

03-24: Self-sufficiency and the WV decision

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Introduction

1. The purpose of this memo is to:

1. inform DMs about a recent Upper Tribunal (UT) decision¹ which deals with the definition of self-sufficiency in relation to an EEA national relying on their UK partner's legacy benefits in order to be considered self-sufficient as a right to reside for the purposes of access to benefits;
2. instruct DMs how to proceed with affected cases, and
3. instruct DMs how the First-tier Tribunal (FtT) should be advised in dealing with lookalike cases where a DM's decision has already been made and an appeal is received.

[1 SSWP v WV \[2023\] UKUT 112 \(AAC\)](#)

2. The UT decision in WV found that EEA nationals who rely on their UK partners' legacy benefits

may be considered as self-sufficient under specific circumstances and so potentially entitled to Universal Credit (UC). The UT decision was handed down on 15 May 2023 and it will affect cases from this date. Whilst the UT decision concerned a claim to UC, it is considered that the decision has implications in respect of claims to State Pension Credit (SPC) as well.

3. The Secretary of State has applied to the Court of Appeal for permission to appeal the UT's decision to that Court (the UT having refused permission to appeal) and permission has been granted.

THE UT decision

Background

4. The claimant, WV, is a Belgian national who came to the UK in May 2017 and married his British spouse, J, in June 2017. WV was granted pre-settled status (PSS) under the European Union Settlement Scheme (EUSS) in November 2019. WV never worked in the UK but after their marriage he, effectively, lived on J's income-related Employment and Support Allowance (ESA(IR)) and other benefits paid to J (Personal Independence Payment, Child Tax Credit, Child Benefit, and Housing Benefit), plus the Carer's Allowance (CA) paid to WV for caring for J from September 2017. When WV joined the household J started receiving the couple rate of ESA(IR), but because of the effects on the various premiums (and taking into account WV's CA) the overall amount of ESA(IR) paid to J decreased.
5. Following a move to a new local authority area in 2020, J was required to make a claim to UC. J and WV made a joint claim to UC on 28 July 2020. J's side of the claim was allowed as she is a British national who habitually resides in GB. WV was made an ineligible partner from the date of claim as he was considered not to have a qualifying right to reside for the purpose of claiming UC.
6. This decision was upheld at the Mandatory Reconsideration (MR) stage but was then revised by the FtT who allowed WV's appeal on 7 January 2021 (on different grounds which WV did not seek to uphold before the UT). DWP appealed to the UT, and on 15 May 2023 the UT allowed DWP's appeal but found WV to have a right to reside as a self-sufficient person and so to be entitled to UC.

Affected claims

7. It is not fully clear from the UT's reasoning which cases are potentially likely to be affected by the UT's decision. Pending the potential reversal of the UT decision, or otherwise clarification of the position, by the Court of Appeal, DMs should proceed on the basis that at least the cases identified below are potentially affected by the UT decision. The effect of the UT decision appears to be that an EEA national may be considered as having been self-sufficient for the

purpose of claiming SPC when they satisfy all of the below conditions:

1. have PSS;
2. do not have any other right to reside;
3. rely on their UK partner's legacy benefits (for which the benefit award was calculated at the couple rate) to be considered as self-sufficient and
4. then make a claim to SPC with their UK partner.

Note 1. The previous legacy benefit would have been claimed only by the UK partner but paid at couple rate.

Note 2. Where the UK partner was not in receipt of a legacy benefit immediately before making a joint claim to SPC with an EEA national, their SPC claim will not be affected by this UT decision.

List of relevant legacy benefits

8. The following legacy benefits are relevant for the purposes of paragraph 7.3 above, when establishing the benefit history of the UK partner on affected claims:
 1. Income-Related Employment and Support Allowance
 2. Income-Based Jobseekers Allowance
 3. Income Support
 4. Housing Benefit
 5. Working Tax Credit
 6. Child Tax Credit

Note. Relevant legacy benefits are means-tested benefits that allow couple rate payments, for which a claimant's partner does not have to satisfy a right to reside test.

Action for DMs

EEA national is the claimant

9. As the Secretary of State is appealing the decision to the Court of Appeal, DMs should stay¹ making a decision on affected claims where the EEA national is the claimant.

1 SSA 98, s 25(2)

10. Equally, if the EEA claimant applies for a revision or supersession of a disallowance decision through an MR, on the grounds that the UT decision means that they are entitled to benefit, the DM should stay¹ making a decision in response.

1 SSA 98, s 25(5)

11. Full guidance on staying can be found in Chapter 4 of the Suspension and Termination Guide. This can be found in the list of “Our Publications” on the DMA (Leeds) intranet site or on DWP’s internet site. Where a claimant states they will be placed into hardship if the decision on their claim is stayed, please refer the case to DMA (Leeds).

12. There is no right of appeal against a decision to stay¹.

1 SS CS (D&A) Regs 1999, Sch 2 para 7

UK national is the claimant

13. SPC claims where the claimant is a UK national with an EEA partner are not affected by the UT decision in WV. Where a claim is made by a UK national, their EEA partner is not required to have a right to reside but to simply not be a person subject to immigration control (PSIC) – any EEA national with PSS will not be a PSIC. Decisions on these claims should not be stayed and claims should be processed under BAU procedures.

Appeals

14. Where a lookalike case has already had a DM’s and MR decisions and an appeal is received against that decision, the FtT should be advised of the UT decision and the Secretary of State’s appeal to the Court of Appeal. The FtT should be asked to use their case management powers¹ to stay proceedings and defer further action pending the outcome the appeal.

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

15. Where the appeal is already with the FtT and is awaiting a hearing date (that is, we have drafted a response), the FtT should be asked to stay proceedings pending the outcome of the appeal to the Court of Appeal¹.

1 SSA 98, s 26(2)(b), s 26(4)(a)

16. Where an appeal is pending before the FtT and the Judge raises the question of whether the UT decision in WV applies in a case, the DM should:

1. advise the FtT that the Secretary of State is appealing the decision to the Court of Appeal and
2. invite the FtT to stay proceedings and defer further action pending the outcome of the appeal to the Court of Appeal¹.

1 SSA 98, s 26(2)(b), s 26(4)(a)

17. Where an FtT has made a decision on a lookalike case, citing WV, then the statement of reasons must be requested straightaway and the case referred to DMA (Leeds) as per standard procedure.

Annotations

The number of this memo should be annotated against the following paragraphs of the DMG: [073244-073246](#).

Contacts

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in – Memo [4/19](#) Requesting case guidance from DMA Leeds for all benefits.

DMA (Leeds): April 2024