp B	Supplementary Benefit
SVQ	Scottish Vocational Qualification
TA	Transitional Addition
TAW	Temporary Allowance for Widow(ers)
TBI	Total Benefit Income
TD	Trade Dispute
TE	Transitional Element
TEC	Training and Enterprise Council
TFEU	Treaty on the Functioning of the European Union
TS	Tribunals Service
TU	Trade Union
UB	Unemployment Benefit
UC	Universal Credit
UCP	Urgent Case Payment
UEL	Upper Earnings Limit
UK	United Kingdom
US	Unemployability Supplement
UT	Upper Tribunal
VAT	Value Added Tax
VSO	Voluntary Sector Option of New Deal for young people
WA	Widow's Allowance
WB	Widow's Benefit
WBLA	Work Based Learning for Adults
WBLfYP	Work Based Learning for Young People
WBTfA	Work Based Training for Adults
WBTfYP	Work Based Training for Young People
WC	Workmen's Compensation
WC(S)	The Workmen's Compensation (Supplementation) Scheme

WC (Supp)	Workmen's Compensation (supplementation) scheme
WCA	Work capability assessment
WDisP	War Disablement Pension
WFHRA	Work focused health related assessment
Wfi	Work-focused Interview
WFP	Winter Fuel Payment
WFTC	Working Families Tax Credit
WMA	Widowed Mother's Allowance
WMA(C)	WMA payable where late husband entitled to Cat C retirement pension
WP	Widow's Pension
Wp	Work programme
WPA	Widowed Parent's Allowance
WP(C)	Widow's Pension payable where late husband entitled to Cat C retirement Pension
WPT	Widow's Payment
WRAC	Work-related activity component
WRAG	Work-related activity group
WTB	Work and training beneficiary(ies)
WTC	Working Tax Credit
WtWB	Welfare to Work Beneficiary
WWP	War Widow's Pension/War Widower's Pension
YT	Youth Training

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
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

General principles

070020 [\[See Memo DMG 32/10\]](#) European Community Law contains three main principles

- freedom of movement for workers¹ (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 nationality² (see DMG 070220) **and**
- equal treatment for men and women³ (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 law¹. 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 them¹.

1 Treaty of Rome, Art 189

Freedom of movement

- 070027 The purpose of European Community provisions¹ 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 Directive¹ 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 women². That six years period ended on 22.12.84.

1 Directive 79/7/EEC; 2 Art 5 & 8

- 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 law¹.

1 European Communities Act 72, s 3(1)

Personal scope

Introduction

070050 [\[See Memo DMG 32/10\]](#) In order to be covered by EC provisions¹ 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 person¹ (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 country² (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).

Arts (4) - (7)

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)¹. This includes members of the family who are not EEA nationals²

2. survivors of people covered by EC provisions³.

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 person¹.

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)¹.

1 Art 2(3)

070058 - 070059

Derived rights

Introduction

070130 [\[See Memo DMG 32/10\]](#) EC regulations¹ 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)².

1 Reg (EEC) 1408/71, Art 2(1); 2 Case 40/76, Kermascheck v Bundesanstalt für 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 spouse¹ or former civil partner
 - Category B
 - Category C for a woman where entitlement is based on the husband's entitlement²
 - 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)³
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 SDA¹
- ESA
- Category A, Category C (personal) and Category D RP
- DisB
- JSA
- AA² and
- DLA and DWA.

1 R(S) 1/84; 2 R(A) 2/78

Derived rights after 30.4.96

070136 Apart from JSA¹ (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 benefit².

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

Benefits covered by the European Community

General

070150 [\[See Memo DMG 32/10\]](#) EC regulations apply to the following branches of social security¹

- 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 entitlement¹.

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 benefits¹

070152 For the UK this means

- IBST² or ESA(Cont) in the assessment phase **and**
- MA³
- AA, CA, and DLA (Care Component)⁴.

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 pay¹.

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)¹ or ESA(Cont) (main phase)
- SDA² **and**
- in certain circumstances, AA³ 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 work¹. Guidance on invalidity benefits under EC Regulations is at DMG 073900.

1 R(S) 13/83

070157 Increases of IBLT and SDA for child dependants¹ are family benefits and not invalidity benefits (see DMG 070165).

1 SS CB Act 92, sec 80(2)(c)

Old age benefits

070158 For the old age benefits¹ UK this means

- RP of any category² (including Additional Pension)³
- age addition⁴
- GRB⁵ **and**
- Christmas bonuses (but these are not for the decision making authorities⁶).

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)*

Adjudication under European Community legislation

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 questions¹.

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 ruling¹.

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 reference¹ 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 provisions¹ **and**
2. a benefit is within the scope of EC provisions².

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 benefit¹.

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 country¹ (see DMG 070530). This does not apply where the decision relates to a claimant in another EEA country².

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

Discrimination

Introduction

070220 [\[See Memo DMG 32/10\]](#) Any discrimination on the grounds of nationality is forbidden¹. 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 country².

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 favourably¹ **or**
2. is liable to treat non-nationals less favourably².

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 nationality¹.

1 R(S) 2/93

Place of birth

070224 The provisions preventing discrimination also cover conditions which are linked to the person's place of birth¹. 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

Introduction

General rule

070230 [\[See Memo DMG 32/10\]](#) In general a person is only subject to the legislation of one European Economic Area country¹.

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 benefits¹.

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 country¹.

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 country¹.

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 country¹ **or**
- the day employment or self employed ended during which that person was subject to United Kingdom legislation². 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 benefit³ began before residence was transferred to another EEA country⁴, or, if later, immediately followed employment or self employed in another EEA country during which the person was subject to United Kingdom benefit⁵.

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 posting¹.

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 months¹.

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

Claims - general

Place for claim

070260 [\[See Memo DMG 32/10\]](#) A claim for benefit may be made to the institution of any EEA country¹. 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)¹.

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 claimant¹.

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

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 claim¹ **and**
2. notify details of the claim to all countries where the person has been insured².

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 claim¹.

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 DWP¹.

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

070267 - 070269

Agreements with other countries

Introduction

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)¹ 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 agreement¹.

1 SS 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.

070315 - 070319

Reciprocal agreements

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	GA	IBST	IBLT	JSA	MB	Dis B	IDB	CHB	AA
Austria	X	X	X	X	X	X	X	X	X	X	-
Belgium	X	X	X	X	X	X	X	X	X	X	-
Cyprus	X	X	X	X	X	X	X	X	X	-	-
Denmark	-	X	X	X	X	X	X	X	X	X	X
Finland	X	X	-	X	X	X	X	X	X	X	-
France	X	X	-	X	X	X	X	X	X	X	-
Germany	-	X	X	X	X	X	X	X	X	X	X
Iceland	X	X	X	X	X	X	-	X	X	-	-
Ireland	X	X	X	X	X	X	X	X	X	-	-
Italy	X	X	X	X	X	X	X	X	X	-	-
Luxembourg	X	X	X	X	X	-	X	X	X	-	-
Malta	X	X	X	X	X	X	-	X	X	-	-
Netherlands	X	X	X	X	X	X	X	X	X	-	-
Norway	X	X	X	X	X	X	X	X	X	X	X
Portugal	X	X	X	X	X	X	X	X	X	X	-
Spain	X	X	X	X	X	X	X	X	X	X	-
Sweden	X	X	X	X	X	X	X	X	X	X	-

070331 There is no agreement with Greece or Liechtenstein. The agreement with Gibraltar¹ 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 separate¹ 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	GA	IBST	IBLT	JSA	MB	Dis B	IDB	CHB	AA	DLA	ICA	ESA (C)
Barbados	X	X	X	X	X	-	X	X	X	X	-	-	-	X
Bermuda	X	X	-	-	-	-	-	X	X	-	-	-	-	-
Canada	X	-	-	-	-	X	-	-	-	X	-	-	-	-
Guernsey	X	X	X	X	X	X	X	X	X	X	X	X	-	X
Isle of Man	X	X	X	X	X	X	X	X	X	X	X	X	X	-
Israel	X	X	X	X	X	-	X	X	X	X	-	-	-	-
Jamaica	X	X	X	-	X	-	-	X	X	-	-	-	-	X
Jersey	X	X	X	X	X	-	X	X	X	X	X	X	-	X
Mauritius	X	X	X	-	-	-	-	X	X	X	-	-	-	-
New Zealand	X	X	X	X	-	X	-	-	-	X	-	-	-	-
Philippines	X	X	-	-	-	-	-	X	X	-	-	-	-	-
Switzerland	X	X	X	X	X	-	-	X	X	X	-	-	-	-
Turkey	X	X	X	X	X	-	X	X	X	-	-	-	-	X
USA	X	X	X	X	X	-	-	-	-	-	-	-	-	X
Yugoslavia	X	X	-	X	X	X	X	X	X	X	-	-	-	X

Northern Ireland

General

070530 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 is¹.

*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 enough¹.

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

Introduction

070540 [\[See Memo DMG 32/10\]](#) 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

Overlap under reciprocal agreements

070590 UK provisions¹ 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 and MB.

	RP	WB	IBST	IBLT	MB	ESA (C)
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 074241		DMG 075740	DMG 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

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Habitual residence

Introduction

072770 The habitual residence test applies to IS, JSA(IB), ESA(IR) and SPC. A claimant who is not habitually resident in the CTA

1. is a person from abroad and has an applicable amount of nil for IS, JSA(IB) and ESA(IR)¹ **and**
2. is treated as not in GB for SPC².

*1 IS (Gen) Regs, reg 21(3) & 21AA; JSA Regs, reg 85(4) & 85A; ESA Regs, reg 70(1) & Sch 5 Part 1 para 11;
2 SPC Regs, reg 2*

072771 Regulations¹ provide that a claimant cannot be habitually resident unless he has the right to reside in the CTA (see DMG 073234). However certain types of EU rights to reside do not count² (see DMG 073450 et seq).

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

072772 - 072779

General principle

072780 Although it is used in both domestic and European law, there is no statutory definition of the term 'habitual residence'. There are different considerations in applying domestic and EC law but in both instances the expression should be given its ordinary and natural meaning. DMs should determine the question by considering all the facts of the case in a common sense way and applying the relevant case law.

072781 - 072785

Common travel area

072786 The legislation requires that a claimant is habitually resident in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland. This is known as the Common Travel Area (CTA)¹.

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

072787 - 072790

When the test should be applied

072791 If other conditions of entitlement to benefit are satisfied the DM should consider whether the claimant is excluded from benefit by being a PSIC. If not the DM should consider

1. whether the claimant is excluded from treatment as a person from abroad in consequence of EC law or under other specific exclusions **if not**
2. whether the claimant has the right to reside in the CTA **and**
3. whether that right to reside is excluded.

If the claimant has the right to reside in the CTA which is not excluded the DM should apply the test for actual habitual residence.

072792 The second element of the habitual residence test, the factual assessment of habitual residence should also be applied if a claimant at any time ceases to be subject to immigration control or gains the right to reside in the CTA (for instance, where a PSIC is granted British citizenship).

072793 - 072799

Persons who are not a “person from abroad/person not in Great Britain”

072800 A claimant who

1. is an EEA national and a qualified person as a worker or a S/E person under EU law¹ (see DMG 072810 & 072481) **or**
2. is an EEA national who retains worker or S/E status under EU law² (see DMG 072821 & 072861) **or**
3. is a family member of one of the above³ (see DMG 072900) **or**
4. is a person exempted from the normal rule concerning the right of permanent residence⁴ (see DMG 073181) **or**
5. is a refugee⁵ (see DMG 073183) **or**
6. is a person who⁶
 - 6.1 has been granted discretionary leave to enter or remain in the UK outside the Immigration Rules (see DMG 073187) **or**
 - 6.2 has been granted leave to remain outside the Immigration Rules under the Domestic Violence concession (see DMG 073191) **or**
 - 6.3 is deemed to have been granted leave outside the Immigration Rules by virtue of specific legislation⁷ which, in accordance with an EU directive⁸ provides temporary protection to persons affected when the Council of the EU decides that there is (or will be) a mass influx of displaced persons who cannot return to their country of origin.

2010 and 2012 he had been doing unpaid voluntary work. The DM decided that the claimant was a person from abroad because he did not have a qualifying right to reside for the purposes of entitlement to ESA(IR). In particular the claimant wasn't a person who retained worker status because he had never been a "worker" in the UK. His activities had consisted of voluntary community work which was outside the "economic" form of activity for remuneration which is an essential factor in being a "worker".

Example 4

The claimant was a Polish national. She sustained a back injury in a car accident in Poland in 2008, and despite medical treatment the result was that she was unable to stand for more than half an hour at a time. She came to the UK on 18.3.13 and started work as a full-time shop assistant on 20.3.13. The claimant worked for about 2 weeks, following which she went off work for a week due to severe back pain. She was paid SSP for this absence. The claimant then returned to work for a few days but she was unable to continue. The claimant did not return to work and her employment was terminated on 15.5.13. A claim for ESA was made on 2.6.13. The DM examined whether the claimant had been a "worker". He assessed all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue. The DM held that the claimant's physical capacity for work was an issue when considering the employment relationship which was critical to the determination of whether the claimant was a worker. The DM decided that the existing nature of the claimant's condition, the lack of physical capacity to do the work, the short interrupted duration of the employment and the reasons for the claimants dismissal were compelling grounds for finding that the claimant had not been a worker. The DM therefore decided that the claimant did not have a qualifying right to reside and for the purposes of ESA(IR) she was a person from abroad" with an applicable amount of nil.

Example 5

An EEA national who claims ESA(IR) shows that he has been working for three hours per day, five days a week for the last four months. The DM decides that the work is genuine and effective because it is not on such a small scale as to be marginal and ancillary. The work was on a regular basis continuing for a reasonable length of time.

073053 - 073055

Self-employment

073056 See DMG 072841 for the characteristics of being a self-employed person rather than a "worker". The UT has held that, in order for a person to be regarded as self-employed for the purposes of the right to reside, the activity as a self-employed person must be genuine and effective rather than marginal or ancillary¹.

Note: see DMG 073216 in relation to self-employment and the CJEU judgment of Saint Prix.

1 Bristol City Council v FV (HB) [2011] UKUT 494 (AAC), CH/2859/11

073057 The Minimum Earnings Threshold described in DMG 073038 may not always be easy to apply in the case of self-employed persons, but in general if

1. average profits (before tax and NI) are more than £646 pcm (£149 pw) (see **Note 2** below) **and**
2. average profits have been at or above that level for a continuous period of 3 months

the DM should accept that the self-employment is genuine and effective and they can be considered as self-employed persons under EU law.

Note 1: If average profits are less than £646 pcm (£149 pw) (see **Note 2** below) and/or have not been at or above that level for a continuous period of 3 months, the DM will need to examine the case under the Tier 2 process (see DMG 073040) with a view to determining whether the self-employment is genuine and effective.

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

DMs should exercise care in applying the guidance on EU case law in DMG 073043 and 073044 (on the meaning of “worker”) to the question of whether self-employment is genuine and effective. Account must be taken of the different nature of self-employment: it may include periods of relative inactivity (see DMG 072842) and there will be periods particularly as a business is starting up when the person may be working long hours but not yet receiving much profit.

Examples of Self-Employment

Example 1

073058 The claimant was a Czech national who came to the UK in 4.1.14. He claimed JSA on 11.2.14. The claimant said that he had a right to reside as a self-employed person. He had a contract with a local business under which he provided bookkeeping services for a local business. The contract was for 2 hours work per month, at a fee of £25 an hour and the claimant had completed the work for January 2014 on 1.2.14. He had not advertised his services nor had he sought any other contracts. On 14.2.14 a DM considered the claim and decided that the claimant's self-employment activities were marginal rather than genuine and effective, so the claimant did not have a right to reside as a self-employed person. The DM accepted however that the claimant had a right to reside as a jobseeker. However the

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

Example 2

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

073059 – 073079

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

Introduction

073080 EEA nationals who have been unemployed and claiming JSA for 6 months will lose their EU right to reside in the UK, **unless** they provide **compelling evidence** that they are continuing to seek employment and that they have a genuine prospects of work. In which case, a short extra period of JSA(IB) will be allowed. In practice, even though these amendments to Immigration legislation take effect from 1.1.14, the first GPoW assessments take place in July.

Note: This paragraph will not apply to anyone with a right to reside other than as a jobseeker or person retaining worker status (see DMG 073234 et seq)

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

073082 - 073083

Jobseekers

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

1. either

1.1 entered the UK in order to seek employment² or

- 1.2** is present in the UK and seeking employment immediately after having a right to reside as a worker, self-employed person, a self sufficient person or a student³ **and**
- 2.** can provide evidence that they are seeking employment and have a genuine prospect of work⁴.

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

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

Retaining Worker Status

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

Employed in the UK for less than one year

073086 A person who¹

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

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

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

1 Imm (EEA) Regs, reg 6(2)(ba); 2 reg 6(2A)

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

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

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

073089

What happens if claimant fails GPoW test?

Joint Claims

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

Family Members

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

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

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

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

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

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

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

073124 - 073125

Extending GPoW assessments to stock EEA nationals

Introduction

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

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

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

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

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

Three month notification

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

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

073130 If the claimant has not found work within the three month notification period, they will be invited to attend a GPoW assessment interview, to enable the claimant to provide

1. evidence to show what their right to reside is (see DMG 073131 to 073133 below for alternative rights to reside) **and**
2. where the person seeks to rely on their right to reside as a jobseeker, compelling evidence to show that they have a GPoW (see DMG 073135, 073138 and 073139 below on compelling evidence).

Alternative right to reside

073131 During the GPoW assessment interview, the claimant may offer an alternative right to reside (see DMG 073234 et seq). Where the claimant is exercising an alternative right to reside, they are advised to provide supporting evidence.

073132 Alternative rights to reside may include

1. self-sufficient persons with comprehensive sickness insurance (DMG 073244 to 073246) **or**
2. self-sufficient students with comprehensive sickness insurance (DMG 073248) **or**
3. family members (DMG 073250) of
 - 3.1 a qualified person (DMG 073238) **or**
 - 3.2 a British Citizen (if certain conditions are satisfied) (DMG 073254 to 073262) **or**
 - 3.3 a student (DMG 073248) **or**
 - 3.4 an EEA national with a permanent right of residence (DMG 073351) **or**
4. family members who retain their right of residence (DMG 073300) **or**
5. extended family members (DMG 073294) **or**
6. permanent rights of residence (DMG 073350 et seq) **or**
7. derivative rights of residence (DMG 073381 – 073413).

This is not an exhaustive list.

073133 Supporting evidence could include

1. job contracts
2. letters from employers
3. evidence of permanent residence, which may include evidence of
 - 3.1 5 years as a qualified person
 - 3.2 certified accounts, tax returns or HMRC registration (S/E people)
 - 3.3 evidence of previous work

- 3.4 P45s
 - 3.5 study and comprehensive sickness insurance (Students)
 - 3.6 self-sufficiency and comprehensive sickness insurance
 - 3.7 Worker Registration and Worker Authorisation documents (Accession state nationals)
4. evidence of a derivative right to reside e.g. evidence of a child in general education (DMG 073387 2.3), evidence that the child's EEA national parent was working in the UK whilst the child resided in the UK (DMG 073387 2.2)
 5. evidence of the claimant's nationality (where this is not already held).

This is not an exhaustive list.

Is the relevant period being applied to stock cases?

073134 The relevant period (DMG 073093 – 073095) is not applied to stock cases, as all claimants will already have had much longer than this period by the time of their GPoW assessment interview. EEA jobseekers and EEA retained workers are given notice that their continued entitlement to JSA(IB) will be reviewed in three months time at their GPoW assessment interview, allowing them time to prepare.

Note: See DMG 073136 to 073139 below where the claimant declares a change in their circumstances.

Compelling evidence

073135 Where the claimant is exercising a right to reside as a jobseeker or retained worker, they must provide compelling evidence that they have a genuine prospect of work at the GPoW assessment interview, or evidence to show that they have an alternative right to reside. If they cannot provide such evidence, their right to reside will end and their award of JSA(IB) will terminate.

Note: For guidance on what constitutes compelling evidence, see DMG 073138 to 073139 below.

Changes in circumstance

Extensions

073136 Where the claimant provides compelling evidence that a change in their circumstances has now given them a genuine prospect of work, the DM can extend the claimant's JSA entitlement.

073137 As the relevant period is not being applied to stock cases (see 073134 above), in order to be eligible for an extension, the change of circumstance should have taken place within the three month notification period (see DMG 073129 to 073130 above).

073138 If there is a genuine offer of a specific job, which is

resident in the CTA¹ and therefore (provided they satisfy the other conditions of entitlement) will be eligible for IS, ESA(IR), JSA(IB) or SPC, as the case may be).

1 IS (Gen) Regs, reg 2IAA(4)(h); ESA Reg, reg 70(4)(h); JSA Regs, reg 85A(4)(h); SPC Regs, reg 2(4)(h)

073195 - 073199

Asylum seekers

073200 A person who is awaiting a decision on an application for asylum is given temporary admission and is lawfully present in GB¹. However, unless and until granted asylum, an asylum seeker is a person subject to immigration control (PSIC).

1 R(IS) 2/06

073201 A PSIC is not normally entitled to any benefits¹ (see DMG 070831 et seq) but there are some exceptions (see DMG 070835). For means-tested benefits these exceptions include any nationals of countries which have ratified either ECSMA or CESC who are lawfully present in GB².

1 I & A Act 99, s 115; 2 SS (Immigration & Asylum) Consequential Regs 2000, reg 2(1) & Para 4 of Sch Part 1

073202 Therefore an asylum seeker from Croatia, Macedonia, or Turkey is not precluded from income related benefits under section 115. However, an asylum seeker on temporary admission has neither a right to reside nor can be habitually resident. Simple lawful presence following temporary admission does not equate to a right to reside¹.

1 R(IS) 8/07 & R(IS) 3/08

CJEU Judgment Saint Prix v. SSWP

Introduction

073203 In its judgment¹, delivered on 19.6.14, the CJEU considered a case involving an EEA national who was exercising a right to reside as a worker in the UK and who ceased work due to pregnancy 11 weeks before her expected date of confinement.

1 Saint Prix v SSW P (Case C-507/12)

073204 The impact of the judgment applies to new IS claims from pregnant women who give up work, and takes effect from the date that the judgment was delivered i.e. 19.6.14.

Note: There may be other benefit claims that may be relevant to this guidance. More complex cases may need referral to DMA Leeds (DMG 073214).

Facts of the case

073205 The claimant – Ms Saint Prix - is a French national who entered the UK in July 2006 and worked mainly as a teaching assistant from September 2006 to August 2007. She then commenced a university course from September 2007. During this period of study she became pregnant with an expected date of confinement of 2.6.08. In January 2008, hoping to find work in secondary schools, the claimant registered with an employment agency and in February 2008, withdrew from her university course. As no secondary school work was available, she took agency work in nursery schools. When nearly six months pregnant, the claimant stopped that work on the grounds that the demands of caring for nursery school children had become too strenuous for her. She looked for a few days, without success, for work that was more suited to her pregnancy. In March 2008, being within 11 weeks of her expected date of confinement, she made a claim for IS, which was rejected on the grounds that she had lost her status as a worker and did not have a right to reside. In August 2008, three months after the premature birth of her child, the claimant resumed work.

CJEU ruling

073206 In their judgment, the CJEU ruled

Article 45 TFEU must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of “worker”, within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child.

Reasonable period

073207 The CJEU ruled that a pregnant woman in Ms Saint Prix’s circumstances could only retain worker status if she returns to work or finds another job within a “reasonable period” after the birth of her child. The CJEU didn’t determine what constitutes a “reasonable period”, but stated that it was for the national court (in Ms Saint Prix’s case) to determine this. The CJEU gave guidance that the national court should take account of all the specific circumstances of the case and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of the Council Directive 92/85/EEC (which relates to the health and safety of pregnant women at work and those who have recently given birth).

073208 Under domestic legislation, pregnant women in employment are entitled to 26 weeks maternity leave. Where they are not entitled to SMP or MA, they may be able to claim IS¹, for a period which is aligned with the 26 week maternity leave period (up to 11 weeks before the expected week of confinement and 15 weeks after childbirth). There has therefore been Departmental agreement to use the 15 week

period after childbirth as a yardstick for considering whether an EEA national in Ms Saint Prix's circumstances returned to work within a "reasonable period".

1 IS (Gen) Regs, Sch 1B, para 14

DM Action

073209 In line with the Saint Prix judgment, DMs may make an award of IS to an EEA national worker who

1. gives up, or stops seeking, work in the late stages of pregnancy **and**
2. at the outset of their IS claim, expresses an intention to return to their previous work, or find another job, by the end of the 15 week period after the birth of their child.

An award of IS may be made for up to 26 weeks, commencing 11 weeks before the expected date of confinement and ending 15 weeks after (but a shorter award period may be relevant if the claim is made closer to the expected date of confinement).

Note: For new IS claims from 10.9.15, for guidance in relation to the length of the reasonable period, see DMG 073223 - 073224.

073210 To enable DMs to determine whether a claimant falls within the scope of the Saint Prix judgment, relevant questions may include

1. was the claimant in genuine and effective work and did she give up work due to the late stages of pregnancy?
2. was the claimant complying with the conditions for retained worker status (see DMG 072821 2.) when she gave up looking for work due to the late stages of pregnancy?
3. does the claimant intend to go back to work?
4. does the claimant have a job to return to?
5. what is the timescale for their return to work?

073211 Where a claimant indicates that they have an intention to return to their previous job or that they will find another job, the DM can award IS for a fixed period until the end of the 15 week period after the expected date of confinement. If the claimant subsequently does not return to work, a recovery of the IS paid will not be required.

Note: for IS claims from 10.9.15, the claimant's intention to return to work should be within the 41 week period after childbirth (see DMG 073230 - 073233).

073212 Where the claimant indicates at the outset of the IS claim that they have no intention of returning to any work within the 15 week period after childbirth or they plan to return to work much later (e.g. when the child is one year old), the conditions in the

Saint Prix judgment will not be satisfied, the claimant will not retain worker status and IS cannot be awarded.

073213 Circumstances in which a claimant will fall **outside** the scope of the Saint Prix judgment include

1. if they give up, or stop seeking, work for reasons **unrelated** to the physical constraints of the late stages of pregnancy **or**
2. if they were registered as a jobseeker for a significant period before the 11th week of their expected date of confinement **or**
3. if they were self-employed (see DMG 073216).

Note 1: This is not an exhaustive list of circumstances.

Note 2: This guidance will be updated to reflect Tribunal decisions which may provide further examples of claims which fall outside the scope of the Saint Prix judgment.

Example 1

Magda, a Hungarian national, began work as a cleaner on a six month temporary employment contract on 24 February 2014. In March she found out that she was pregnant with an expected confinement date of 20 October 2014. Towards the end of July, she was finding it difficult to carry her cleaning equipment and to bend over when cleaning floors. On 5 August she gave up her job and claimed IS on 12 August (she was not entitled to MA as she had not worked for at least 26 weeks in 66 week period before her baby was due). Her employer told her she could return to her job under a new contract when she was able to after she gave birth, and it was her intention to return to work. As she was within 11 weeks of her expected date of confinement, the DM considered that Magda had retained worker status (in line with the judgement in Saint Prix). The DM therefore awarded IS from 12 August until 15 weeks after the (expected date of) birth of her child.

Example 2

Dominique, a Belgian national, was an agency worker who had several spells of employment between 2009 and 2012. In June 2013, she claimed JSA as an EEA jobseeker and received this benefit from 5 June 2013. In 2014 while receiving JSA she became pregnant with an expected confinement date of 30 November. Eleven weeks before this date, she claimed IS. The DM considered that Dominique's situation was not covered by the Saint Prix judgment as when she claimed IS (in the late stages of pregnancy) she was a jobseeker. Her claim for IS was therefore disallowed.

Complex cases

073214 If DMs are dealing with claims that cannot be resolved using this guidance, please contact DMA Leeds for further assistance.

Entitlement to SMP or MA

073215 Pregnant women may be entitled to claim SMP (from their employer) or MA (from the Department) if they had been working. Both are payable for a maximum period of 39 weeks. SMP or the standard rate of MA is generally paid at a higher rate than the standard rate of IS, and entitlement to SMP or MA is not subject to the right to reside test. DMs should therefore ensure that any pregnant EEA national claiming IS is made aware of a possible entitlement to SMP or MA, as this would likely be more advantageous to claim than IS.

Self-employment

073216 Self-employed persons do not fall within the scope of the Saint Prix judgment. The CJEU only considered the retention of “worker” status under Article 45 TFEU.

Income Support – right to reside – worker status and pregnancy

Background

073217 In its judgment¹ delivered on 19.6.14, the CJEU ruled that a pregnant woman, in Ms *Saint Prix*'s circumstances could only retain worker status provided she

1. returns to work **or**
2. finds another job within a reasonable period after the birth of her child.

Those circumstances concern women who give up work or seeking work because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth. For full guidance on *Saint Prix* see [DMG 073203 - 073216](#).

1 Saint Prix v SSWP (Case C-507/12)

073218 Pending the outcome of the CJEU's *Saint Prix* judgment, several cases were stayed at the UT. Four lead cases were identified and their judgment¹ has now been delivered by the UT. The paragraphs below provide guidance on the UT's judgment (“*SFF and Others*”) and the impact on new IS claims from claimants who fall within the scope of the *Saint Prix* CJEU judgment. This guidance takes effect from the date that the *SFF and Others* judgment was delivered i.e. 10.9.15.

1 SSWP v SFF, ADR v SSWP, CS v LB Barnet & SSWP [2015] UKUT 0502 (AAC)

Judgment of the Upper Tribunal

To whom are *Saint Prix* rights available?

- 073219 The UT held that the *Saint Prix* right is available to workers and retained workers (paragraph 25 of the judgment).
- 073220 The question of whether the *Saint Prix* right would be available to pure jobseekers was not decided by the UT (paragraph 25 of the judgment). It remains the department's position that a *Saint Prix* right is not available to pure jobseekers (see DMG 073213 2.).

When does the *Saint Prix* right start?

- 073221 The UT concluded that the start of the *Saint Prix* right was liable to be fact specific, depending both on the woman and unborn child concerned, and on the job that the woman had been doing, for example if the job involved manual labour or heavy lifting. The 11th week before the expected date of childbirth was identified as being a *convenient yardstick*, although the UT noted this *is capable of being displaced in particular cases* (paragraph 26 of the judgment). Therefore DMG guidance at [073208](#), in relation to when the *Saint Prix* right starts, should still be followed (However, see DMG 073223 in relation to the length of the reasonable period).

How long does the reasonable period last?

- 073222 Following delivery of the *Saint Prix* CJEU judgment, DMG guidance was produced to advise DMs that the 26 week period of ordinary maternity leave should be used as a benchmark for the "reasonable period". That 26 week period commences 11 weeks before the expected date of confinement and ends 15 weeks after (but a shorter award period may be relevant if the claim is made closer to the expected date of confinement) (see [DMG 073209](#)).
- 073223 From 10.9.15, for new IS claims from claimants who fall within the scope of *Saint Prix*, DMG guidance at 073208 and 073209 should no longer be followed in respect of the length of the reasonable period.
- 073224 The UT adopted the approach that in the UK the "reasonable period", for the purposes of a *Saint Prix* right, is to be determined by taking account of the national rules on the duration of maternity leave (in accordance with specified legislation¹). That is the 52 week period made up of ordinary maternity leave and additional maternity leave. The UT also emphasised that there had to be a fact specific consideration of any case in which those circumstances arose. However, the UT noted that it would be an unusual case in which the period was other than the 52 week period (paragraphs 27 to 37 of the judgment).

¹ Directive 92/85/EEC Art 8

073225 For benefit purposes, guidance relating to entitlement to IS for reasons of pregnancy provides that unless the woman is incapable of work by reason of pregnancy, a 26 week period of entitlement is applied i.e. 11 weeks before the expected date of confinement and ending 15 weeks after the date the pregnancy ended ([DMG 20160 – 20162](#)). Once the period of IS entitlement for reasons of pregnancy has ended, an EEA national with a *Saint Prix* right can only continue to receive IS for the remainder of the 'reasonable period', if they fall within one of the prescribed categories of persons¹ for the purposes of entitlement to IS ([see DMG 20081 et seq](#)).

Note: Where the EEA national has a *Saint Prix* right during the period of entitlement for IS for reasons of pregnancy, but then does not meet the conditions of entitlement to IS for the remainder of the reasonable period, entitlement may exist to JSA(IB) or ESA. This is because the claimant continues to retain her worker status throughout the reasonable period. Where there is an entitlement to JSA(IB) during the remainder of the reasonable period, the claimant would be subject to general GPoW provisions.

1 IS (Gen) Regs, reg 4ZA & Sch 1B

Example

Maria is an EEA national agency worker, working in a local supermarket. She is working on a temporary contract, which commenced 4.1.16. In April she finds out she is pregnant with an expected date of confinement of 14.11.16. Towards the end of August, she is having difficulty with being on her feet all day, moving boxes and bending down to restock shelves. On 26.8.16 she gives up her job and claims IS on 30.8.16. Included in her claim for IS are her EEA national partner and their twins (aged 18 months). Her employment agency explains that her current contract will end immediately, but that she can resume employment with them under a new contract when she is able to after the birth of her baby. At the point of her claim to IS, she states that it is her intention to return to work.

The DM determines that Maria retains her worker status in line with *Saint Prix*, and awards IS for 26 weeks from 30.8.16 to 27.2.17. For entitlement to IS to continue during the remaining reasonable period, Maria is required to satisfy the domestic conditions of entitlement for IS¹. The DM determines that Maria does not fall within one of the prescribed categories of persons for the purposes of entitlement to IS during the remainder of the 52 week reasonable period ([see DMG 20081 et seq](#)), but advises the claimant that she may satisfy the conditions of entitlement to JSA(IB). The claimant makes a claim to JSA(IB) from 28.2.17, and the DM determines that the claimant can retain her worker status for 6 months ([DMG 073086](#)), when the claimant will be subject to the general GPoW provisions.

IS (Gen) Regs, reg 4ZA & Sch 1B

Returning to work or jobseeking

073226 The UT agreed with DWP's approach that a *Saint Prix* worker can move from retained worker status under specified legislation¹ to a *Saint Prix* status and back to retained worker status, provided she complies with the retained worker provisions of that specified legislation. However the UT goes on to extend that approach to someone who enters the *Saint Prix* reasonable period as a worker and whose job ends for lawful or unlawful reasons whilst being in the reasonable period. The UT held that a woman in that situation should be allowed to move to retained worker status provided the relevant conditions of the specified legislation are satisfied (paragraphs 39 to 40 of the judgment).

1 Directive 2004/38/EC Art 7(3)(b) or (c)

Example 1

Eva, an EEA national, ceased work on 31.12.15 when her fixed-term employment contact came to an end. She claimed and was awarded JSA(IB) as a retained worker from 4.1.16. In February 2016, she finds out she is pregnant with an expected date of confinement of 30.6.16. On 15.4.16, she gives up looking for work and stops claiming JSA(IB). She claims IS instead as she is within 11 weeks of her expected date of confinement and states that she intends to look for a job after the birth of her baby. The DM considers that she enters the *Saint Prix* period as a retained worker and awards IS from 15.4.16. In line with the UT judgment, she can retain her worker status for the remainder of the 52 week reasonable period, and will be entitled to IS for as long as she continues to satisfy the domestic conditions of entitlement¹. Eva continues to retain her worker status as she states she will be returning to the employment market at the end of her reasonable period, complying with the relevant conditions of Article 7(3) of Directive 2004/38/EC.

1 IS (Gen) Regs, reg 4ZA & Sch 1B

Example 2

Carla, an EEA national, began work as a cleaner on a six month temporary employment contract on 30.3.15. In April she finds out that she is pregnant with an expected confinement date of 21.11.15. Towards the end of August, she is finding it difficult to carry cleaning equipment and to carry out her usual cleaning duties. On 4.9.15 she gives up her job and claims IS on 14.9.15. She is not entitled to MA as she has not worked for the required period of time before her baby is due. Her employer told her that she can return to her job under a new contract when she is able to after the birth of her baby and she stated at the point of her claim to IS that it was her intention to return to work.

As she gives up work within 11 weeks of her expected date of confinement, the DM considers that Carla is a worker, and then retains her worker status in line with the *Saint Prix* judgment from the date that her contract of employment ceases. The DM awards IS from 14.9.15. IS entitlement continues for reasons of pregnancy for 26

weeks until 15 weeks after the date that the claimant's pregnancy ends. The DM then determines that the claimant falls within one of the prescribed categories of persons, as a lone parent, resulting in continued IS entitlement for a further 26 weeks.

Can a *Saint Prix* right contribute towards permanent residence?

073227 A *Saint Prix* right can contribute towards the period of time required for the acquisition of permanent residence¹, provided that all the relevant *Saint Prix* criteria are fulfilled (paragraph 44 of the judgment).

Note: If the *Saint Prix* right to reside is terminated because the woman does not return to work, or if the woman says she has no intention of returning to work from the outset of her claim (see DMG 073232), it cannot count towards the acquisition of permanent residence.

1 Directive 2004/38/EC Art 16

Nature of the *Saint Prix* right to reside - prospective or retrospective assessment

073228 The UT concluded that the *Saint Prix* right to reside should be assessed prospectively and the issue is to be approached as primarily a question of the woman's intention (paragraph 21 of the judgment).

073229 The proviso, in paragraph 41 of the *Saint Prix CJEU* judgment that a woman must return to work or find another job within a reasonable period, should be treated as a condition subsequent for terminating the *Saint Prix* right where it is not met, and not a condition precedent to the right coming into existence (paragraph 22 of the judgment).

073230 DMs should

1. continue to assess a *Saint Prix* right of residence prospectively at the point of the claim (DMG 073203) **and**
2. assume that the claimant *will* return to work, where she says that she has an intention to do so (DMG 073211).

Note: Within DMG 073211, from 10.9.15 the reference to the claimant's intention to return to work within the reasonable period should be amended to the intention being *within the 41 week period after childbirth* (see DMG 073232).

073231 Where the claimant's circumstances change and she

1. changes her mind during the reasonable period and does not return to work
or
2. does not comply with the conditions for retained worker status

her *Saint Prix* right of residence will be lost.

Note: Although the claimant will have been paid benefit up to the point that her *Saint Prix* right is lost, no recovery will be sought.

073232 If at the outset of her IS claim, the claimant says that she has no intention of returning to work within the 41 week period following childbirth, or plans to return to work much later, the claimant does not retain worker status and does not obtain a *Saint Prix* right at any point.

073233 From 10.9.15, DMs may make an award of IS to an EEA national worker who

1. gives up or stops seeking work due to the physical constraints of the late stages of pregnancy **and**
2. at the outset of their claim, expresses an intention to return to their previous work or find another job, by the end of the 41 week period following the birth of their child.

Note: See DMG 073225 in respect of IS entitlement during the reasonable period.

Right to reside

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

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

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

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

Note: this list is not exhaustive.

Extended right of residence

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

073237

Qualified persons

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

1. a jobseeker¹(see DMG 073084) **or**
2. a worker² **or**
3. a S/E person³ **or**
4. a self-sufficient person⁴ **or**
5. a student⁵.

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

073239

Jobseekers

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

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

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

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

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

073241

Workers and self-employed persons

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

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

073243

Self-sufficient persons with comprehensive sickness insurance

073244 EEA nationals who

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

Moving between alternate rights to reside

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

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

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

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

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

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

Example 1

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

Example 2

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

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

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

Imprisonment

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

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

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

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

Sanctions & Disallowances of JSA

073439 In the case of a sanction, payment of JSA is removed for a time, but entitlement may continue. So where the EEA national has not yet reached their GPoW assessment interview, they would still get their 6 months as a retained worker or 91 days as a jobseeker. The period of the sanction would not break continuity for the calculation towards the 5 year period for permanent residence.

073440 In the case of a disallowance, the JSA award ends. If the disallowance is for a fixed period, the claimant will have to reclaim JSA once the disallowance has ended. Once the claimant has made a repeat claim as a jobseeker (who has received such

Chapter 07 - Part 6 - Severe disablement allowance, SPC, Widow's Benefit/Bereavement Benefit and Winter Fuel Payments

European legislation referred to in Chapter 07 - Part 6

Full title

Council Regulation (EC) No. 883/04

Abbreviation

Reg (EC) 883/04

Agreements referred to in Chapter 07 - Part 6

Country description	Full title	Short
Austria	The Social Security (Austria) Order 1981 No. 605	SS (Austria) Order 81
Barbados	The Social Security (Barbados) Order 1992 No. 812	SS (Barbados) Order 92
Bermuda	The National Insurance and Industrial Injuries (Bermuda) Order 1969 No. 1686	NI and II (Bermuda) Order 69
Cyprus	The Social Security (Cyprus) Order 1983 No. 1698	SS (Cyprus) Order 83
Finland	The Social Security (Finland) Order 1984 No. 125	SS (Finland) Order 84
Germany	The Family Allowances, National Insurance and Industrial Injuries (Germany) Order 1961 No. 1202	FA, NI & II Order 61
Iceland	The Social Security (Iceland) Order 1985 No. 1202	SS (Iceland) Order 85
Ireland	National Insurance (Republic of Ireland) Order 1966 No. 270	NI (Rep I) Order 66
Isle of Man	The Social Security (Isle of Man) Order 1977 No. 2150	SS (I of M) Order 77
Israel	The National Insurance and Industrial Injuries (Israel) Order 1957 No. 1879	NI and II (Israel) Order 57
Jamaica	The Social Security (Jamaica) Order 1997 No. 871	SS (Jamaica) Order 97
Jersey and Guernsey	The Social Security (Jersey and Guernsey) Order 1994 No. 2802	SS (Jersey and Guernsey) Order 94
Malta	The Social Security (Malta) Order 1996	SS (Malta) Order 96
Mauritius	The Social Security (Mauritius) Order 1981 No. 1542	SS (Mauritius) Order 81
New Zealand	The Social Security (New Zealand) Order 1983 No. 1894	SS (New Zealand) Order 83
Northern Ireland	The Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 No. 1003	SS (N Ireland Reciprocal Arrangements) Regs

Country description	Full title	Short
Norway	The Social Security (Norway) Order 1991 No. 767	SS (Norway) Order 91
Philippines	The Social Security (Philippines) Order 1989 No. 2002	SS (Philippines) Order 89
Portugal	The Social Security (Portugal) Order 1979 No. 921	SS (Portugal) Order 79
Spain	The Family Allowances, National Insurance and Industrial Injuries (Spain) Order 1975 No. 415	FA, NI & II (Spain) Order 75
Sweden	The Social Security (Sweden) Order 1988 No. 590	SS (Sweden) Order 88
Switzerland	The Family Allowances, National Insurance and Industrial Injuries (Switzerland) Order 1969 No. 384	FA, NI and II (Switzerland) Order 1969
Turkey	The National Insurance and Industrial Injuries (Turkey) Order 1961 No. 584	NI and II (Turkey) Order 61
United States of America	The Social Security (United States of America) Order 1984 No. 1817	SS (USA) Order 84
Yugoslavia	The Family Allowances, National Insurance and Industrial Injuries (Yugoslavia) Order 1958 No. 1263	FA, NI and II (Yugoslavia) Order 58

Severe Disablement Allowance

076960 Any difficult international issues in relation to SDA should be referred to DMA Leeds for Advice..

1 SS CB Act 92, s 113(1)(a)

076961 - 077009

State Pension Credit

SPC - Absence from Great Britain

Introduction

077010 This section contains guidance on the provisions for entitlement to SPC when a person is absent from GB.

077011 Although it is a condition of entitlement to SPC that a person is in GB¹, it can continue to be paid during a temporary absence from GB for up to thirteen weeks² (see DMG 077013 to 077015), or without a specific limit in some circumstances³ (see DMG 077017).

1 SPC Act 2002, s 1(2)(a); 2 SPC Regs, reg 3; 3 reg 4

077012 When calculating periods of absence from GB, the day of leaving GB and the day of return to GB are both days on which the person is in GB¹.

1 R(S) 1/66

United Kingdom law

Claimant absent from Great Britain

077013 From 6.10.08 a claimant who is absent from GB continues to be entitled to SPC for the first thirteen weeks of absence if¹

1. the absence is temporary (see DMG 070853) **and**
2. there was title to SPC immediately before leaving GB **and**
3. the absence is not expected to last more than 52 weeks² **and**
4. the other conditions of entitlement remain satisfied³.

1 SPC Regs, reg 3; 2 reg 3(a); 3 reg 3(b)

077014 Prior to 6.10.08 continued entitlement to SPC during a temporary absence from GB was limited to the first four weeks of absence for any reason, or for up to eight weeks if the claimant was accompanying a child receiving medical treatment outside GB. In both cases the same four conditions listed in DMG 077013 had to be met.

Partner absent from Great Britain

077015 If a claimant's partner (or polygamous partner) is absent from GB, the calculation of the applicable amount can continue to include that person for the first thirteen weeks of the partner's absence abroad¹ if the absence is temporary (see DMG 070853). Prior to 6.10.08 this period was limited to the first four weeks of temporary absence

abroad, or the first eight weeks if the partner was accompanying a child receiving medical treatment abroad.

1 SPC Regs, reg 5(1)(f) and 5(2)

077016 At the end of the thirteen week period the absent partner stops being treated as a member of the claimant's household and the DM should supersede the award to remove the partner and the partner's income from the calculation.

Absent from Great Britain for NHS treatment

077017 The claimant or partner is treated as in GB (and retains entitlement to SPC) during any period of absence abroad where he or she is receiving pre-arranged treatment at a hospital or other institution pursuant to certain parts of the NHS Act 1977 or the NHS and Community Care Act 1990¹ (see DMG 070661 - 070663). This legislation only applies in England and Wales and there is no equivalent for Scotland.

1 SPC Regs, reg 4

077018 This provision does not assist a claimant or partner who happens to fall ill while abroad and obtains treatment overseas.

077019 - 077024

European Community law

077025 SPC is listed as a special non-contributory benefit for the purposes of EC law¹. Such benefits are only payable in, and at the expense of, the State in which the person is habitually resident. This means that SPC is payable in the UK only and EC law does not permit export of this benefit to claimants living abroad..

1 Reg (EC) No. 883/04, Art 70; and Annex X

Reciprocal agreements

077026 SPC is not within the scope of any of the reciprocal agreements between the UK and other countries.

077027 - 077029

Widow's Benefit/Bereavement Benefit

Introduction

077030 This section gives guidance on

1. the residence and presence conditions for entitlement to WB/BB (see DMG 077071)
2. absence from GB (see DMG 077072, 077080 and 077090)
3. entitlement to pro rata WB/BB (see DMG 077150) **and**
4. the effects of Social Security agreements on entitlement to WB/BB (see DMG 077240).

077031 BBs were introduced by the Welfare Reform and Pensions Act 1999, and replaced widow's benefit where the late spouse died on or after 9.4.01.

077032 Prior to this date there were no provisions for payment of widower's benefits.

077033 Following the introduction of the Civil Partnership Act, surviving civil partners could have title to BBs where the late civil partner died on or after 5.12.05.

077034 Detailed guidance on the general conditions of entitlement to WBs and BBs is at DMG Volume 10, Chapters 58 and 63.

077035 The remainder of this chapter concentrates mainly on BBs (although some of the examples refer to WBs), but apply equally to claims to WBs where the husband died before 9.4.01.

077036 - 077070

Residence and presence

077071 There are no residence and presence conditions for WB/BB. However a claimant can be disqualified from receiving WB/BB when they are absent from GB.

Absence from Great Britain

077072 A surviving spouse or surviving civil partner who is absent from GB

1. is **not** disqualified for receiving WB/BB¹ (apart from Widow's/Bereavement Payment)
2. may be disqualified for receiving WPT/BPT (see DMG 077080) **and**

3. may **not** have the rate of WB/BB increased in the general uprating of benefit rates.

1 SS Ben (PA) Regs, reg 4(1) & 5(1)

Widow's/Bereavement Benefit under European Community provisions

077073 EC provisions refer to survivor's benefits¹. For the UK this means

1. WP²/BPt
2. WMA³/WPA⁴ **and**
3. WP⁵/Bereavement Allowance⁶.

1 Reg (EC) 883/04, Art 3(1)ee); 2 SS CB Act 92, s 36; 3 SS CB Act 92, s 37(1); 4 s 39A; 5 s 38; 6 s 39B

077074 The following are not survivor's benefits

1. long term Incapacity Benefit for widows, widowers and surviving civil partners¹. These are invalidity benefits (see DMG 073852)
2. Child Dependency Increases of WPA². These are family benefits (see DMG 070165) **and**
3. Category B RP for widows. This is an old age pension (see DMG 075753).

1 SS CB Act 92, s 40 & 41; 2 s 80(5)

077075 - 077079

Widow's/Bereavement Payment

077080 A surviving spouse or surviving civil partner who is absent from GB, other than in Sark, is not disqualified¹ for receiving BPT if when the spouse or civil partner died

1. the surviving spouse or surviving civil partner was in GB **or**
2. the deceased was in GB².

1 SS CB Act 92, s 113(1); 2 SS Ben (PA) Regs, reg 4(2A)

077081 Where both the surviving spouse or surviving civil partner and the deceased were absent from GB at date of death, the surviving spouse or surviving civil partner is not disqualified for being absent from GB if

1. the deceased satisfied the contribution conditions for WPA or Bereavement Allowance **either** for a basic pension of at least the minimum rate or for Additional Pension only **or**
2. the surviving spouse or surviving civil partner returns to GB within four weeks of the spouse or civil partner's death **or**
3. he/she is in another EEA country (see DMG 077082) **or**
4. he/she is in a country with which the UK has an Agreement (see DMG 077083).

Example 1

A man and his wife are involved in a road accident whilst on holiday in India. The husband is killed but the wife is not badly injured and spends only five days in hospital. The contribution condition for BPT is satisfied but those for WPA and Bereavement Allowance are not satisfied. After arrangements are made to fly her husband's body home the widow arrives back in GB three weeks after her husband's death. She would not be disqualified for receiving BPT.

Example 2

The widow in Example 1 is more seriously injured and has to remain longer in hospital in India. She does not return to GB until five weeks after her husband's death. She will be disqualified for receiving BPT if her late husband did not satisfy the contribution conditions for WPA and Bereavement Allowance.

European Community

077082 A surviving spouse or surviving civil partner is **not** disqualified for receiving BPT if he/she is absent from GB in another EEA country¹.

1 Reg (EC) 883/04 Art 7

Reciprocal agreements

077083 A surviving spouse or surviving civil partner is **not** disqualified for receiving BPT if he/she is absent from GB in one of the following non-EEA countries¹

- Barbados²
- Bermuda³
- Cyprus⁴
- Isle of Man⁵
- Israel⁶
- Jamaica⁷
- Jersey and Guernsey⁸
- Malta⁹
- Mauritius¹⁰
- Philippines¹¹
- Switzerland¹²
- Turkey¹³
- United States of America¹⁴
- Yugoslavia (See DMG 070334)¹⁵.

*1 SS (RA) Order; 2 SS (Barbados) Order 92, Sch, Art 5(1); 3 NI & II (Bermuda) Order 69, Sch, Art 9(2);
4 SS (Cyprus) Order 83, Sch, Art 4(1); 5 SS (I of M) Order 77, Sch 1, Art 2(1);
6 NI & II (Israel) Order 57, Sch, Art 8(1); 7 SS (Jamaica) Order 97, Sch, Art 5(1);
8 SS (Jersey & Guernsey) Order 94, Sch, Art 5(1); 9 SS (Malta) Order 96, Sch, Art 25;
10 SS (Mauritius) Order 81, Sch 1, Art 4(1); 11 SS (Philippines) Order 89, Sch, Art 4(1);
12 FA, NI & II (Switzerland) Order 69, Sch 1, Art 16(2); 13 NI & II (Turkey) Order 61, Sch, Art 17 & 21;
14 SS (USA) Order 84, Sch 1, Art 7(2); 15 FA, NI & II (Yugoslavia) Order 58, Sch, Art 25(1)*

077084 - 077089

Not entitled to uprating increases

Introduction

077090 The rate of WB/BB paid to a surviving spouse or surviving civil partner who is absent from GB is increased by the general uprating of the rates of benefit¹ if the surviving spouse or surviving civil partner

1. remains ordinarily resident in GB **or**
2. is in an EEA country and is within the scope of EU provisions² (see DMG 070050) **or**
3. is in an EEA country and the agreement with that country still applies to him/her (see DMG 070320) **or**
4. is in a country with which the UK has an agreement which allows the rate to be increased (see DMG 077112) **or**
5. is in Sark³.

1 SS A Act 92, s 150; 2 Reg (EC) 883/04, Art 2; 3 SS Ben (PA) Regs, reg 12

077091 The rate of BB **cannot** be increased where the surviving spouse or surviving civil partner is absent abroad and not ordinarily resident in GB

1. immediately before the date any uprating order takes effect **and**
2. he/she is not in a EEA country or is not covered by EU provisions or a country with which the UK has an agreement which allows the rate to be increased **and**
3. the deceased spouse or deceased civil partner became entitled to Category A RP or died before the date on which the Uprating Order takes effect¹.

1 SS Ben (PA) Regs, reg 5(3)(d)

Example 1

The claimant and her husband are ordinarily resident in Hong Kong. Her husband dies on 1.7.04. The claimant continues to be ordinarily resident in Hong Kong. Bereavement Allowance is awarded from 2.7.04 for 52 weeks, restricted to the rate in force at April 2004, the last uprating before widowhood.

Example 2

A husband and wife are separated, the husband being ordinarily resident in Zimbabwe and his wife in GB. The husband dies in Zimbabwe on 1.3.88. WB is awarded to widow in GB from 1.3.88. The widow continues to be ordinarily resident in GB until 20.3.90, but then becomes ordinarily resident in South Africa. She is not disqualified for receipt of 1988 and 1989 uprating increases but disqualified for receipt of 1990, 1991 and subsequent uprating increases.

077092 BB which is not increased by upratings is referred to as being "frozen". (see DMG 077130 - 077138).

077093 Guidance on the frozen rate of WB before 1.10.89 is in Annex 2.

077094 - 077099

Rate of Widow's/Bereavement Benefit not increased

Absence from Great Britain

077100 A surviving spouse or surviving civil partner is only prevented from receiving the increased rate of benefit whilst he/she is absent from and not ordinarily resident in GB¹.

1 SS Ben (PA) Regs, reg 5(1); R(P) 1/78

Visits to Great Britain

077101 If a surviving spouse or surviving civil partner whose rate of BB has been frozen **visits** GB then whilst in GB he/she will be entitled to the current rate of BB **and** when he/she again leaves GB the rate of BB will revert to the rate that was paid before the visit to GB¹.

1 R(P) 1/78

077102 A surviving spouse or surviving civil partner who returns to GB and becomes ordinarily resident here is entitled to BB at the current rate. If later he/she leaves GB again then the rate of BB is restricted to the last rate received in GB. It does **not** revert to that paid when he/she was last absent from GB¹.

1 SS Ben (PA) Regs, reg 5(3); R(P) 2/67

DM's decision

077103 When the rate of benefit can be increased because of the general uprating¹, the DM decides whether a surviving spouse or surviving civil partner is ordinarily resident in GB immediately before the date of the general uprating².

1 SS A Act 92, s 155(3); 2 s 173(6)(b); R(P) 2/67

077104 Although the DM does not decide whether the rate of benefit will be increased, the effect of that decision needs to be taken into account when awarding BB either on review or following a new claim.

In another European Economic Area country

077105 A surviving spouse or surviving civil partner within the scope of EC provisions and entitled to UK BB remains entitled whilst absent from GB in another EEA country¹.

This includes both

1. temporary absences (for example, holidays) **and**
2. permanent absences.

1 Reg (EC) 883/04, Art 7);

077106 Whilst in the other EEA country the rate of BB **is** increased by uprating orders.

077107 - 077109

Agreements with European Economic Area countries

Introduction

- 077110 EU provisions replace agreements between EEA countries (see DMG 070320)
1. for any person within their personal scope **and**
 2. where the right to benefit was acquired on or after EU provisions applied.
- 077111 For BB a national of a EEA country will generally be covered by EU provisions. Agreements between EEA countries may still apply to non EEA nationals.

Agreements which allow uprating

- 077112 The rate of BB paid to a non EEA national in one of the following countries can be increased because of the general uprating of benefit rates
1. Austria¹
 2. Finland²
 3. Germany³
 4. Iceland⁴
 5. Irish Republic⁵
 6. Norway⁶
 7. Portugal⁷
 8. Spain⁸ **and**
 9. Sweden⁹.

*1 SS (Austria) Order 81, Sch, Art 4(1); 2 SS (Finland) Order 84, Sch, Art 4(1);
3 FA, NI & II (Germany) Order 61, Sch 1, Art 3(2); 4 SS (Iceland) Order 85, Sch, Art 3(1);
5 NI (ROI) Order 66, Sch 1, Art 3(3); 6 SS (Norway) Order 91, Sch, Art 4(1);
7 SS (Portugal) Order 79, Sch, Art 4(1); 8 FA, NI & II (Spain) Order 75, Sch, Art 4;
9 SS (Sweden) Order 88, Sch, Art 4(1)*

077113 - 077119

Pro rata Widow's/Bereavement Benefit under EU provisions

077160 A surviving spouse or surviving civil partner may be entitled to pro rata BB where

1. he/she is within, or the deceased was within the personal scope of EU provisions¹ (see DMG 070050) **or**
2. the deceased spouse or deceased civil partner has paid UK contributions and **either** the deceased has paid contributions, which count for survivor's benefit, in another EEA country or the deceased has been resident in another EEA country and that residence counts for survivor's benefit purposes.

1 Reg (EC) 883/04; Art 2

077161 A surviving spouse or surviving civil partner's entitlement to BB may consist of

1. basic benefit (BPT, WPA or Bereavement Allowance)
2. AP **and**
3. CDI.

077162 The basic benefit can be paid at pro rata rate. To that must be added any entitlement to

1. AP **and**
2. CDI.

For the purposes of EU law CDI are family benefits (see DMG 070165).

077163 Although theoretically AP can be paid at pro rata rate, in practice pro rata AP is never paid.

1 Annex VIII

077164 When the record of UK contributions **and** the insurance record in other EEA countries has been obtained, the DM decides what insurance should be included in the pro rata rate of benefit.

077165 - 077169

Rate of Bereavement Benefit

077170 The rate of BB paid to a surviving spouse or surviving civil partner who satisfies the conditions in DMG 077150 can be paid in two different ways . The higher of the two rates is payable¹.

1 Reg (EC) 883/04., Art 52(3)

077171 The calculation set out in method 2 (see DMG 077173) does not have to be made where the rate of BB using that method is **equal to** or **lower** than the rate of BB under method 1 (see DMG 077172)¹.

1 Reg (EC) 883/04 Art 52(4)UK

Method 1

077172 The DM should calculate the basic component of BB to which, if any, the claimant would be entitled under UK legislation alone, disregarding any insurance or residence which the deceased completed under the legislation of any other EEA country¹. This is the rate of BB to be awarded unless the rate calculated under DMG 077164 is higher².

*1 SS CB Act 92, sec 37 & 38; sec 39(1) & (2); SS (Widow's Benefit & Retirement Pension) Regs, reg 6;
Reg ((EC) 883/04, Art 52(1)(a) 2 52(3)*

Method 2 - pro rata

077173 The rate of BB is calculated in three stages.

Stage 1 - Addition

Add together all the periods of insurance (or residence, if entitlement in that country depends on periods of residence) in all the EEA countries where the deceased was insured and treat them as periods of insurance completed in the UK¹.

Stage 2 - Theoretical rate of Bereavement Benefit

Calculate the theoretical amount of BB which would be payable if all the insurance added together in Stage 1 had been paid in the UK². The theoretical rate of BB will be reduced if the surviving spouse or surviving civil partner became entitled to Bereavement Allowance between the ages of 45 and 55 (see Benefit Specific Guidance)³.

Stage 3 - Actual rate of Bereavement Benefit

The purpose of the calculation of the **actual** rate of BB is to decide the amount to be paid by each of the EEA countries where the late husband or late civil partner was insured⁴.

The rate of BB to be paid by the UK is⁵

$$\frac{\text{Periods of UK insurance}}{\text{total insurance}} \times \text{theoretical rate}$$

*1 Reg (EU) 883/04, Art 6; Art 51(3) 2 Art Art 52(1)(b)(I); 3 SS CB Act 92, sec 38(1) & 39(4);
4 Case 793/79, Menzies; 5 Reg (EU) 883/04 Art 52(1)(b); R(S) 3/85*

Example

The widow's husband was insured in the UK for 1150 weeks and in Germany for 500 weeks. The total insurance is 1650 weeks.

If all that insurance had been paid in the UK the widow would be entitled to WP at 75% of the standard rate. At April 2013 figures this is £105.95.

The actual rate of WB to be paid by the UK is

$$\frac{1150 \text{ (UK insurance)}}{1650 \text{ (total insurance)}} \times \text{£105.95 (theoretical amount)}$$

That is £73.84.

- 077174 The pro rata rate of WB can be paid even though that rate is less than 25% of the UK standard rate¹.

1 SS (Widow's Benefit & Retirement Pension) Regs, reg 6(1)

Child Dependency Increase paid with Widowed Mother's Allowance

- 077175 CDI paid with WPA is a family benefit and entitlement is decided separately from the personal BB.

Minimum age for Widow's Pension/Bereavement Allowance entitlement

- 077176 The minimum age for entitlement to UK Bereavement Allowance is 45¹. A surviving spouse or surviving civil partner below that age is still not entitled to Bereavement Allowance even though the deceased was insured in another EEA country.

1 SS CB Act 92, s 39B

077177 - 077189

Pro rata insurance

Insured in one country for less than one year

077190 An award of pro rata BB need not be made if

1. the period of insurance (or residence) in that country is less than one year (but see DMG 077191) **and**
2. that insurance does not satisfy the conditions for entitlement to BB¹.

1 Reg (EC) 8823/04 Art 57(1)

077191 Insurance periods of less than a year are included in

1. adding together all periods of insurance **and**
2. calculating the theoretical amount.

They are not included in deciding the pro rata rate of BB¹.

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

Not insured in any country for one year

077192 The total insurance of a person from all the countries in which that person has been insured is treated as being completed in the country in which the person was last insured if¹

1. that person has not been insured for one year in any country **and**
2. BB would not be awarded in any country.

If the country where the person was last insured is the UK, that person will be entitled to BB if the total insurance is sufficient to satisfy the conditions of entitlement in the UK.

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

077193 - 077194

Uprating of pro rata Bereavement Benefit

077195 The pro rata fraction is not recalculated when the rates of benefit are increased¹.
But the rate of BB is increased.

1 Reg (EC) 883/04, Art 59(2)

Example

On becoming entitled to UK WB the pro rata fraction was 1150/1650 (see DMG 077173). This meant that the actual rate of UK WB was £30.11. At the general uprating of benefit in April 1995 rates the full rate of WB was increased from £57.60 to £58.85.

The pro rata fraction remains the same but the actual rate being paid increases from £30.11 to £30.76.

The new calculation of the actual rate of WB is

$$\frac{1150}{1650} \text{ (UK insurance)} \times \text{£}44.14 \text{ (theoretical amount)}$$

that is £30.76.

077196 - 077199

Not entitled to Bereavement Benefit in all European Economic Area countries

077200 A surviving spouse or surviving civil partner may **not** be entitled at the same time to BB from every EEA country in which the deceased was insured. For example, each of those countries may have different minimum ages at which a surviving spouse or surviving civil partner can become entitled to BB (in the UK the minimum age for Bereavement Allowance is 45).

077201 The rate of pro rata BB is calculated by deciding which of the following are better for the claimant

1. using the insurance (or residence) only from more countries where the conditions for entitlement to RP are satisfied **or**
2. using the insurance (or residence) from all the EEA countries where the person has been insured¹.

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

077202 - 077204

New Zealand

Entitlement to WB/BB

077220 A person who is entitled to BB because residence in New Zealand has been taken into account under these agreements remains entitled whilst permanently resident (see DMG 077222) in the UK or in the EEA or Switzerland¹.

1 SS (New Zealand) Order 83, Sch, Art 11

End of entitlement to increased BB

077221 Entitlement to the **increased** rate of BB ends where

1. a person is entitled to BB because of the Agreement **and**
2. that person is no longer permanently resident (see DMG 077222) in the UK¹.

The surviving spouse or surviving civil partner remains entitled to BB based on the UK record.

1 SS (New Zealand) Order 83, Sch, Art 1(1) & 11(4)

Permanently and ordinarily resident

077222 The DM decides whether a person is resident in the UK.

077223 Under the New Zealand Agreement a person is permanently resident in the UK if

1. that person is **ordinarily resident** (see DMG 070769) in the UK¹ **and**
2. the absence from the UK is only temporary (see DMG 070853)².

1 SS (New Zealand) Order 83, Sch 1, Art 1(1)(5); 2 Art 11(4)

077224 - 077229

Overlap under reciprocal agreements

Introduction

077230 UK provisions do **not** provide for UK BB to be adjusted where BB is also being paid by a country with which the UK has an agreement.

077231 BB paid on a pro rata basis is **not** adjusted because it overlaps with pro rata BB paid by the other country. Each country will pay either

1. pro rata BB **or**
2. if higher, the rate payable under its own legislation.

077232 The countries with which the UK has agreed to pay pro rata BB are listed at DMG 077205. Pro rata BB is **not** paid under the agreement with New Zealand.

077233

Northern Ireland

077234 BB is paid only by the territory where the person is residing. A person who has paid contributions in GB or Northern Ireland has only one contribution record. That record is transferred if the person moves to live in another territory¹.

1 SS (I of M) Order 77, Sch 1, Art 3 & 4; SS (N Ireland Reciprocal Arrangements) Regs 76, Sch 1, Art 4 & 5

