

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 the 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 UC 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 joint claim to UC 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 UC with the EEA national, their UC 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

9. As the Secretary of State is appealing the UT decision to the Court of Appeal, the usual procedure would be to stay¹ making a decision on affected claims.

1 SSA 98, s 25(2)

10. However, as the decision will only affect joint claims for UC, to stay such cases would have the effect of denying benefit entitlement to the UK partners. So, in respect of any joint claim where the issue involves an EEA claimant who is relying on their right to reside as a self-sufficient person (on the basis described at paragraphs 7.3 and 8 above) under this UT decision and would

otherwise not have any other right to reside, the DM should make a decision without taking the UT decision into account¹. That is, decisions should be made BAU and UK nationals should be allowed to claim – as long as all other entitlement requirements for UC are satisfied. When considering eligibility of their EEA national partners, DMs will need to consider other resources, outside the ones listed in paragraph 8, and any alternative rights to reside EEA national claimants might have. If there are none, they should be treated as ineligible partners.

1 SSA 98, s 25(3); UC, PIP, JSA & ESA (D&A) Regs, reg 53(1)

11. The EEA claimant should be notified why we were unable to stay in this case, but that the claim will be reviewed once the Secretary of State's appeal to the Court of Appeal is concluded.
12. In some circumstances single claims may also be affected, such as single EEA claimants who have previously been in a couple receiving legacy benefits and who assert self-sufficiency on the basis of such legacy benefits but whose relationship has now ended. Such cases should be referred to DMA (Leeds) for further advice.

Mandatory Reconsiderations

13. The same process applies to MRs. Where an EEA claimant, who is part of a joint UC claim with their UK partner, requests an MR because they believe they had a right to reside as a self-sufficient person under this UT decision and would otherwise not have any other right to reside, the DM should make a decision without taking the UT decision into account¹. The claimant should be notified that their claim might be reviewed once a judgment is handed down by the Court of Appeal.

1 SSA 98, s 25(3); UC, PIP, JSA & ESA (D&A) Regs, reg 53(1)

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 of 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 to the case, the DM should:

16.1. advise the FtT that the Secretary of State is appealing the decision to the Court of Appeal and

16.2. 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 ADM: [C1312](#), [C1728-1729](#).

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