

Department for Work and Pensions

DECISION MAKING AND APPEALS (PART OF STRATEGIC COMMUNICATIONS)

Decision Makers Guide

Volume 2

Amendment 39 – Feb 2018

1. This letter provides details on Amendment 39; 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

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

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Amendment 39 affects Chapter 7, Part 03. The changes are

- para. 072823 amendment to spare paras
- para. 072828 Involuntary unemployment – new para
- para. 073829 Meaning of “involuntary unemployment” – new para
- para. 073830 072831 - Undue delay – new paras
- para. 073832 – 072840 new spare paras
- para. 073197 croatia deleted from text
- para. 073252 Note 2 added cross referencing 073445
- para. 073446 clarification of para text
- para. 073729 example added to text

3. **For reference purposes Decision Makers may find it useful to retain deleted pages for a short period after the introduction of this package.**
4. 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

AA	Attendance Allowance paid under s 64 of the SS (CB) Act 92
"AA"	Attendance Allowance as defined in IS (Gen) Regs, reg 2(1) or JSA, reg 1(3)
ADC	Actual Date of Confinement
ADF	Adviser Discretion Fund
ADI	Adult Dependency Increase
AFIP	Armed Forces Independence Payment
AIP	Assessed Income Period
AMG	Appropriate Minimum Guarantee
AP	Additional Pension
APP	Adoption Pay Period
Art	Article
ASE	Actively seeking employment
AT	Appeal Tribunal
AWT	All Work Test
BA	Bereavement Allowance
BACS	Bankers Automated Clearing System
BB	Bereavement Benefits
BL	Board and Lodging
BP	Basic Pension/Bereavement Premium
BPT	Bereavement Payment
BSP	Bereavement support payments
BTEC	Business and Technology Education Council
BWC	Benefit Week Commencing
BWE	Benefit Week Ending
CA	Carer's Allowance
CAA	Constant Attendance Allowance
Cat	Category
CB	Contributory Benefit
CC	Community Charge
CDI	Child Dependency Increase
CECSC	Council of European Social Charter
CHB	Child Benefit
CHB(LP)	Child Benefit for Lone Parents
CJEU	Court of Justice of the European Union
CMB	Child Maintenance Bonus
CMP	Child Maintenance Premium
CP	Carer Premium
CPen	Civil Penalty
CSM	Child Support Maintenance

CT	Council Tax
CTA	Common Travel Area
CTB	Council Tax Benefit
CTC	Child Tax Credit
CTF	Community Task Force
CTM	Contribution to Maintenance
CWP	Cold Weather Payment
CwP	Community work Placements
DCP	Disabled Child Premium
DCT	Direct Credit Transfer
DH	Department of Health
Dis G	Disablement Gratuity
Dis P	Disablement Pension
DLA	Disability Living Allowance
DM	Decision Maker
DMA	Decision Making and Appeals
DMG	Decision Makers Guide
DO	District Office
DP	Disability premium
DPTC	Disabled Persons Tax Credit
DWA	Disability Working Allowance
DWP	Department for Work and Pensions
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECsMA	European Convention on Social & Medical Assistance
EctHR	European Court of Human Rights
EDP	Enhanced Disability Premium
EEA	European Economic Area
EFC	Earnings factor credits
EFTA	European Free Trade Association
ELDS	Eligible loan deduction scheme
Emp O	Employment Officer
EO	Employment Option of New Deal for young people
EO(E)	Employed Employment Option
EO(S/E)	Self-Employed Employment Option of the New Deal for young people
EPP	Enhanced Pensioner Premium
ERC	Employment Rehabilitation Centre

ERA	Employment Retention and Advancement
ESA	Employment and Support Allowance
ESA(Cont)	Employment and Support Allowance (contributory allowance)
ESA(IR)	Employment and Support Allowance (income-related allowance)
ESA(Y)	Employment and Support Allowance for those with limited capability for work in youth
ESDA	Exceptionally Severe Disablement Allowance
ET	Employment Training
ETFO	Environment Task Force Option of New Deal for young people
EU	European Union
EWC	Expected Week of Confinement
EZ	Employment Zone
FamC	Family Credit
FAS	Financial Assistance Scheme
FND	Flexible New Deal
FP	Family Premium
FP(LP)	Family Premium (Lone Parent Rate)
FRIY	Flat Rate Introduction Year
FRM	Flat Rate Maintenance
F/T	Full-Time
FTE	Full-Time Education
FTET	Full-Time Education and Training Option
FtT	First-tier Tribunal
GA	Guardian's Allowance
GB	Great Britain
GC	Guarantee Credit
GCE	General Certificate of Education
GCSE	General Certificate of Secondary Education
GMP	Guaranteed Minimum Pension
GNVQ	General National Vocational Qualification
GP	General Practitioner
GPoW	Genuine Prospect of Work
GRB	Graduated Retirement Benefit
GRC	Gender Recognition Certificate
GRP	Gender Recognition Panel
HA	Health Authority
HB	Housing Benefit
HBS	Housing Benefit Supplement
HCP	Health care professional
Hep C	Hepatitis C

HIV	Human Immunodeficiency Virus
HM	Her Majesty
HMF	Her Majesty's Forces
HMRC	Her Majesty's Revenue and Customs
HO	Home Office
HPP	Higher Pensioner Premium
HRP	Home Responsibilities Protection
IA	Industrial Accident
IAP	Intensive Activity Period for those aged 25 and over and under 50
IAP for 50+	Intensive Activity Period for those aged 50 or over
IB	Incapacity Benefit
IBLT	Long-term Incapacity Benefit
IBS	Infected Blood Scheme
IBST	Short-term Incapacity Benefit
IBST(H)	Higher rate of short-term Incapacity Benefit
IBST(L)	Lower rate of short-term Incapacity Benefit
IB(Y)	Incapacity Benefit for those incapacitated in youth
IC	Intermittent Custody
IDB	Industrial Death Benefit
IFM	Immediate Family Member
IfW	Incapacity for Work
II	Industrial Injury(ies)
IIDB	Industrial Injuries Disablement Benefit
Incs	Increments (of Retirement Pension)
IND	Immigration and Nationality Department
IPC	International Pension Centre
IPPIW	Immediate Past Period of Incapacity for Work
IS	Income Support
IT	Industrial Tribunal (now Employment Tribunal)
IVA	Invalidity Allowance
IVB	Invalidity Benefit
IVP	Invalidity Pension
IVS	Invalid Vehicle Scheme
JSA	Jobseeker's Allowance
JSA 18-21 Pilot Scheme	Jobseeker's Allowance 18-21 Work Skills Pilot Scheme
JSA(Cont)	Contribution based JSA
JSAg	Jobseeker's Agreement
JSA(IB)	Income based JSA
JSD	Jobseeker's Direction
JSP	Jobseeking Period

LA	Local Authority
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	Liabile 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
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
PWHS	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
SIBSS	Scottish Infected Blood Support Scheme
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
SSI	Scottish Statutory Instrument
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
TT	Thalidomide Trust
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
WHP	Work and Health Programme
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
WSI	Welsh Statutory Instrument
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

Part 3 - Habitual residence & right to reside - IS/JSA/SPC/ESA

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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.

072818 - 072820

Retaining worker status

Temporary illness or accident

072821 A worker retains worker status when he

1. stops working **and**
2. is temporarily unable to work due to illness or accident¹.

Note 1: These retained workers are not subject to their right to reside status ending after six months and do not therefore have to satisfy a GPoW assessment (073080 et seq)

Note 2: For retaining the status of being a self-employed person, see 072861.

Note 3: The illness or accident which results in a worker being temporarily unable to work must be suffered by that worker².

1 Imm (EEA) Regs 2016, reg 6(2)(a); 2 CIS/3182/2005, para 20

Involuntary unemployment - Employed in the UK for one year or more

072822 Workers retain worker status when they stop working, after having worked as an employee in the UK for **one year or more** provided¹ the person

1. has registered as a jobseeker with the relevant employment office **and**
2. is in duly recorded involuntary unemployment after having been in genuine and effective work for **one year or more and**
3. can provide evidence that they are seeking employment and have a genuine chance of being engaged.

Note: See also 072810 to 072817 for guidance on whether the person was a worker the first place

1 Imm (EEA) Regs 2016, reg 6(2)(b);

Involuntary unemployment - Employed in the UK for less than one year

072823 DMG 072822 sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee for one year or more and then becomes involuntarily unemployed. This paragraph sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee in the UK for **less than one year**. A person who¹

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

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.

1 Imm (EEA) Regs 2016, reg 6(2)(e); 2 reg 6(3)

Vocational Training

072824 Workers can retain worker status when they

1. are involuntarily unemployed and have embarked on vocational training¹ **or**
2. have voluntarily ceased working and have embarked on vocational training that is related to the person's previous employment².

1 Imm (EEA) Regs 2016, reg 6(2)(d); 2 reg 6(2)(e)

072825

Meaning of “registered as a jobseeker”

072826 On 18.12.09 a UT decided the case of an EEA national who claimed IS. She had completed a habitual residence questionnaire, answering yes to the question “Are you looking for work in the UK?” and submitted the questionnaire to a Jobcentre Plus Office. The UT held¹ that the Secretary of State had not put in place any formal system for registration, the claimant had satisfied the requirement to register by her statement on the questionnaire. The Court of Appeal later confirmed the UT's decision².

1 SSWP v FE [2009] UKUT 287 (AAC), CIS/184/08;

2 Secretary of State for Work and Pensions v Elmi [2011] EWCA Civ 1403

072827 Consequently, with effect from 18.12.09 onwards where a claimant

1. makes a claim for IS, ESA(IR) or SPC, **and**
2. is a migrant worker from another EEA state, **and**
3. has worked in the UK but is currently unemployed **and**
4. has declared on the claim form or otherwise in the course of making the claim (including on the habitual residence form) that they are looking for work, but has **either**
 - 4.1. not claimed JSA or NI credits, **or**
 - 4.2. has made a claim for JSA or NI Credits which has failed **and**

5. can establish that they continue to seek employment in the UK

it should be accepted that the claimant is not a person from abroad/person not in GB.

Involuntary Unemployment

072828 DMG 072822 and 072823 set out the conditions which need to be satisfied for a person to retain their worker status¹. These conditions are that

1. the claimant must be in involuntary unemployment **and**
2. the involuntary unemployment must be duly recorded **and**
3. the claimant must have registered as a jobseeker with the relevant employment office **and**
4. the claimant can provide evidence that they are seeking employment and have a genuine chance of being engaged.

1 Imm (EEA) Regs 2016, reg 6(2)(b) & (c); Directive 2004/38/EC, Art. 7(3)(b)

The meaning of “involuntary unemployment”

072829 The concept of involuntary unemployment is interpreted as meaning that the person retains a link with the labour market¹. That is determined by having regard to

1. the reasons why the previous employment ended **and**
2. the person's intention **and**
3. the person's activities after leaving their employment.

Note: The reasons why the previous employment ended are relevant considerations as to whether or not the claimant is genuinely still in the labour market, but those reasons are not necessarily the determining factor. They provide the context for a person's activities after they have left their employment².

1 R(IS)12/98; Case C-413/01 Ninni-Orasche [2003] ECR I-13217; 2 CIS/3315/2005 & CIS/2423/2009

Undue delay

072830 Consideration should be given to the timeliness within which the conditions for retaining worker status are satisfied and whether there has been any undue delay between the end of employment and the claim to JSA. In order to retain worker status, the claimant must act promptly and without undue delay¹.

1 CIS/2423/09

072831 Where there is a delay of more than a few days between the end of employment and the making of a claim to JSA, the DM should make enquiries into the reasons for, and circumstances of, any delay. What the claimant did between the ending of employment and their claim to JSA, will be determining factors as to whether there are reasonable grounds for the delay, such that it is not right to regard it as an undue delay. It follows that the longer the delay, the more compelling the reasons must be for it.

Example

Maria, a Spanish national, has been working for her employer for 14 months, working set shift patterns. Following a change to her shift patterns, Maria now has difficulty with travel arrangements for the late shift. Maria's employer will not let her deviate from the new shift pattern, stating that she must work the same shifts as her colleagues. Maria gives her notice and looks for work closer to home whilst she is working her notice. Once her employment ceases, Maria does not claim JSA immediately, although she continues to look for work, contacting prospective employers. After a month, Maria claims JSA. The DM determines that

- Maria's employment ended due to a change in her shift pattern which was outside Maria's control and
- Maria's intention was to find another job and that she had commenced looking for alternative work whilst working her notice and
- Once her employment ceased, Maria continued looking for work, contacting prospective employers.

When the DM considers the one month delay in Maria's claim to JSA, Maria explains that she had not claimed JSA immediately after ceasing employment because she was confident of getting another job quickly. She had provisionally been offered a job which was due to start the day before she made her claim to JSA, but at the last minute, the job had fallen through. Maria produced a letter from the company giving details of why the job was no longer available. The DM determines that there are reasonable grounds for the delay and that Maria remained in the labour market between the ending of her employment and the date of making her claim to JSA. Consequently Maria retains her worker status.

072832 - 072840

Self-employed persons

072841 In the context of EU rights to reside it is the EU law meaning of self-employed that has to be applied. EU law distinguishes between "workers" (who are persons who perform "services for and under the direction of another person in return for which he receives remuneration"¹) and self-employed (who are "independent providers of services who are not in a relationship of subordination with the person who receives the services"²). The CJEU has also stated³ that the following three factors are characteristic of self-employment

1. there is no relationship of subordination concerning the choice of activity, working conditions and conditions of remuneration **and**
2. the activity is engaged under the person's own responsibility **and**
3. the remuneration is paid in full to the person so engaged directly.

In addition self-employed earners derive their right to move and reside from article 49 of the TFEU rather than article 45 which applies to workers.

1 Case C-357/89 Raulin v Minister Van Onderwijs en Wetenschappen;

2 Case C-256/01 Allonby v Accrington and Rossendale College;

3 Case C-268/99, Jany v Staatssecretaris van Justitie

072842 Questions may arise as to whether (for the purposes of the EU right to reside) at any particular moment in time a claimant is a self-employed person. An Upper Tribunal Judge has said this¹

“I do not accept that a claimant who is for the moment doing no work is necessarily no longer self-employed. There will commonly be periods in a person’s self-employment when no work is done. Weekends and holiday periods are obvious examples. There may also be periods when there is no work to do. The concept of self-employment encompasses periods of both feast and famine. During the latter, the person may be engaged in a variety of tasks that are properly seen as part of continuing self-employment: administrative work, such as maintaining the accounts; in marketing to generate more work; or developing the business in new directions. Self-employment is not confined to periods of actual work. It includes natural periods of rest and the vicissitudes of business life. This does not mean that self-employment survives regardless of how little work arrives. It does mean that the issue can only be decided in the context of the facts at any particular time. The amount of work is one factor. Whether the claimant is taking any other steps in the course of self-employment is also relevant. The claimant’s motives and intentions must also be taken into account, although they will not necessarily be decisive”.

DMs will have to arrive at a judgement based on all the facts of the case in accordance with this guidance.

1 SSWP v JS [2010] UKUT 240 (AAC)

072843 In order for a person to be regarded as self-employed for the purposes of the right to reside, the condition that the work involved be genuine and effective must also be satisfied (see DMG 072816 & 072817).

072844 Unless Tier 1 of the MET (DMG 073038) is satisfied to establish that the self-employed work is genuine and effective, the DM should consider all the circumstances of each particular case. Factors to consider may include

1. periods of actual work
2. monies received for such work
3. administration tasks relating to the business
4. maintaining accounts
5. marketing work to generate more work
6. development of business in new directions

7.

8. receipts for tools, stock or materials purchased

This is not an exhaustive list.

072845 A person must have more than an intention to be self-employed. They must provide evidence of the steps taken, or the ways used to set up their self-employment¹.

1 R(IS)6/00

072846 It helps to have registered with HMRC as a self-employed person. However, a person not registered with HMRC does not necessarily mean that they are not self-employed. Registration with HMRC may be one of the factors towards establishing that the person has self-employed status. However that registration should link to genuine and effective work (see 072843).

072847 - 072860

Retaining the status of being a self-employed person

072861 A self-employed person retains that status only if he is unable to work temporarily as a result of an illness or accident¹.

1 Imm (EEA) Regs 2016, reg 6(4); R (on the application of Marian Tilianu) v Social Fund Inspector and SSWP [2010] EWCA Civ 1397

Note: the illness or accident which results in a self-employed person being temporarily unable to work must be suffered by that self-employed person.

072862 – 072899

Family members of workers and self-employed persons

072900 Family members of persons referred to in 072800 **1.** and **2.** have the same rights of residence as those persons and are entitled to reside in the UK for as long as they remain family members of a worker or s/e person or someone who retains the status of worker or s/e person. These family members are deemed **not** to be persons from abroad/not in GB (see DMG 072800 **3.**). The following are family members for these purposes¹

1. spouse 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.

Note: if certain conditions are met, family members of British citizens have the same EU law rights to reside as they would if they were a family member of another EEA state² (see DMG 073254 et seq for full details of the conditions). Thus where the conditions are satisfied and the British citizen would fall within the terms of DMG 072800 **1.** and **2.**, if they were a national of another EEA state, their family members should be treated in the same way as a family member described in DMG 072800 **3.** As such they will not be a “person from abroad” for the purposes of IS, JSA(IB) and ESA(IR). Nor will they be a person treated as not in GB for the purposes of SPC.

1 Directive 2004/38/EC, art 2; 2 Imm (EEA) Regs 2016, reg 9

Meaning of “dependent”

072901 Direct descendants aged 21 or over (see 072900 **2.2**) and any relatives in the ascending family line (see 072900 **3.**) must prove they are dependent on the EEA national or his spouse or civil partner. A UT Judge has analysed the EU case law on the meaning of “dependent” in this context. He summarised that case law¹ as finding that²

- 1.** a person is only dependent who actually receives support from another **and**
- 2.** there need be no right to that support and it is irrelevant that there are alternative sources of support available **and**
- 3.** that support must be material³, although not necessarily financial, and must provide for, or contribute towards the basic necessities of life.

1 Case C-316/85, Centre Public D’Aide Sociale de Courcelles v Lebon; Case C-2000/02, Chen v Secretary of State for the Home Department; Case C-1/05, Jia v Migrationsverket;

2 CIS/2100/07; 3 C-423/12 Reyes

072902 - 072985

A claimant given one of the above is not a person from abroad (or a person not treated as in GB for SPC purposes) for as long as the leave lasts, including periods when he/she has applied in time for an extension of leave.

073190

Destitution domestic violence concession

073191 Since 1.4.12, individuals who came to the UK or were granted leave to stay in the UK as the spouse or partner of

1. a British citizen **or**
2. someone settled in the UK

and whose relationship has broken down due to domestic violence have been able to apply to the Home Office for three months limited leave to remain (granted outside the Immigration Rules) pending consideration of an application for indefinite leave to remain.

073192 The Home Office consider whether:

1. the applicant entered the UK or was given leave to remain in the UK as a spouse, civil partner, unmarried or same sex partner of a British Citizen or someone present and settled in the UK **and**
2. the relationship has broken down due to domestic violence **and**
3. they do not have the means to access accommodation or to support themselves and need financial help **and**
4. they will apply to stay permanently in the UK under the Destitution Domestic Violence immigration rule¹.

If the Home Office accepts that someone satisfies all 4 of the conditions above it will issue the applicant with letters notifying the start and end date for 3 months limited leave to remain in the UK. During this 3 month period the claimant must apply to stay permanently under the Domestic Violence immigration rule¹.

1 Immigration Rules, rule 289B

073193 If the person has made an application to stay permanently within the 3 month period but the Home Office has not yet made a decision by the end of the 3 month period, the period of limited leave under the Destitution Domestic Violence concession continues until the final decision is made. In these circumstances (i.e. where an application has been made within the 3 month period but the Home Office has not made a decision within that 3 month period) where the final decision is a refusal to grant indefinite leave to remain, the limited leave continues for a further 10 days after the Home Office decision is sent to the applicant.

073194 During any period when a person has limited leave under the Destitution Domestic Violence concession (including the periods of extension described in DMG 073193 above), that person does not have to satisfy the requirement that they be habitually

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 21AA(4)(h); ESA Reg, reg 70(4)(h); JSA Regs, reg 85A(4)(h); SPC Regs, reg 2(4)(h)

Asylum seekers

073195 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

073196 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

073197 Therefore an asylum seeker from 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

Claimant unable to provide documentary evidence of nationality

073198 The claimant has primary responsibility to provide documentary evidence of their nationality, to support their continued residence in the UK. If the claimant has not provided sufficient evidence to the DM to confirm that they have leave to enter or remain in the UK with recourse to public funds, they will be a person subject to immigration control.

073199 Evidence of nationality must be in the form of

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

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

3. direct ascendant relatives of the EEA national, his spouse or civil partner, who are dependants **or**
4. extended family members (see DMG 073293)

Note 1: See DMG 072901 for advice on dependency

Note 2: See the Note to DMG 073445 for guidance in respect of a child under the age of 21 where they are estranged from their parents.

1 Imm (EEA) Regs 2016, reg 7(1)

073253

Family Members of British Citizens

073254 If certain conditions are satisfied, family members (as defined in DMG 073252) of British citizens have the same EU law rights to reside as they would if they were a family member of another EEA state¹. Those conditions were amended with effect from 1.1.14 but there are some transitional provisions. The following guidance gives the conditions as they were before 1.1.14, then the new conditions and finally the details of the transitional provisions.

1 Imm (EEA) Regs 2016, reg 9

073255

The old rules

073256 Prior to the amendment described below, a person who was a family member of a British citizen ("BC") enjoyed the same rights to reside as if they were a family member of an EEA national but only if

1. the BC was either
 - 1.1 residing in an EEA State as a worker or S/E person **or**
 - 1.2 so residing before returning to the UK **and**
2. if the family member was the spouse or civil partner of the BC, they were living together in the EEA state where the BC was residing as a worker or S/E person as in **1.1 or**
3. had married or entered into a civil partnership before the BC returned to the UK after having resided in an EEA state as a worker or a S/E person as in **1.2.**

073257

The new rules

073258 With effect from 25.11.16, a person who is a family member (as defined in 073252) of a British citizen (BC) has the same rights to reside in the UK as if they were the family member of a national of any other EEA state, provided that the following conditions are satisfied¹

1. the BC
 - 1.1 was residing in an EEA state (other than the UK) as a worker, S/E person, self-sufficient person or student immediately before returning to the UK **or**
 - 1.2 had acquired a right of permanent residence in an EEA state **and**
2. the family member and BC resided together in the EEA state **and**
3. the family member and BC's residence in the EEA state was genuine.

Note: For the purposes of 1.2 the BC is only to be treated as having acquired the right of permanent residence in the EEA state², if such residence would have led to the acquisition of the right of permanent residence³, had it taken place in the UK.

1 Imm (EEA) Regs 2016, reg 9(2); O&B (C-456/12); 2 Imm (EEA) Regs 2016, reg 9(6); 3 reg 15

073259 From 25.11.16, factors that are relevant to whether residence in an EEA state (other than the UK) is or was genuine, include¹

1. whether the centre of the BC's life transferred to the EEA state **and**
2. the length of the family member and BC's joint residence in the EEA state **and**
3. the nature and quality of the family member and BC's accommodation in the EEA state and whether it is or was the BC's principal residence **and**
4. the degree of the family member and BC's integration in the EEA state **and**
5. whether the family member's first lawful residence in the EU with the BC was in an EEA state.

1 Imm (EEA) Regs 2016, reg 9(3)

073260 There is no application¹ of the regulation in the circumstances where

1. the purpose of the residence of the BC in the other EEA state was as a means to circumvent any immigration laws² applicable to any non-EEA family members to have leave to enter or remain in the UK **or**
2. a person is only eligible to be treated as a family member as a result of being an extended family member³ (see 073293).

1 Imm (EEA) Regs 2016, reg 9(4); 2 Immigration Act 1971; 3 Imm (EEA) Regs 2016, reg 7(3)

073261 Where it is necessary to treat a BC as though the BC were an EEA national¹, for the purposes of determining whether the BC would be a qualified person² (see 073238)

1. any requirement to have comprehensive sickness insurance (see 073244 – 073246 and 073249) cover in the UK still applies, except that cover is not required to extend to the BC **or**
2. in assessing whether the BC can continue to be treated as a retained worker³, the BC is not required to satisfy condition A⁴ (see 073084) **or**

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.

073439 – 073441

Sanctions & Disallowances of JSA

073442 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.

073443 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

a disallowance), they will get the balance (if any) of their relevant period. A period of disallowance would therefore break the continuity for the calculation towards the 5 year period for permanent residence.

Separation from EEA partner

073444 Family members have an automatic right of residence in the UK for as long as they remain the family member of an EEA national¹ who

1. is entitled to reside in the UK for an initial period of three months **or**
2. is a qualified person **or**
3. has a right of permanent residence (DMG [073250](#)).

The meaning of family member² includes (amongst others) a spouse or civil partner (DMG [073252](#) 1.)

1 Imm (EEA) Regs 2016, reg 14(2); 2 reg 7(1)(a)

073445 Where there has been a breakdown in the relationship and the spouse or civil partner no longer live in the same household as the EEA national, the spouse or civil partner is still considered to be a family member for as long as

1. the relationship between the spouse or civil partner and the EEA national has not been dissolved **and**
2. the EEA national continues to be a qualified person, or have a permanent right to reside¹.

If they later get divorced or legally terminate their civil partnership, the spouse or civil partner will only have a right to live in the UK if they satisfy the conditions² relating to a family member who has retained the right of residence (DMG [073300](#)).

Note: The breakdown in the relationship can also include a child under the age of 21, who is estranged from their parents. Such a child remains a family member without being in the same household³.

1 Imm (EEA) Regs 2016, reg 14(2); Diatta (C-267/83); 2 Imm (EEA) Regs 2016, reg 10; 3 reg 7(1)(b)(i)

073446 Where there has been a breakdown in the relationship and the claimant wishes to demonstrate permanent residence, the onus is on the claimant to provide documentary evidence of their EEA national sponsor. Where the claimant has been the victim of domestic violence (DMG 21369) and so cannot provide anything other than oral evidence to demonstrate their residency status, the DM should adopt a pragmatic approach. It must be remembered that a claimant's oral statement is evidence (DMG 01400). Where oral evidence is the only evidence available, the DM must decide on the balance of probability (DMG 01343) whether the claimant has discharged the burden of proof (DMG 01405 et seq).

Note: This guidance does not cover a couple who are LTAMC.

Deportation orders

073447 An EEA national (or family member of an EEA national) may be deported from the UK, where it is decided that the person's removal is justified on the grounds of public policy, public security or public health¹.

1 Imm (EEA) Regs 2016, reg 23(6)(b); Immigration Act 1971, s.3(5), s.5 & Sch3

073448 A person exercising a right to reside under the Imm (EEA) Regs 2016 (for example, a permanent right of residence) continues to hold that status until such time as a deportation order is served¹.

Note: DMs should note that it is the serving of the deportation order itself (not the decision to make such an order) that invalidates any leave to remain in the UK that was given to the person before the deportation order was made².

1 Imm (EEA) Regs 2016, reg 23(9); 2 Immigration Act 1971, Sch 3, para 2(2)

073449

Example 1

On 4.2.18, Alex returned to the UK after undertaking a 12 week placement in Tanzania. This was a voluntary placement with the International Citizen Service, a scheme funded by the UK Government Department for International Development (DfID). Alex makes a claim to JSA from 5.2.18.

As this was a recognised voluntary scheme funded by DfID, which from the outset was temporary in nature (i.e. a 12 week programme), and as the claimant's intention was to return to the UK following the end of the programme, the DM determines that Alex's centre of interest remained in the UK during his absence, that the absence was temporary and that Alex did not lose his habitual residence during the period of his absence.

Example 2

Karen has British nationality. In December 2010 she left the UK to live and work in the United States. In January 2013, when her two year employment contract came to an end, Karen returned to the UK. She claimed JSA on 18.1.13. It emerged that, during her absence, Karen had retained a property here and had continued to pay the mortgage on it. She had put the bulk of her belongings in storage in the UK. She had also returned to the UK twice a year. The DM decided that Karen was resuming her previous habitual residence here immediately on her return.

073730 - 073745

