

## Chapter 07, Part 2 - Attendance Allowance, Disability Living Allowance, Carer's Allowance, Dependency Increases and Employment and Support Allowance (see Part 6 for Bereavement and Widow's Benefits)

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# Attendance Allowance, Disability Living Allowance and Carer's Allowance

## Introduction

071700 This section contains guidance on the residence and presence conditions and competency conditions, for Attendance Allowance, Disability Living Allowance and Carer's Allowance. The guidance covers

1. residence and presence conditions under United Kingdom law
2. periods of temporary absence from Northern Ireland under United Kingdom law
3. export of benefit to other countries, under European Union law
4. new and repeat claims from abroad under European Union law
5. claims made by "incomers" (i.e. European Economic Area nationals who have recently moved to the United Kingdom)
6. reciprocal agreements on residence and presence.

**Note:** See Appendices 3 and 4 for further guidance on competency.

071701 If a claimant does not satisfy the residence and presence conditions in United Kingdom law, the decision maker should consider whether the claimant is helped by European Union law and, if not, by any reciprocal agreements.

071702 How European Union law interacts with domestic legislation regarding residence and presence conditions for Attendance Allowance, Disability Living Allowance, and Carer's Allowance has changed over the years. The main relevant developments are set out below in historical order.

1. Prior to 1.6.92, Attendance Allowance, Disability Living Allowance (both Care and Mobility), and Carer's Allowance were treated as invalidity benefits in light of a decision by the European Court of Justice<sup>1</sup>. Under European Union law<sup>2</sup> an invalidity benefit cannot be withdrawn solely because the recipient goes to live in another European Economic Area country.
2. From 1.6.92, Attendance Allowance, Disability Living Allowance (Care and Mobility Components), and Carer's Allowance were listed in Reg (EEC) 1408/71 as special non-contributory benefits<sup>3</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence<sup>4</sup>. They could not

be exported when someone moved permanently to live in another European Economic Area Member State.

3. A number of judgments were made<sup>5</sup> which indicated that listing as a special non-contributory benefit was conclusive as to a particular benefit's status.
4. On 18.10.07<sup>6</sup> the European Court of Justice ruled that Attendance Allowance, Disability Living Allowance (Care Component), and Carer's Allowance are sickness benefits for the purposes of European legislation<sup>7</sup> but that Disability Living Allowance (Mobility Component) remains a special non-contributory benefit<sup>8</sup>. Although this ruling was made on 18.10.07, it relied heavily on an earlier judgement of the European Court of Justice on 8.3.01<sup>9</sup> concerning an Austrian care benefit. In that judgement the European Court of Justice first ruled that the fact that certain benefits were listed as special non-contributory benefits in European legislation was not conclusive, and that the Austrian benefit was a sickness benefit.
5. In a subsequent judgement on 5.5.11, the Court of Justice of the European Union confirmed that Disability Living Allowance (Mobility Component) is a special non-contributory benefit<sup>10</sup>.
6. On 21.7.11 the Court of Justice of the European Union made a decision relating to a claim made for Incapacity Benefit (Youth provision) for a person who had been residing in Spain for 5 years. The Court of Justice of the European Union held<sup>11</sup> that it is legitimate for the United Kingdom (as a Member State) to make rules intended to ensure that there is a genuine and sufficient link between a claimant of a non-contributory benefit and the social security system of the United Kingdom. However, the past presence test, applied without reference to other factors, was too narrow and was not necessarily representative of the real and effective degree of the connection between the claimant and the United Kingdom's social security system. The Court of Justice of the European Union then listed the factors which applied in the case before it and held that, taken together, these demonstrated that there was a genuine and sufficient link.

*1 R(M) 1/92, Newton v CAO, Case C-356/89; 2 Reg (EEC) 1408/71, art 10; Reg (EC) 883/04, art 7; 3 Reg (EEC) 1408/71, art 4(2a) & Annex IIa entry Y(d), (e) & (f); 4 R(DLA) 5/99 & R(A) 1/99 (Case C-20/96 & C90/97); 5 ECJ Cases C-20/96 (Snare) & C-297/96 (Partridge); R(DLA) 5/99 & R(A) 1/99; 6 ECJ Judgement Case C 299/05; 7 Reg (EEC) 1408/71 & Reg (EC) 883/04; 8 Reg (EEC) 1408/71 Annex IIa & Reg (EC) 883/04 Annex X; 9 ECJ Case C-215/99 (Jauch); 10 CJEU Judgement Case C-537/09; 11 Case C-503/09 LS v Secretary of State for Work and Pensions*

071703 The Court of Justice of the European Union decision referred to in DMG 071702 **6.** means that, from 21.7.11, new considerations applied in relation to

1. decisions about whether an award of Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component) which has been

made to a person residing in the United Kingdom can be exported when the claimant moves to reside permanently in another European Economic Area State **and**

2. new and repeat claims for Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component) made by persons residing in a European Economic Area State other than the United Kingdom **and**
3. claims for Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component) made by European Economic Area nationals who have recently moved to the United Kingdom.

## Meaning of "European Economic Area State"

071704 For the sake of simplicity, for the purposes of the guidance below, references to a "European Economic Area State" means any Member State of the European Union, plus Iceland, Liechtenstein, Norway **and Switzerland** and "European Economic Area national" means a national of any of those countries.

## Residence and presence conditions in Northern Ireland law

071705 **[See DMG Memo Vol 2/108 & 10/89]** A claimant must satisfy prescribed conditions of residence and presence in Northern Ireland on any day included in the claim<sup>1</sup>. A person must

1. be habitually resident in the common travel area **and**
2. not be subject to immigration control or a person who is exempt from the exclusion of persons subject to immigration control for the purposes of Attendance Allowance, Disability Living Allowance and Carer's Allowance (see DMG 070836) **and**
3. be present in Northern Ireland (see DMG 070809) **and**
4. subject to special rules relating to young children (see DMG 071719 to 071721), have been present in Northern Ireland for a period of (or periods totalling) not less than 104 weeks in the previous 156 weeks<sup>2</sup>.

*1 SS C&B (NI) Act 92, sec 64(1); 2 SS (AA) Regs (NI), reg 2(1); SS (DLA) Regs (NI), reg 2(1); SS (ICA) Regs (NI), reg 9(1)*

**Note:** The regulations were amended in June 2016 replacing the requirement that the claimant be ordinarily resident with a requirement that they be habitually resident in the common travel area. These amendments also changed the past presence test from a requirement of presence for 26 weeks out of the previous 52 to the requirement

referred to in DMG 071705 4.. See DMG 071713 for the dates these changes take effect.

## **Person subject to immigration control and European Union right to reside**

071706 A person's right to reside in the United Kingdom can depend on

1. their status as determined by the Home Office **or**
2. what right a person may acquire under European Union law.

There are occasions where a person subject to immigration control can claim public funds (see DMG 070798). This can be, for example, where they are the family member of a European Economic Area national, and that European Economic Area national is exercising a freedom of movement right (see DMG 073250 et seq) (for example, as a worker or a self-employed person), or where they demonstrate a derivative right of residence (for example, Ibrahim/Teixeria) (see DMG 073387). The granting of leave to enter or remain (whether granted with or without recourse to public funds) is made under the Immigration Rules. Where the claimant has been granted leave to enter or remain without recourse to public funds, and that person also has a right to reside under the Imm (EEA) Regs 2016, the condition of having "no recourse to public funds" does not have effect for as long as the person has a right to reside under the Imm (EEA) Regs 2016<sup>1</sup>.

*1 Imm (EEA) Regs 2016, reg 43 & Sch 3, para 1*

## The habitual residence test

071707 [See DMG Memo Vol 2/91] [See DMG Memo Vol 2/96] [See DMG Memo Vol 2/99] [See DMG Memo Vol 2/101, 5/123, 9/58 & 14/79] [See DMG Memo Vol 2/106] With effect from the date determined in accordance with DMG 071713 below, it is a condition of entitlement for Attendance Allowance, Disability Living Allowance and Carer's Allowance that the claimant be habitually resident in the common travel area (which comprises the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland).

**Note:** It is also a condition of entitlement that the claimant be "in Northern Ireland".

071708 The term "habitually resident" is not defined in United Kingdom law but there is detailed case law on what it means. It is for decision makers to determine whether a claimant is habitually resident in the common travel area based on all the facts of the case. Decision makers are referred to DMG 073707 et seq for full guidance.

## Serving members of the forces

071709 For Attendance Allowance, Disability Living Allowance and Carer's Allowance, a person who is absent from Northern Ireland shall be treated as though they were habitually resident in Northern Ireland (and therefore the common travel area) where that person is resident outside Northern Ireland in their capacity as a "serving member of the forces"<sup>1</sup>.

**Note:** Persons who are abroad in their capacity as serving members of the forces are also treated as present in Northern Ireland (including for the purposes of the past presence test) (see DMG 071725 1.).

*1 SS (AA) Regs (NI), reg 2(4)(a); SS (DLA) Regs (NI), reg 2(2A)(a); SS (ICA) Regs (NI), reg 9(3)(a)(i)*

## Meaning of "serving member of the forces"

071710 Subject to the exceptions in DMG 071711, a "serving member of the forces" means<sup>1</sup> a person who

1. is over 16 **and**
2. is a member of one of the following organisations and establishments who gives full pay service
  - 2.1 any of the regular naval, military or air forces of the crown

**2.2** the reserved forces, namely the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve and the Royal Auxiliary Air Force

**2.3** the Royal Irish Regiment (to the extent that its members are not members of the regular forces).

*1 SS (AA) Regs (NI), reg 2(4)(a); SS (DLA) Regs (NI), reg 2(2A)(a); SS (ICA) Regs (NI), reg 9(3)(a)(i); SS (Conts) Regs 01, reg 1(2) & Part 1 of Sch 6*

071711 The following persons do not come within the definition of “serving members of the forces”<sup>1</sup>

1. deserters
2. persons serving as a member of any naval force or Her Majesty’s forces who locally entered that naval force at an overseas base, provided that the person has
  - 2.1** not previously been an insured person under Part 1 of the National Insurance Act 1965 **and**
  - 2.2** is not and has not been a National Insurance contributor under the Social Security Act 1975
3. persons serving as a member of any military force of Her Majesty’s forces who entered that force or was recruited to that force outside the United Kingdom, where the depot of their unit is situated outside the United Kingdom
4. persons serving as a member of any air force of Her Majesty’s forces who entered that force or was recruited for that force outside the United Kingdom **and** is liable under the terms of engagement to serve only in a specified place outside the United Kingdom.

*1 SS (Conts) Regs 01, reg 1(2) & Part 2 of Sch 6; 2 SS (NI) Act 75; SS C&B (NI) Act 92*

## Serving member of the forces - family members

071712 For Attendance Allowance, Disability Living Allowance and Carer’s Allowance a claimant who is living with a person who is resident outside Northern Ireland in their capacity as a serving member of the forces (as defined in DMG 071710 & 071711 above) and who is that person’s

1. spouse or civil partner
2. son or daughter
3. step-son or step-daughter
4. father or mother

5. step-father or step-mother
6. father-in-law or mother-in-law

shall be treated as habitually resident in the common travel area<sup>1</sup>.

**Note:** Persons satisfying these conditions will also be treated as present in Northern Ireland (see DMG 071725 4.).

*1 SS (AA) Regs (NI), reg 2(4)(b); SS (DLA) Regs (NI), reg 2(2A)(b); SS (ICA) Regs (NI), reg 9(3)(a)(ii)*

## Date the change to a habitual residence test applies from

071713 The change from the test of ordinary residence to habitual residence and the consequent rules about serving members of the forces and their family members described in DMG 071707 to DMG 071711 take effect from<sup>1</sup>

1. in the case of a person who has an existing award of Attendance Allowance, Disability Living Allowance or Carer's Allowance on 19.6.16, whichever is the earlier of<sup>1</sup>
  - 1.1 the day immediately following the day on which the existing award terminates (ie when a fixed period award comes to an end) **or**
  - 1.2 on the day on which the first revision or supersession is made on or after 20.6.16 **or**
2. in any other case, 20.6.16<sup>2</sup>.

*1 SS (DLA, AA & CA) (Amdt) Regs (NI) 2016, reg 1(2); 2 reg 1(1)*

**Note 1:** As the main change here is from a requirement to be "ordinarily resident" to a requirement to be "habitually resident", it will be unusual for the change in legislation to affect entitlement.

**Note 2:** Claims for Carer's Allowance can be backdated for up to three months (and more if there is a delay in awarding the qualifying benefit). Decision makers may therefore have to deal with claims made after 20.6.16 that are in respect of periods prior to that date. Where an award is made after 20.6.16 with a first day of entitlement prior to 20.6.16, the rule in sub paragraph 2. above will apply. This is because **as at 19.6.16** there was no existing award.

071714

## The Past Presence Test [See DMG Memo Vol 2/91]

071715 [See DMG Memo Vol 2/90] [See DMG Memo Vol 2/95] [See DMG Memo Vol 2/96] [See DMG Memo Vol 2/101, 5/123, 9/58 & 14/79] [See DMG Memo Vol 2/106] It is a condition of entitlement to Attendance Allowance, Disability Living Allowance and Carer's Allowance that, in respect of any day of potential entitlement, the claimant must have been present in Northern Ireland for a specified period in the past ("the past presence test").

071716 Due to a decision of the Upper Tribunal in Great Britain on 17.3.16<sup>1</sup> which the Department has decided to follow, the past presence test is no longer to be applied to claims submitted by refugees and their family members or to people with Humanitarian Protection status and their families. All claimants must satisfy the other conditions of entitlement.

*1 [2016] UKUT 149 [AAC]*

071717 Subject to the rules relating to Disability Living Allowance (care component) for those aged 3 and under described in DMG 071719 to 071721 below, the amended requirement is<sup>1</sup> that in respect of any day for which benefit is claimed, the claimant must have been present in Northern Ireland for a period (or periods totalling) 104 weeks in the 156 weeks immediately preceding that day.

**Note:** The past presence test was changed from a requirement that a claimant be present for 26 weeks out of the previous 52 by amending regulations made in April 2013. See DMG 071722 for details of when this change takes effect.

*1 SS (AA) Regs (NI), reg 2(1)(a)(iii); SS (DLA) Regs (NI), reg 2(1)(a)(iii); SS (ICA) Regs (NI), reg 9(1)(c)*

### Example 1

On 27.6.16, Margaret claimed Carer's Allowance. She reported that she had lived and worked in the United States of America from 2002 until 4.8.14 when she returned to reside in the United Kingdom. The decision maker calculated that the 156 weeks immediately preceding 27.6.16 ran from 1.7.13 to 26.6.16. The decision maker calculated that, during that period, Margaret had been present in Northern Ireland for 98 weeks and 6 days. The decision maker decided that, as at the first day of entitlement in relation to the claim, Margaret did not satisfy the past presence test. However he decided to treat the claim as being made in advance for a period starting on 8.8.16 (the first day immediately following the completion of 104 weeks residence in the United Kingdom).

### Example 2

Howard made a claim for Attendance Allowance on and from 6.7.16. He reported that, during the previous three years, he had resided in Northern Ireland from June

2013 to 1.10.15 and since 7.1.16. The rest of the time he had lived in Australia. The decision maker calculated that the 156 weeks immediately preceding 6.7.16 ran from 10.7.13 to 5.7.16 and that during that period Howard had been in Northern Ireland for a total of 142 weeks. He therefore decided that Howard satisfied the past presence test as at the date of claim.

## Terminally ill

071718 In the case of a claim for Attendance Allowance or Disability Living Allowance from a person who is terminally ill, the past presence test does not apply<sup>1</sup>.

*1 SS (AA) Regs (NI), reg 2(3); SS (DLA) Regs (NI), reg 2(3)(a)*

## Disability Living Allowance (Care Component) - Application of the Past Presence Test to certain children

### Child aged less than 6 months

071719 The past presence test in relation to any day of potential entitlement to Disability Living Allowance (care component) in the case of a claimant who is a child under the age of 6 months is that they must have been present in Northern Ireland for a period (or periods totalling) 13 weeks<sup>1</sup>.

**Note:** This rule has applied since Disability Living Allowance began in 1992 and is not changed by the amending regulations.

*1 SS (DLA) Regs (NI), reg 2(4)*

### Continuation up to the age of 12 months

071720 Where, immediately before they attain the age of 6 months, a child is entitled to Disability Living Allowance by virtue of having satisfied the past presence test described in DMG 071719, then the past presence test will be that, in respect of any day, that child must have been present in Northern Ireland for a period of (or periods totalling) 13 weeks<sup>1</sup>. This test will continue to apply until that child attains the age of 12 months<sup>1</sup>.

**Note:** This rule has applied since Disability Living Allowance began in 1992 and is not changed by the amending regulations.

*1 SS (DLA) Regs (NI), reg 2(5)*

## Child aged over 6 months but less than 16 years

071721 Except where, and to the extent that, DMG 071720 applies, the past presence test for a child who is aged of 6 months or over but under the age of 16 years is that for any day of potential entitlement the child must have been present in Northern Ireland for a period of (or periods totalling) 26 weeks in the 52 weeks immediately preceding that day<sup>1</sup>. In applying the past presence test to British National children returning to Northern Ireland, decision makers should note the effect of an Upper Tribunal judgement<sup>2</sup>, which is to be applied from 12.10.20. Here it was held that two British national children returning to Great Britain from a period of residence abroad (in Australia and New Zealand) where in an analogous position to those already resident and to treat them otherwise was a breach of Article 3.1 of the United Nations Convention on the Rights of the Child. Prior to 12.10.20 the past presence test required a non-resident child, over the age of 36 months, to have been in Northern Ireland for 104 of the past 156 weeks in order to be eligible to claim Disability Living Allowance.

*1 SS (DLA) Regs (NI), reg 2(6); 2 [2020] UKUT 284 (AAC)*

## Dates the changes to the past presence test period apply from

071722 The changes described in DMG 071717 and 071721 above take effect from<sup>1</sup>

1. in the case of a person who has an existing award of Attendance Allowance, Disability Living Allowance or Carer's Allowance on 19.6.16, whichever is the earlier of
  - 1.1 the day immediately following the day that the existing award terminates (ie when a fixed period award comes to an end) **or**
  - 1.2 104 weeks after 20.6.16 (ie from 18.6.18) **or**
2. in any other case, 20.6.16<sup>2</sup>.

*1 SS (DLA, AA & CA) (Amdt) Regs (NI) 2016, reg 1(2)(b); 2 reg 1(1)*

### Example

Alice claimed Disability Living Allowance on 14.9.15. In making her claim, Alice said that she had lived in Canada until 10.6.14 when she moved to reside in Northern Ireland. The decision maker was satisfied that Alice satisfied the past presence test because she had been in Northern Ireland for 26 weeks in the 52 weeks ending on 13.9.16. The decision maker made an award of Disability Living Allowance for a fixed term of 52 weeks. The first day of entitlement was 14.9.15. At the end of the fixed period the decision maker decided that the amended past presence test came into force in Alice's case on 13.9.16. He decided that the 156 week period ran from

17.9.13 to 12.9.16. During this period, Alice had been in Northern Ireland for 118 weeks and therefore she satisfied the amended past presence test.

## Effect of European Union law

071723 The past presence test remains in force in United Kingdom domestic law but its application is modified where European Union law applies: that is to say where the person concerned is within the personal scope of the European Union regulations concerning the co-ordination of social security systems<sup>1</sup> **and** the United Kingdom is the competent state for the payment of the benefits concerned. Details are given (starting at DMG 071750 below) in respect of the three situations where this will be a consideration.

1. Exportability of an award of Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component).
2. New and repeat claims for Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component) made by persons residing in a European Economic Area state other than the United Kingdom.
3. Claims for Attendance, Carer's Allowance and Disability Living Allowance (Care and Mobility Components) made by European Economic Area nationals who have recently come to reside permanently in the United Kingdom.

*1 Reg (EEC) 1408/71 & Reg (EC) 883/04*

071724

## Periods of absence from Northern Ireland

### Members of the Forces, Aircrew, Mariners etc

071725 Claimants who are habitually resident in the common travel area but who are absent from Northern Ireland on any day should, for the purposes of the presence tests (including the past presence test), be treated as being present<sup>1</sup> if on that day they are abroad **only** because they are

1. serving members of the forces (see DMG 078060 - 078185) **or**
2. aircrew or mariners (see DMG 078060 - 078185) **or**
3. in prescribed employment on the continental shelf (see DMG 078060 - 078185) **or**
4. living with a serving member of the forces and are that person's spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, stepfather, mother, mother-in-law or step-mother.

**Note:** References to 'step' relationships and 'in-laws' are to be read as including relationships arising through civil partnerships<sup>2</sup>.

*1 SS (AA) Regs (NI), reg 2(2); SS (DLA) Regs (NI), reg 2(2); SS (ICA) Regs (NI), reg 9(3); 2 CP Act 04, s 246*

### Temporary absences from Northern Ireland - Attendance Allowance and Disability Living Allowance

#### Meaning of "temporary absence"

071726 [See DMG Memo Vol 2/79] [See DMG Memo Vol 2/108 & 10/89] A person is temporarily absent from Northern Ireland if<sup>1</sup>, at the beginning of the period of absence, that temporary absence is unlikely to exceed 52 weeks.

*1 SS (AA) Regs (NI), reg 2(6); SS (DLA) Regs (NI), reg 2(2C)*

#### Temporary absence - up to 13 weeks

071727 An Attendance Allowance or Disability Living Allowance claimant who is temporarily absent from Northern Ireland shall be treated as present (including for the purposes of deciding whether the past present test is satisfied) for a period of up to 13 weeks<sup>1</sup>.

**Note:** The period allowed was reduced from 26 to 13 weeks by an amendment to regulations made in June 2016. See DMG 071728 for the dates this change takes effect from.

*1 SS (AA) Regs (NI), reg 2(2)(d); SS (DLA) Regs (NI), reg 2(2)(d)*

## Date 13 week absence rule change takes effect from

071728 The change to the temporary absence rule described in DMG 071727 above takes effect from

1. in the case of a claimant who has an existing award of Attendance Allowance or Disability Living Allowance on 19.6.16, whichever is the earlier of<sup>1</sup>
  - 1.1 the day immediately following the day that the current award terminates (ie when a fixed period award comes to an end) **and**
  - 1.2 26 weeks after 20.6.16 (ie 19.12.16) **or**
2. in any other case, 20.6.16<sup>2</sup>.

*1 SS (DLA, AA & CA) (Amdt) Regs (NI) 2016, reg 1(2)(c); 2 reg 1(1)*

### Example 1

A two year fixed term award of Disability Living Allowance was made to Vincent, with a first day of entitlement of 6.5.15. Vincent left the United Kingdom on 3.5.16 for a temporary visit to relatives abroad. The decision maker decided that as there was an existing award of Disability Living Allowance on 19.6.16, the new rules would take effect from 19.12.16. However the 26 weeks absence allowed under the old rules would expire on 2.11.16. He therefore set a case control to check the position closer to that time.

### Example 2

Margaret has an indefinite award of Attendance Allowance which started in 2005. She left the United Kingdom on 27.6.16 for a temporary visit to the United States of America. The decision maker decided that, as Margaret had an existing award of Attendance Allowance on 19.6.16, the new rules would apply in her case from 19.12.16. If Margaret's absence continued unbroken until 19.12.16, by that date she would have been absent for 25 weeks. Under the new rules only 13 weeks absence starting with the first day of absence is allowable. Accordingly the decision maker set a case control to check the position at a time close to 19.12.16.

### Example 3

Bill claimed Disability Living Allowance on 27.6.16 and an award was made from 30.6.16. On 11.7.16, Bill left for an extended holiday in Spain. The decision maker

decided that, as there was no award of Disability Living Allowance on 19.6.16, the new rules applied from 20.6.16. The decision maker therefore decided that Bill could be treated as present in Northern Ireland for up to and including 10.10.16 (ie 13 weeks starting on 12.7.16) and set a case control accordingly.

## Absence to receive medical treatment

### Introduction

071729 The rules relating to absences from Northern Ireland for medical treatment were changed by amending regulations that were made in June 2016. However there are savings provisions under which the old rules may continue to apply for some time. The following guidance therefore sets out the old rules, the new rules and gives details of the savings provisions.

### The old rules

071730 Claimants who are absent from Northern Ireland on any day should, for the purposes of the presence tests (including the past presence test) be treated as being present<sup>1</sup> if on that day they are abroad **only**

1. because they are temporarily absent from Northern Ireland (see DMG 070853 to 070878) **and**
2. the absence is for the specific purpose of being treated for an incapacity or a disabling condition **and**
3. the incapacity or condition began before leaving Northern Ireland **and** the Department has certified that it is consistent with the proper administration of the Act<sup>2</sup> that they should be treated as being present in Northern Ireland<sup>3</sup> (see DMG 070822).

<sup>1</sup> *SS (AA) Regs (NI), reg 2(2)(d); SS (DLA) Regs (NI), reg 2(2)(d); 2 SS C&B (NI) Act 92;*  
<sup>3</sup> *SS (AA) Regs (NI), reg 2(2)(e); SS (DLA) Regs (NI), reg 2(2)(e)*

### The new rules

071731 Subject to the savings provisions described in DMG 071733 to 071734 with effect from 20.6.16 where<sup>1</sup>

1. an Attendance Allowance or Disability Living Allowance claimant's absence from Northern Ireland is temporary (within the meaning given in DMG 071726) **and**

2. the absence is solely in connection with arrangements made for the medical treatment of the claimant for a disease or bodily or mental disablement (which started before the claimant left Northern Ireland) **and**
3. the arrangements referred to in sub-paragraph 2. relate to medical treatment (see DMG 071732)
  - 3.1 outside Northern Ireland **and**
  - 3.2 during the period when the claimant is temporarily absent from Northern Ireland **and**
  - 3.3 by, or under the supervision of, a person appropriately qualified to carry out that treatment

the claimant shall be treated as present in Northern Ireland for the first 26 weeks of the absence.

*1 SS (AA) Regs (NI), reg 2(5); SS (DLA) Regs (NI), reg 2(2B)*

### Meaning of “medical treatment”

071732 In DMG 071731 2. “medical treatment” means<sup>1</sup> medical, surgical or rehabilitative treatment (including any course or diet or other regimen).

*1 SS (AA) Regs (NI), reg 2(5); SS (DLA) Regs (NI), reg 2(2B)*

### The savings provisions

071733 The rule described in paragraph 071731 above takes effect from 20.6.16, but there are savings provisions. The old rules described in DMG 071730 will continue to apply to a person<sup>1</sup>

1. who, on 20.6.16 is absent from Northern Ireland **and**
2. whose absence is temporary and for the purpose of being treated for incapacity or a disabling condition, which started before they left Northern Ireland **and**
3. in respect of whom, before 20.6.16, the Department had certified that it was consistent with the proper administration of the Act<sup>2</sup> that, subject to that person satisfying the condition in sub-paragraph 2., they should be treated as present in Northern Ireland

until the date established in accordance with DMG 071734.

*1 SS (DLA, AA & CA) (Amdt) Regs (NI) 2016, reg 5(1) & (2); 2 SS C&B (NI) Act 92*

071734 The old rules will continue to apply to a person who described in DMG 071733 until the earlier of the following events takes place<sup>1</sup>

1. the person returns to Northern Ireland
2. the first revision or supersession of the award is made **after 20.6.16**.

**Note:** The reference here is to the date the decision maker **makes** the revision or supersession decision **not** the date that decision takes effect from.

*1 SS (DLA, AA & CA) (Amdt) Regs (NI) 2016, reg 5(3)*

### **Example 1**

Victoria has an indefinite award of Attendance Allowance. On 30.1.16, Victoria notified her local office that, with the approval of her doctor, she intended to go to Germany for a period of medical treatment for her condition. She planned to leave the United Kingdom on 10.2.16. On 4.2.16, a Department's certificate (confirming that it was consistent with the proper administration of the Act that Victoria should be treated as present in Northern Ireland) was made. In June 2016 the decision maker reviewed Victoria's position. She was still receiving the medical treatment in Germany and it was expected this would last for a month or two more. The decision maker noted that, as all the conditions in DMG 071733 above were satisfied, (subject to there being grounds to revise or supersede the award in the meantime), the new rules would not be triggered until Victoria returned to the United Kingdom. The decision maker set a case control to check the position in two months' time.

### **Example 2**

Zainab has an indefinite award of Disability Living Allowance. With her doctor's approval she left the United Kingdom on 5.7.16 to receive medical treatment in the United States of America. The decision maker decided that the condition in DMG 071733 1. was not satisfied and so the savings provisions did not apply. Under the new rules Zainab could only be treated as present in Northern Ireland for the first 26 week of absence. In this case the last day of that period would be 2.1.17.

## **Temporary absences from Northern Ireland - Carer's Allowance**

### **Temporary absences - four weeks**

071735 A Carer's Allowance claimant who is absent from Northern Ireland shall be treated as being present for any day where<sup>1</sup>

1. the absence is for a temporary purpose (and was for a temporary purpose when it began) **and**
2. it has not lasted for a continuous period of more than 4 weeks.

*1 SS (ICA) Regs (NI), reg 9(2)(a)*

### **Accompanying the Severely Disabled Person**

071736 A Carer's Allowance claimant shall be treated as present on any day of absence from Northern Ireland if<sup>1</sup> the absence

1. is temporary **and**
2. for the specific purpose of caring for the severely disabled person
  - 2.1 who is also absent from Northern Ireland **and**
  - 2.2 for whom Attendance Allowance or Disability Living Allowance (care component) at the highest or middle rate, the daily component of Personal Independence Payment (at the standard or enhanced rate) or an Armed Forces Independence Payment<sup>2</sup> is payable.

**Note:** The term "specific purpose" does not mean the sole or only purpose for being absent from Northern Ireland (see DMG 070649 - 070650).

*1 SS (ICA) Regs (NI), reg 9(2)(b); 2 Armed Forces and Reserve Forces (Compensation Scheme) Order 2011*

071737 United Kingdom law does not allow claimants who go to live permanently in another country to export their benefit. But see DMG 071740 et seq if a claimant goes to live permanently in another European Economic Area Member State.

071738 – 071739

## Export of benefit to other European Economic Area Member States under European Union law

### General [See DMG Memo Vol 2/97]

071740 [See DMG Memo Vol 2/75 & DMG Memo Vol 2/81] [See DMG Memo Vol 2/105]

United Kingdom law does not allow claimants who go to live permanently in another country to export their benefit. If the claimant does not satisfy the residence and presence conditions in United Kingdom law, the decision maker should consider whether European Union law helps the claim.

071741 To be helped by European Union law a claimant must

1. be a European Economic Area national or a family member of a European Economic Area national or a third country national in some circumstances (see DMG 071756 et seq) **and**
2. come within the personal scope<sup>1</sup> (see DMG 071754 et seq) of European Union law **and**
3. have moved within the European Economic Area.

*1 Reg (EEC) 1408/71, art 2 & Reg (EC) 883/04, art 2*

### Family member

071742 Family member includes the spouse or civil partner of a European Economic Area national, and the children of such a person who are either minors or dependant on such a person<sup>1</sup> (see DMG 071759 - 071760 for more detail).

*1 Reg (EEC) 1408/71, art 1(f)(ii) & Reg (EC) 883/04, art 1(i)(2)*

### Transitional protection - entitlement continuous from before 1.6.92

071743 A claimant who was continuously entitled to Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component) or Disability Living Allowance (Mobility Component) from before 1.6.92, and who moved to another European Economic Area Member State before 18.10.07, is transitionally protected to export his benefit when moving to take up residence in that other European Union Member State<sup>1</sup> if he

1. was a national of a European Economic Area Member State (or family member of a European Economic Area citizen) as at 1.6.92 (but see DMG 071745 and note DMG 071747 - 071748 concerning countries that were not in the European Union as at 1.6.92) **and**
2. moved to live in another European Union Member State before 18.10.07 **and**
3. satisfies all other conditions of entitlement to the benefit other than residence and presence conditions **and**
  - 3.1 was within the scope of relevant European Union law i.e. has worked in the United Kingdom (or any other Member State) at any time as an employed or self-employed person **or**
  - 3.2 is a member of the family of another person who satisfies condition 3.1 above.

**Note:** The transitionally protected, pre - 1.6.92 described above is an “invalidity benefit” for the purposes of the European Union regulations concerning the co-ordination of social security benefits<sup>2</sup>.

*1 Reg (EEC) 1408/71, art 95(b)(8); 2 Reg (EEC) 1408/71 & Reg (EC) 883/04*

071744 Claimants who satisfy all the conditions in DMG 071743 above are transitionally protected to export awards of Attendance Allowance or Carer’s Allowance or Disability Living Allowance (Care Component) or Disability Living Allowance (Mobility Component) where they left Northern Ireland before 18.10.07 (but see DMG 071746 below).

**Note:** With Disability Living Allowance, the transitional protection only applies to the component for which there was continuous entitlement since before 1.6.92. So, if a claimant was entitled to the Disability Living Allowance (Care Component) from before 1.6.92 and then entitlement to Disability Living Allowance (Mobility Component) starts from a day falling after 1.6.92, only the Care Component is transitionally protected.

071745 However, only awards of Disability Living Allowance Mobility Component can still attract transitional protection if a claimant moves to another European Economic Area Member State on or after that date. From 18.10.07, awards of Attendance Allowance, Carer’s Allowance and Disability Living Allowance (Care Component) can only be exported as sickness benefits (see DMG 071750 et seq below) even where the original award pre-dates 1.6.92.

071746 Transitional protection for Attendance Allowance, Disability Living Allowance and Carer’s Allowance does not apply to nationals of the European Free Trade Area countries (Iceland, Norway and Liechtenstein) or Switzerland. This is because the

European Economic Area and Swiss Agreements include exemptions from the transitional provision<sup>1&2</sup>. This also means that European Economic Area nationals who move to Iceland, Norway, Liechtenstein or Switzerland cannot benefit from transitional protection.

*1 EU/Swiss Agreement, Annex II, OJ 2002 L114, p. 6; 2 EEA Agreement, Annex VI, OJ 1994 L.I, p. 3*

071747 A full list of European Economic Area Member States is at DMG 070040, with details of when they first joined the European Union. Additionally, the following countries were not European Economic Area Member States as at 1.6.92:

Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Sweden.

071748 Persons who are entitled to Attendance Allowance, Carer's Allowance, Disability Living Allowance (Care Component) or Disability Living Allowance (Mobility Component) since before 1.6.92 who moves (before 18.10.07) to one of the countries listed in DMG 071747 can benefit from transitional protection and so will be able to export these benefits but only from the date that country joined the European Union.

### Example

Grace is a United Kingdom national who became entitled to Disability Living Allowance (Mobility Component) from 1.4.92. In April 2002 she moved to live in Hungary. The decision maker decided that, as, at that time, Hungary was not a member of the European Union, the Disability Living Allowance (Mobility Component) could not be exported as a transitionally protected "invalidity benefit". However, having checked that the conditions of entitlement had been satisfied continuously since 1.4.92, the decision maker decided that Grace could benefit from transitional protection from the date Hungary joined the European Union (i.e. from 1.5.04).

### Entitlement began on or after 1.6.92

071749 From 1.6.92, Attendance Allowance, Disability Living Allowance and Carer's Allowance were listed as special non-contributory benefits for the purposes of European Union law<sup>1</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence. A person who became entitled to Attendance Allowance, Disability Living Allowance or Carer's Allowance on or after 1.6.92 could not export their benefit when moving permanently to live in another European Economic Area Member State<sup>2</sup>, nor could someone claim a special non-contributory benefit when living in another European Economic Area Member State. However, from 18.10.07, Attendance Allowance, Disability Living Allowance (Care Component) and Carer's Allowance are sickness benefits in European Union law. But see

Appendices 1 and 2 to this Part of Chapter 07 for more detailed guidance on the position between 8.3.01 and 20.7.11.

- 1 Reg (EEC) 1408/71, art 4(2A) & 10(a) & Annex 11a;
- 2 ECJ Cases C-20/96 & C-297/96, R(DLA) 5/99 & R(A) 1/99

## Export of benefit to another European Economic Area Member State from 21.7.11

### Introduction

071750 On 21.7.11, the Court of Justice of European Union made a decision<sup>1</sup> which affects the way European Union law applies in relation to the export of Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component). The guidance below therefore sets out the European Union law position as it applies from 21.7.11. The guidance about how the law was applied from 8.3.01/18.10.07 up to 20.7.11 in the light of the Court of Justice of European Union's decision<sup>2</sup> dated 18.10.07 that Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component) are sickness benefits can be found in Appendix 1 to this Part of Chapter 07. There was also a law change to regularise the position with regard to new claims/requests for reconsideration made in the light of the Court of Justice of European Union's decision<sup>2</sup> that Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component) are sickness benefits. Details can be found at Appendix 2.

*1 Case C-503/09 LS v Secretary of State for Work and Pensions; 2 ECJ Judgement Case C-299/05*

### European Union law - background

071751 There are two current sets of European Union regulations relating to the co-ordination of Social Security benefits across the Member States. These are

1. Regulation (EC) No. 883/2004 which sets out the main rules **and**
2. Regulation (EC) No. 987/2009 which deals with the administrative procedures to be followed in implementing the main rules.

**Note:** For the European Union Member States, these regulations replaced earlier regulations<sup>1</sup> with effect from 1.5.10. They applied to Switzerland from 1.4.12 and to Norway, Iceland and Liechtenstein from 1.6.12. The old regulations<sup>1</sup> continue to apply in certain transitional cases. Decision makers are advised to seek guidance from Decision Making Services where issues relating to the old regulations apply. See also DMG 071756 to 071758 below concerning third country nationals.

*1 Reg (EEC) 1408/71 & Reg (EEC) 574/72*

## What types of benefit are Attendance Allowance, Disability Living Allowance & Carer's Allowance?

071752 The European Union Social Security Co-ordination Regulations set out different rules depending upon the branch of social security involved (e.g. "sickness benefits", "old-age benefits", "family benefits"). On 18.10.07 the Court of Justice of the European Union held<sup>1</sup> that the Care Component of Disability Living Allowance was a sickness benefit. However on 5.5.11 the Court of Justice of the European Union confirmed that the Mobility Component of Disability Living Allowance was a special non-contributory benefit. Disability Living Allowance (Mobility Component) cannot therefore be paid to a person residing abroad. For the purposes of the European Union regulations concerning the co-ordination of social security benefits Attendance Allowance, Disability Living Allowance (Care Component) and Carer's Allowance are sickness benefits in cash for long term care.

*1 ECJ Judgement Case C 299/05; 2 Bartlett, Gonzales Ramos and Taylor v Secretary of State for Work and Pensions Case C-537/09*

## Exportability - general rules for Attendance Allowance, Disability Living Allowance (Care Component) or Carer's Allowance [See DMG Memo Vol 2/97]

071753 [See DMG Memo Vol 2/75 & DMG Memo Vol 2/81] [See DMG Memo Vol 2/100] [See DMG Memo Vol 2/103] [See DMG Memo Vol 2/105] [See DMG Memo Vol 2/111] A claimant with an award of Attendance Allowance, Disability Living Allowance (**Care only**) or Carer's Allowance, who leaves Northern Ireland and resides in a European Economic Area State will continue to be entitled to that award where<sup>1</sup>

1. the person is within the personal scope of relevant European Union legislation **and**
2. the United Kingdom continues to be the competent state for payment of a sickness benefit **and**
3. the person can demonstrate that they have a genuine and sufficient link to the United Kingdom **and**
4. the normal domestic conditions of entitlement are met except that the claimant no longer has to
  - 4.1 be habitually resident in Northern Ireland **or**
  - 4.2 be present in Northern Ireland **or**

**4.3** meet the past presence test.

*1 SS (AA) Regs (NI), reg 2; SS (DLA) Regs (NI), reg 2; SS (ICA) Regs (NI), reg 9*

**Personal scope of European Union legislation**

**[See DMG Memo Vol 2/97]**

071754 **[See DMG Memo Vol 2/105]** With effect from 1.5.10, a person is within the scope of the European Union regulations relating to the co-ordination of social security systems if that person<sup>1</sup>

**1.** is

**1.1** a national of a Member State **or**

**1.2** a stateless person or refugee residing in a Member State

who is or has been subject to the legislation of one or more Member States **or**

**2.** is a member of the family or a survivor of a person falling within DMG 071753

**1..**

*1 Reg (EC) 883/04, art 2(1)*

071755 Also within the personal scope of European Union provisions<sup>1</sup> are survivors of persons who have been subject to the legislation of one or more Member States (regardless of the nationality of such persons), provided the survivor is

**1.** a national of a Member State **or****2.** a stateless person or refugee residing in one of the Member States.

*1 Reg (EC) 883/04, art 2(2)*

**Third country nationals**

071756 The United Kingdom is not covered by the extension of rights to third country nationals under Reg (EC) 883/04, which came in to force on 1.5.10. However third country nationals will continue to be subject to the terms and limitations of Reg (EEC) 1408/71 as summarised below.

071757 An amendment to European Union Regulations<sup>1</sup> extended the provisions of Reg (EEC) 1408/71 to third country nationals from 1.6.03 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to third country nationals:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

*1 Reg (EC) 859/2003*

071758 Therefore a third country national who has worked will be able to export an award of Attendance Allowance or Disability Living Allowance (Care) or Carer's Allowance if he satisfies the same conditions that apply to a European Economic Area national (and the United Kingdom is the competent state for payment of a sickness benefit) **except** where he leaves Northern Ireland to live in Denmark, Iceland, Norway, Liechtenstein, or Switzerland. Of course, the third country national must be legally residing in both the United Kingdom and then the new state of residence that they move to.

### Meaning of “member of the family”

071759 Members of a person's family are<sup>1</sup>

1. the spouse
2. children under 18 **and**
3. children over 18 who are dependent.

*1 Reg (EC) 883/04, art 1(i)(2)*

### Meaning of “dependent”

071760 A GB Commissioner has analysed the European Union case law on the meaning of “dependent” in the context of the European Union Citizenship Directive<sup>1</sup>. He summarised that case law<sup>2</sup> as finding that<sup>3</sup>

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

*1 Directive 2004/38/EC; 2 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;*  
*3 CIS/2100/07*

## Deciding which European Economic Area State's legislation applies [See DMG Memo Vol 2/97]

071761 [See DMG Memo Vol 2/75 & DMG Memo Vol 2/81] [See DMG Memo Vol 2/100] [See DMG Memo Vol 2/103] [See DMG Memo Vol 2/105] [See DMG Memo Vol 2/111] The European Union co-ordination regulations contain rules intended to avoid a conflict between the domestic laws of the Member States. The basic rules are<sup>1</sup>

1. a person pursuing activity as an employed or self-employed person in a Member State is subject to the legislation of that Member State. (See DMG 071764 for the legislation that applies to posted workers.)
2. a civil servant is subject to the legislation of the Member State to which the administration employing him is subject
3. a person receiving unemployment benefits in accordance with a specific provision in the European Union co-ordination regulations<sup>2</sup> from the Member State of residence is subject to the legislation of that Member State
4. a person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State
5. any other person to whom sub-paragraphs 1. to 4. do not apply is subject to the legislation of the Member State of residence. However this is subject to other rules in the European Union co-ordination regulations which guarantee benefits under the legislations of one or more Member States.

*1 Reg (EC) 883/04, art 11(3); 2 art 65*

071762 Except in relation to the benefits listed at DMG 071763, for the purposes of DMG 071759.1. a person receiving cash benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity<sup>1</sup>.

*1 Reg (EC) 883/04, art 11(2)*

071763 DMG 071762 does not apply to<sup>1</sup>

1. invalidity benefits
2. old age or survivors' pensions
3. pensions in respect of accidents at work or occupational diseases
4. sickness benefits in cash which are for treatment for an unlimited period.

*1 Reg (EC) 883/04, art 11(2)*

## Workers posted abroad

071764 Where persons whose employer normally carries out its activities in the United Kingdom are posted by that employer to another European Economic Area state, the legislation of the United Kingdom will continue to apply provided<sup>1</sup>

1. they are not sent to replace another person **and**
2. the posting is not expected to last more than 24 months<sup>1</sup>.

*1 Reg (EC) 883/04, art 12(1)*

## Competent state for the payment of cash sickness benefits

071765 The circumstances in which a state is required to export or award a sickness benefit to a claimant living in another European Economic Area Member State are prescribed in European Union law<sup>1</sup>. However, for third country nationals, these rules only apply when the claimant moves to certain of the European Economic Area Member States (see DMG 071757-8 above).

**Note 1:** With effect from 31.10.11 the Act<sup>2</sup> was amended so as to confirm that, under Northern Ireland law, European Economic Area citizens who have moved within the European Economic Area are only entitled to Attendance Allowance, Carer's Allowance, or Disability Living Allowance (Care Component) where the United Kingdom is the competent state for the payment of sickness benefits in cash under European Union law<sup>3</sup>.

**Note 2:** See Appendices 3 and 4 for further guidance on competency.

*1 Reg (EEC) 1408/71, art 1(q) & Chapter 1 Title III & Reg (EC) 883/04 Title III Chapter 1;  
2 SS C&B (NI) Act 92, sec 65(7), sec 70(4A) & sec 72(7B); 3 Reg (EEC) 1408/71,  
Chapter 1 of Title III & Reg (EC) 883/04, Chapter 1 of Title III*

071766 There are two main rules for deciding competency for sickness benefits in cash depending upon whether the claimant is an "insured person" or a person receiving a pension.

## Insured persons

071767 **[See DMG Memo Vol 2/75 & DMG Memo Vol 2/81]** In relation to sickness benefits, "insured person" means<sup>1</sup> any person who satisfies the conditions of entitlement for a sickness benefit

*1 Reg (EC) 883/04, art 1(c)*

071768 An “insured person” (and members of that person’s family - see DMG 071759) who is residing or staying in a Member State (A) other than the Member State (B) in which they are insured, is entitled to sickness benefits in cash from Member State B<sup>1</sup>.

*1 Reg (EC) 883/04, art 21*

071769 The following persons should be regarded as persons insured in the United Kingdom for cash sickness benefits

1. those covered by United Kingdom contributions in the relevant income tax years that would enable them to claim contribution-based Employment and Support Allowance (relevant income tax years cover) **provided** they have not been insured for sickness benefits in a European Economic Area State other than the United Kingdom since they worked and paid National Insurance contributions in respect of that work in the United Kingdom
2. posted workers (see DMG 071777) and frontier workers (see DMG 071778) who work in the United Kingdom **and**
3. claimants who are in receipt of contribution-based Jobseeker’s Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, and Maternity Allowance
4. workers who are currently living and working in the United Kingdom and their family members.

**Note:** Decision makers are reminded of the need to consider which European Economic Area State’s legislation applies (see DMG 071761 to 071763). In general, where a person is living and working in a European Economic Area State other than the United Kingdom, it is the legislation of that European Economic Area State which will apply.

## Pensioners

071770 A person (and any member of that pensioner’s family) receiving a pension under the legislation of one or more Member States is to be paid cash sickness benefits by the Member State responsible for the cost of sickness benefits in kind<sup>1</sup>.

*1 Reg (EC) 883/04, art 29*

071771 In receipt of a **pension** (under United Kingdom legislation) means entitled to and actually in receipt of

1. state Retirement Pension of any category **or**
2. main phase contribution-based Employment and Support Allowance, long-term Incapacity Benefit, Severe Disablement Allowance **or**

3. a bereavement benefit, including widows' benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**
4. a pension for Industrial Injuries Disablement Benefit (including Reduced Earnings Allowance and Retirement Allowance)
5. transitionally protected Disability Living Allowance (Mobility Component).

**Note:** This definition of "pension" derives from the European Union co-ordination regulations.

### Meaning of sickness "benefits in kind"

071772 For the purposes of the European Union rules about sickness and maternity benefits "benefits in kind" means<sup>1</sup> benefits in kind provided for under the legislation of a Member State which are intended to

1. supply
2. make available
3. pay directly to a provider for
4. reimburse the cost of

medical care and products and services ancillary to that care, including long term care benefits in kind. This means healthcare. Long term care benefits in kind does not include Attendance Allowance, Disability Living Allowance (Care) and Carer's Allowance, which are long term care benefits in cash.

*1 Reg (EC) 883/04, art 1(va)(i)*

### Deciding which state is responsible for sickness benefits for a pensioner

071773 Where a person who receives a pension or pensions under the legislation of one or more Member States, one of which is the Member State of residence and the person is entitled to sickness benefits in kind under the legislation of the Member State of residence, then the Member State of residence will pay sickness benefits (in cash and in kind)<sup>1</sup>.

*1 Reg (EC) 883/04, art 23*

#### Example

Martin resides in Germany. He receives pensions under both German and United Kingdom legislation and he is entitled to sickness benefits in kind under German

legislation. Germany is the Member State responsible for paying cash sickness benefits to Martin.

071774 Where a person receives a pension or pensions under the legislation of one or more Member States but there is no entitlement to benefits in kind under the legislation of the Member State of residence, sickness benefits in cash and in kind will be provided by one of the Member States responsible for the pension(s) determined as follows<sup>1</sup>

1. where the person is entitled to benefits in kind under the legislation of only one Member State then that Member State will bear the cost of benefits in kind and pay the cash sickness benefits.
2. where the person is entitled to benefits in kind under the legislation of two or more Member States then the Member State where the person was insured for the longest period of time will bear the cost of benefits in kind and pay cash sickness benefits.

*1 Reg (EC) 883/04, art 24*

### **Example 1**

Chris resides in Spain. He is entitled to and receives a full United Kingdom Retirement Pension. He does not receive a pension from any other Member State and he is not entitled to benefits in kind under Spanish legislation. Chris claimed the Disability Living Allowance (Care) and the decision maker decided that, under European Union rules the United Kingdom was the state responsible for paying sickness benefits in cash and in kind and that therefore Disability Living Allowance (Care) could be paid to him in Spain.

### **Example 2**

Renate resides in Greece. She is entitled to a United Kingdom Retirement Pension at a reduced rate but she is also entitled to a German retirement pension. Renate is not entitled to benefits in kind under Greek law. The decision maker found out that Renate had worked and paid social security insurance in Germany for 25 years but only for 10 years in the United Kingdom. The decision maker decided that the United Kingdom was not the competent state for the payment of sickness benefits.

071775 Where a person who receives a pension under the legislation of one or more Member States (other than the Member State of residence) resides in a Member State where entitlement to sickness benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person then the rule in DMG 071774 above will apply<sup>1</sup>.

*1 Reg (EC) 883/04, art 25*

**Example**

Julie resides in the United Kingdom. She receives a full Cypriot pension. She is entitled to United Kingdom healthcare under United Kingdom domestic law but not to any United Kingdom pensions or benefits. The United Kingdom will provide her with healthcare but it will be paid for by the Cypriot authorities. (As Cyprus is her competent authority for sickness benefits, she must apply to Cyprus for any long term care benefits in cash.)

**Certain workers and their family members**

071776 The United Kingdom will be the competent state for a sickness benefit for

1. posted workers and their family members
2. frontier workers who work in the United Kingdom, and their family members
3. family members of workers living and working in the United Kingdom
4. claimants in receipt of contribution-based Jobseeker's Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, and Maternity Allowance, and their family members.

**Meaning of "posted worker"**

071777 A posted worker<sup>1</sup> is an employed or self-employed person normally working in the United Kingdom but posted temporarily to work in the territory of another European Economic Area member state, usually for less than 12 months, or less than 24 months from 1.5.2010 (see DMG 070236).

*1 Reg (EC) 883/04, art 12 & 13*

**Meaning of "frontier worker"**

071778 Frontier worker<sup>1</sup> means an employed or self-employed person who works in the United Kingdom but lives in another European Economic Area member state where he returns daily, or at least once a week.

*1 Reg (EC) 883/04, art 1(f)*

**United Kingdom competency ceases [See DMG Memo Vol 2/97]**

071779 [See DMG Memo Vol 2/75 & DMG Memo Vol 2/81] [See DMG Memo Vol 2/100] [See DMG Memo Vol 2/103] [See DMG Memo Vol 2/105] [See DMG Memo Vol 2/111] The United Kingdom will automatically cease to be the competent state to pay

a sickness benefit where either the claimant or the family member on whom the claimant relies to satisfy European Union law

1. starts work in another European Economic Area Member State as an employed or self-employed person<sup>1</sup> (other than as a United Kingdom posted worker of course) **or**
2. is or becomes eligible for a sickness benefit from the state of residence<sup>2</sup> **or**
3. receives an old age or invalidity benefit or other pension from the state of residence<sup>3</sup>.

**Note:** The United Kingdom may be the competent state for the payment of sickness benefits to a claimant because that claimant derives rights from a family member. However, if one of the events described in DMG 071779 1. to 3. happens to one family member, the decision maker must consider whether competency continues on account of rights derived from another family member.

### Example

Lucy is a disabled person, aged 25. She lives with and is dependent upon her parents, Patricia and Dan. The family resides permanently in Spain and Disability Living Allowance (Care) has been awarded to Lucy on the basis that Dan was insured for contribution-based Employment and Support Allowance. The decision maker discovered that Dan had started work in Spain. However, as Patricia was receiving a United Kingdom Retirement Pension, the decision maker decided that the United Kingdom remained the competent state for payment of sickness benefits to Lucy.

*1 Reg (EC) 883/04 art 13(3)(a) & 31; 2 Reg (EC) art 21 & 29; 3 Reg (EC) art 23, 24, & 29*

071780 The United Kingdom will also cease to be the competent state to pay a sickness benefit where the claimant or the family member on whom the claimant relies to satisfy European Union law

1. no longer has National Insurance cover (the first day on which the claimant would no longer meet contribution conditions for title to short-term Incapacity Benefit or contribution-based Employment and Support Allowance on a new claim) **or**
2. is no longer entitled to and receiving a pension from the United Kingdom **or**
3. finishes the work from which rights were acquired<sup>1</sup>
4. is no longer entitled to and receiving contribution-based Jobseeker's Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, or Maternity Allowance

provided that the claimant, or the family member on whom the claimant relies to satisfy European Union law, do not then fall within another category of person for whom the United Kingdom is the competent state (for instance the claimant becomes entitled to a pension from the United Kingdom before National Insurance cover for short-term Incapacity Benefit or contribution-based Employment and Support Allowance ends).

*1 Reg (EC) 883/04, art 11(3)(e)*

## Genuine and sufficient link

071781 **[See DMG Memo Vol 2/72]** Once the decision maker is satisfied that the claimant is within the personal scope of the European Union co-ordination regulations and that the United Kingdom is the competent state for the payment of cash sickness benefits, in deciding whether Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care) can be exported, decision makers must determine whether the claimant has a genuine and sufficient link to the United Kingdom. Guidance on how to make this determination and the factors to be taken into account is given at DMG 071786 et seq below.

**Note:** The past presence test does not apply.

071782 If the claimant does not have a genuine and sufficient link, then entitlement to Disability Living Allowance (Care), Attendance Allowance or Carer's Allowance ceases when the claimant leaves the United Kingdom.

071783 – 071784

## New and repeat claims from abroad for Attendance Allowance, Disability Living Allowance (Care Component) or Carer's Allowance under European Union law

### Introduction

071785 [See DMG Memo Vol 2/75 & DMG Memo Vol 2/81] [See DMG Memo Vol 2/100] [See DMG Memo Vol 2/103] [See DMG Memo Vol 2/105] [See DMG Memo Vol 2/111] Provided the claimant is within the personal scope of the European Union co-ordination regulations and provided the United Kingdom is the competent state for the payment of sickness benefits, where a new claim for Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component) is made by a person who is habitually resident in another European Economic Area state in respect of any period on or after 21.7.11, decision makers cannot apply the past presence test and the claimant will not have to satisfy the conditions that they be present "in Northern Ireland" nor the condition that they be "habitually resident" in Northern Ireland<sup>1</sup>. However the claimant will have to show a genuine and sufficient link to the United Kingdom<sup>2</sup>.

*1 SS (AA) Regs (NI), reg 2; SS (DLA) Regs (NI), reg 2; SS (ICA) Regs (NI), reg 9*

### Genuine and sufficient link

071786 [See DMG Memo Vol 2/72] Except where DMG 071796 applies, decision makers must determine whether the claimant has a "genuine and sufficient link" with the United Kingdom.

071787 Decision makers will need to make a balanced judgement based on all the facts of the case. Among the relevant elements that may be considered are

1. **Personal factors**, for example whether the claimant is receiving a United Kingdom benefit for example, a pension

**Note:** Where the claimant has a spouse's or survivor's pension, that will be a relevant factor but is not sufficient in itself where the claimant has never lived in the United Kingdom or been a United Kingdom worker **and**

2. **Periods of residence or work in the United Kingdom**, for example

2.1 whether the claimant has spent a significant part of their life in the United Kingdom

- 2.2** whether the claimant has worked and paid United Kingdom National Insurance contributions as result of that work

**and, if the claimant is a family member** (within the meaning given in DMG 071775 i.e. including adult children who are dependant on their parents)

- 3. Family factors**, for example where the claimant is a dependent child of someone who is receiving a pension from the United Kingdom. Where the claimant is the spouse or civil partner of a person with a genuine and sufficient link with the United Kingdom that will be a relevant but not exclusive factor in deciding whether the claimant has a genuine and sufficient link.

**Note:** This is not a checklist and it will be for the decision maker to give the appropriate weight to each relevant fact in coming to an overall determination of whether there is a genuine and sufficient link to the United Kingdom.

#### **Example 1**

Harry moved to Spain in 2005 after having lived and worked all his life in the United Kingdom. He receives a full United Kingdom state Retirement Pension in Spain. On 12.9.11 he claimed Attendance Allowance. The decision maker decided that the United Kingdom was the competent state for sickness benefits and that Harry had a genuine and sufficient link to the United Kingdom.

#### **Example 2**

Susan, a United Kingdom worker retires early and moves to France. She marries her French neighbour, Henri. At 60 she claims her United Kingdom pension. Henri does not work due to disability and has no income. He is not yet old enough to receive his French pension and does not meet the conditions for any French benefits. Henri claims Disability Living Allowance (Care Component). The decision maker decided that the United Kingdom was the competent state for the payment of sickness benefits. However he decided that Henri did not have a genuine and sufficient link to the United Kingdom: the only link was that he was married to a United Kingdom pensioner. He had never lived nor worked in the United Kingdom and had no United Kingdom benefits payable to him.

071788 Subject to the other conditions of entitlement, if all the European Union law conditions above are satisfied, Attendance Allowance, Carer's Allowance or Disability Living Allowance (Care Component) can be paid to the claimant in their country of residence.

071789

## Claims for Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component) by "incomers"

071790 [See DMG Memo Vol 2/75 & DMG Memo Vol 2/81] [See DMG Memo Vol 2/100] [See DMG Memo Vol 2/103] [See DMG Memo Vol 2/105] [See DMG Memo Vol 2/111] Decision makers will encounter claims for Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component) made by persons who have recently moved from a European Economic Area state to reside permanently in the United Kingdom.

071791 [See DMG Memo Vol 2/88] On any day where a claimant

1. is habitually resident in Northern Ireland **and**
2. a relevant European Union regulation applies to them **and**
3. can demonstrate a genuine and sufficient link to the United Kingdom

for the purposes of establishing entitlement to Attendance Allowance, Disability Living Allowance and Carer's Allowance for that day, that claimant **does not** have to satisfy the past presence test<sup>1</sup>.

<sup>1</sup> SS (AA) Regs (NI), reg 2; SS (DLA) Regs (NI), reg 2; SS (ICA) Regs (NI), reg 9

071792 A relevant European Union regulation applies when the claimant is within the personal scope of the European Union regulations relating to the co-ordination of social security systems **provided** that the United Kingdom is the competent state for the payment of Attendance Allowance, Disability Living Allowance (Care) or Carer's Allowance (which for the purposes of in the co-ordinating regulations are cash "sickness benefits" for long term care).

071793 Where a claim for Attendance Allowance, Disability Living Allowance (Care Component) or Carer's Allowance is made by a claimant who satisfies the conditions in DMG 071791 1. & 2. but cannot demonstrate a genuine and sufficient link to the United Kingdom, the past presence test applies just as it would for a United Kingdom national. However the past presence test may be deemed to be met if the claimant satisfies DMG 071796 or the European Union rules about aggregation (see DMG 071797-8) may assist.

071794

# The past presence test and European Union law

## Introduction

071795 [See DMG Memo Vol 1/125, 2/95, 4/154, 8/103, 9/52, 10/80 & 11/31] [See DMG Memo Vol 2/105] The past presence test continues to have application in respect of some claims for Attendance Allowance, Carer's Allowance, and Disability Living Allowance (Care Component) by "incomers" (see DMG 071791) and in the case of Disability Living Allowance (Mobility Component) see DMG 071803.

## Certain employed and self-employed persons

071796 The following persons who are European Economic Area or Swiss nationals are treated as satisfying the past presence test and decision makers do not have to consider whether they have a genuine and sufficient link to the United Kingdom

1. current workers (and their family members), whether employed or self-employed, who pay United Kingdom National Insurance contributions. This includes posted workers (see DMG 071797) and frontier workers (see DMG 071778) **or**
2. people who (and their family members), although not currently employed, are receiving contribution-based Employment and Support Allowance in the assessment phase or contribution-based Jobseeker's Allowance or Maternity Allowance, or those who continue to be insured for contribution-based Employment and Support Allowance after they cease work.

## Aggregation and the past presence test - Attendance Allowance, Carer's Allowance and Disability Living Allowance (Care Component)

071797 Some periods of insurance in another Member State may qualify to be aggregated with residence in the United Kingdom when considering whether the past presence test is met. The past presence test does not apply to claims to Attendance Allowance or Disability Living Allowance from the terminally ill (see DMG 071717).

071798 Certain workers and their family members are deemed to satisfy the past presence test for claims to Attendance Allowance, Disability Living Allowance or Carer's Allowance (see DMG 071796). Where deeming is not appropriate, any periods

recognised as insurance whether from residence, employment or self-employment in another Member State, can be aggregated with presence in the United Kingdom in order to satisfy the past presence test<sup>1</sup> provided the claimant is within the scope of European Union law (see DMG 071754).

*1 Reg (EC) 883/04 art 6 & Annex XI entry 2*

**Note:** See DMG 071805 for the effect of aggregation on the past presence test in the case of Disability Living Allowance (Mobility Component).

071799

## Disability Living Allowance (Mobility Component) - effect of European Union law

### Claims from abroad and exportability

071800 The Mobility Component of Disability Living Allowance, is a special non-contributory benefit<sup>1</sup>. It cannot be claimed from abroad and where an award has been made to a person residing in the United Kingdom under United Kingdom domestic law provisions Disability Living Allowance (Mobility Component) that award cannot be exported when the claimant moves to reside permanently abroad but see DMG 071743 et seq regarding certain claimants with transitional protection.

*1 Reg (EEC) 1408/71, art 4(2a), art 10a, & Annex IIA, & Reg (EC) 883/04, art 3(3) & art 70 & Annex X & CJEU Judgement case C-537/09*

### Claims by incomers

071801 **[See DMG Memo Vol 2/105]** On any day when a claimant

1. is habitually resident in Northern Ireland **and**
2. a relevant European Union regulation applies (see DMG 071792) to them **and**
3. can demonstrate a genuine and sufficient link to the United Kingdom

for the purposes of establishing entitlement to Disability Living Allowance (Mobility Component) for that day, that claimant **does not** have to satisfy the past presence test<sup>1</sup>.

*1 SS (DLA) Regs (NI), reg 2*

071802 In these cases the question of whether the United Kingdom is the competent state is not at issue, but decision makers will need to establish whether the claimant is within the personal scope of the European Union co-ordination regulations<sup>1</sup>.

*1 Reg (EC) 883/04, art 2*

071803 Where a person satisfies the conditions in DMG 071801 **1.** & **2.** but cannot demonstrate a genuine and sufficient link to the United Kingdom, the past presence test will apply. However the claimant may be able to gain assistance from European Union law.

071804 Firstly the past presence test may be deemed to be satisfied because the claimant is a worker or self-employed person who satisfies the conditions in DMG 071796. Secondly they may be able to satisfy the past presence test by virtue of aggregation (see DMG 071805).

## **Aggregation and the past presence test - Disability Living Allowance (Mobility Component)**

071805 **[See DMG Memo Vol 2/105]** As the Mobility Component is to be treated as a special non-contributory benefit, it is only payable in the United Kingdom. However, for the purpose of satisfying the past presence test, periods of insurance for social security benefits arising from periods of employment, self-employment or residence in another European Economic Area State qualify to be aggregated with residence in the United Kingdom when considering whether the past presence test is met.

071806 – 071809

## Residence and presence and reciprocal agreements

### General

071810 Where general United Kingdom law is not helped by European Union law, the decision maker should consider whether the claim is helped by any reciprocal agreements with other countries. See DMG 070320 which gives guidance on when reciprocal agreements can be used.

071811 Attendance Allowance and Disability Living Allowance (both Care and Mobility) are covered in the reciprocal agreements with

1. Jersey and Guernsey<sup>1</sup> (including Alderney, Herm, and Jethou) **and**
2. Isle of Man<sup>2</sup> **and**
3. Great Britain<sup>3</sup>.

*1 SS (Jersey and Guernsey) Order (NI) 94; 2 SS (Isle of Man) Order (NI) 77;  
3 SS (GB Reciprocal Arrangements) Regs (NI)*

### Habitually resident test

071812 The agreements do not help a claimant to satisfy the habitually resident test. A claimant must be habitually resident in Northern Ireland before benefit can be awarded, but residence and presence in Great Britain can be treated as residence and presence in Northern Ireland<sup>1</sup>.

*1 SS (GB Reciprocal Arrangements) Regs (NI), Sch, art 2*

### Subject to immigration control

071813 Nationals of the countries in DMG 071811 will always satisfy the test in DMG 071705  
**2..** Other claimants who come to live in Northern Ireland from one of these countries are treated as if they do not have a limitation on their right to reside in Northern Ireland<sup>1</sup> and will also satisfy the test.

*1 SS (DLA) Regs (NI), reg 2(1)(a)(ia)*

### Presence tests

071814 The agreements allow periods of presence in the other country to be taken into account for the presence tests in DMG 071705<sup>1</sup>.

*1 SS (Jersey and Guernsey) Order (NI) 94, Sch, art 29; SS (Isle of Man) Order (NI) 77, Sch 1, art 2;  
SS (GB Reciprocal Arrangements) Regs (NI), Sch, art 2*

**Example**

An Australian national who has lived in the Isle of Man for 15 years comes to live in Northern Ireland on 2.9.96 and claims Disability Living Allowance immediately on arrival. The past presence condition is satisfied by using the periods of presence in the Isle of Man. However, the decision maker will also have to consider whether the claimant is habitually resident here before an award of benefit can be considered.

071815 – 071819

# Dependency increases

## Introduction

071820 This section contains guidance on dependency increases. The guidance covers entitlement to increases of benefits for

1. spouses or civil partners (see DMG 071830)
2. persons caring for children (see DMG 071850) **and**
3. children (see DMG 071870)

where either the dependant, claimant or both is absent from Northern Ireland.

071821 For each type of dependant the guidance includes

1. Northern Ireland law **and**
2. European Community law **and**
3. Reciprocal agreements.

071822 If the claimant does not satisfy the conditions for payment of an increase in Northern Ireland law the decision maker should consider whether the claimant is helped by European Community law and, if not, by any reciprocal agreements.

071823 When considering entitlement to a dependency increase the decision maker will need to refer to the guidance in DMG Volume 3, Subjects Common to all Benefits on the general entitlement conditions for dependants to ensure that these are satisfied before considering this section.

071824 If the claimant's personal benefit is disqualified because of absence from Northern Ireland, then any increase is also disqualified.

071825 – 071829

## Dependency increases - spouse or civil partner

### Northern Ireland law

#### General

071830 Northern Ireland law disqualifies a claimant from receiving benefit because of absence from Northern Ireland<sup>1</sup>. However, providing all the general conditions of entitlement are satisfied (see DMG Volume 3, Subjects Common to all Benefits) an increase for a spouse or civil partner can be paid if the conditions in DMG 071831 - 071833 are satisfied.

*1 SS C&B (NI) Act 92, sec 113(1)(a)*

#### Claimant in Northern Ireland but spouse or civil partner absent

071831 An adult dependency increase is payable if

1. the claimant is in Northern Ireland **and**
2. the claimant's spouse or civil partner is absent from Northern Ireland **and**
3. the claimant and spouse or civil partner are still accepted as residing together (see DMG Volume 3, Subjects Common to all Benefits)<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 14; SS Ben (PRT) Regs (NI), reg 2(1) & (4)*

#### Spouse or civil partner in Northern Ireland but claimant absent

071832 An adult dependency increase is payable if

1. the claimant is absent from Northern Ireland **and**
2. the claimant is **not** disqualified from receiving personal benefit because of the absence **and**
3. the spouse or civil partner remains in Northern Ireland<sup>1</sup>.

*1 SS C&B (NI) Act 92, sec 113(1)(a)*

#### Claimant and spouse or civil partner both absent from Northern Ireland

071833 An adult dependency increase is payable if

1. the claimant and spouse or civil partner are both absent from Northern Ireland **and**
2. the claimant is **not** disqualified from receiving personal benefit because of the absence **and**
3. the claimant and spouse or civil partner are still accepted as residing together (see DMG Volume 3, Subjects Common to all Benefits)<sup>1</sup>.

*1 SS C&B (NI) Act 92, sec 113; SS Ben (PA) Regs (NI), reg 14;  
SS Ben (PRT) Regs (NI), reg 2(1) & (4)*

## European Community law

### General

071834 If the conditions for payment of an increase are not satisfied in Northern Ireland law, the decision maker should consider whether European Community law helps. For this purpose the claimant, spouse or civil partner must be absent in another European Economic Area country (see DMG 070040).

071835 In order to rely on European Community law the dependant (who does not have to be a European Economic Area national) must be a member of the family of a worker (see DMG 070063) or survivor (see DMG 070053) who is

1. a European Economic Area national (see DMG 070040) **and**
2. within the personal scope of European Community law (see DMG 070052 et seq).

071836 A spouse is a member of the family for European Community law. A civil partner may be a member of the family for European Community law depending on the domestic legislation of the member state<sup>1</sup> (see DMG Chapter 10).

*1 Directive 2004/38, art 2(2)*

071837 European Community law allows for payment of an increase of benefit when the dependant is **residing** in another European Economic Area country. Unlike personal benefit there are no provisions to assist payment of the increase when the dependant is only **staying** in another European Economic Area country.

### Claimant in Northern Ireland but spouse or civil partner absent

071838 Whether or not the claimant is also absent from Northern Ireland, an adult dependency increase is payable if the **claimant**

1. is a European Economic Area national (see DMG 070040) **and**

2. comes within the personal scope of European Community law (see DMG 070050 et seq) **and**
3. the dependant is a member of the claimant's family (see DMG 070020) **and**
4. the dependant is residing (see DMG 070000 - 070883) in another European Economic Area country **and**
5. the claimant would satisfy the Northern Ireland conditions for an increase if the dependant were residing in Northern Ireland (see DMG Volume 3, Subjects Common to all Benefits)<sup>1</sup>.

**Note:** The dependant does not have to be a European Economic Area national.

*1 Reg (EEC) 1408/71, arts 23(3), 39(4), 47(3), 58(3) & 68(2)*

### **Spouse or civil partner in Northern Ireland but claimant absent**

071839 An adult dependency increase is payable if

1. the claimant is absent from Northern Ireland **and**
2. the claimant remains entitled to personal benefit **and**
3. the general conditions for entitlement to an adult dependency increase remain satisfied (see DMG Volume 3, Subjects Common to all Benefits).

### **Claimant and spouse or civil partner both absent from Northern Ireland**

071840 An adult dependency increase is payable if the conditions in DMG 071838 are satisfied.

## **Reciprocal agreements**

### **General**

071841 Guidance on the countries covered by reciprocal agreements and the benefits covered is in DMG 070333. The cover for increases for dependants varies according to each agreement. Some agreements make specific provision for increases for dependants while others define "benefits, pensions and allowances" as including any increase for a dependant. An adult dependency increase will therefore remain payable in the circumstances in DMG 071843 - 071845.

071842 Reciprocal agreements with European Economic Area countries have little effect because of the wide provisions in European Community law and so guidance on those agreements is not included. This section contains guidance on the provisions in the agreements with non European Economic Area countries.

### Claimant in Northern Ireland but spouse or civil partner absent

071843 An adult dependency increase is payable if the country and benefit involved are shown as covered by an agreement in the following table<sup>1</sup>.

	IBLT	IBST	ICA	II Bens	MB	RP	SDA
Barbados	x	x	-	x	x	x	-
Bermuda	-	-	-	x	-	x	-
Cyprus	x	x	-	x	x	x	-
Great Britain	x	x	x	x	x	x	x
Guernsey	x	x	-	x	x	x	-
Isle of Man	x	x	x	x	x	x	x
Israel	-	-	-	x	-	x	-
Jamaica	x	-	-	x	-	x	-
Jersey	x	x	-	x	x	x	-
Malta	x	x	-	x	-	x	-
Mauritius	-	-	-	x	-	x	-
New Zealand	-	x	-	-	-	x	-
Philippines	-	-	-	x	-	x	-
Switzerland	x	x	-	x	-	x	-
Turkey	x	x	-	x	x	x	-
USA	x	x	-	-	-	x	-
Yugoslavia	x	x	-	x	x	x	-
(see note)							

**Note:** The reciprocal agreement between Northern Ireland and former Yugoslavia should be treated as separate agreements between Northern Ireland and

1. the State Union of Serbia and Montenegro
2. Bosnia-Herzegovina
3. Croatia the former Yugoslav republic of Macedonia
4. Slovenia.

*1 SS (Barbados) Order (NI) 92, Sch, art 5(7); NI & II (Bermuda) Order (NI) 70, Sch, arts 9(4) & 10(3);  
 SS (Cyprus) Order (NI) 83, Sch, art 4(2); SS (GB Reciprocal Arrangements) Regs (NI), Sch 1, art 2;  
 SS (Isle of Man) Order (NI) 77, Sch 1, art 2(1); NI and II (RA with Israel) Order (NI) 58, Sch, art 9;  
 SS (Jamaica) Order (NI) 97, Sch 1, art 5(3); SS (Jersey and Guernsey) Order (NI) 94, Sch, art 5(5);  
 SS (Malta) Order (NI) 96, Sch, art 4(4); SS (Mauritius) Order (NI) 81, Sch 1, art 4(3);  
 SS (New Zealand) Order (NI) 83, Sch, art 3; SS (Philippines) Order (NI) 89, Sch, art 4(3);  
 FA, NI and II (Switzerland) Order (NI) 69, Sch 1, art 16(3);  
 NI and II (RA with Turkey) Order (NI) 61, Sch, art 28(1);  
 SS (USA) Order (NI) 84, Sch 1, art 7(4);  
 FA, NI and II (Yugoslavia) Order (NI) 58, Sch, art 26(1)*

### **Spouse or civil partner in Northern Ireland but claimant absent**

071844 An adult dependency increase is payable if the claimant is absent from Northern Ireland **and**

1. resides in a country covered by a reciprocal agreement (see DMG 070333) **and**
2. remains entitled to personal benefit because of that agreement **and**
3. all other general conditions for entitlement to the adult dependency increase are satisfied (see DMG Volume 3, Subjects Common to all Benefits).

### **Claimant and spouse or civil partner both absent from Northern Ireland**

071845 An adult dependency increase is payable if the claimant and spouse or person caring for a child

1. reside in a country covered by a reciprocal agreement (see DMG 070333) **and**
2. the claimant remains entitled to personal benefit because of that agreement **and**
3. all other general conditions for entitlement to the adult dependency increase are satisfied (see Volume 3, Subjects Common to all Benefits).

071846 – 071849

# Dependency increases - person caring for a child

## Northern Ireland law

### General

071850 Northern Ireland law disentitles a claimant from receiving an increase of benefit because of the dependants absence from Northern Ireland<sup>1</sup>. However, providing all the other conditions of entitlement are satisfied (see DMG Volume 3, Subjects Common to all Benefits), title to adult dependency increase will exist if the conditions in DMG 071852 or 071853 are satisfied.

*1 SS (IB for D) Regs (NI), reg 14; SS Ben (Dep) Regs (NI), regs 10(3), 12(1) & 12(2); Sch 2, para 7(b)(iv)*

### Claimant in Northern Ireland but person caring for child absent

071851 There is no entitlement to an adult dependency increase<sup>1</sup>.

*1 SS (IB for D) Regs (NI), reg 14; SS Ben (Dep) Regs (NI), regs 10(3) & 12(1); SS JSA (Transitional Provisions) Regs (NI), reg 9(4); SS Ben (Dep) Regs (NI), reg 12(2); Sch 2, para 7(b)(iv)*

### Person caring for a child in Northern Ireland but claimant absent

071852 An adult dependency increase is payable if

1. the claimant is absent from Northern Ireland **and**
2. the claimant is not disqualified from receiving personal benefit because of the absence **and**
3. the person caring for a child is in Northern Ireland **and**
4. all other conditions of entitlement for an increase are satisfied<sup>1</sup> (see DMG Volume 3, Subjects Common to all Benefits).

*1 IB and SDA - SS (IB for D) Regs (NI), reg 14, SS (Dep) Regs (NI), reg 12(1); MA, RP, Dis Pen with US - SS (Dep) Regs (NI), reg 10(3); SS JSA (Transitional Provisions) Regs (NI), reg 9(4); ICA - SS (Dep) Regs (NI), reg 12(2); Sch 2, para 7(b)(iv)*

### Claimant and person caring for a child both absent from Northern Ireland

071853 An adult dependency increase is payable if<sup>1</sup>

1. the claimant and the person caring for the child are absent from Northern Ireland **and**

2. the claimant is not disqualified from receiving personal benefit because of the absence **and**
3. is still accepted as residing with<sup>2</sup> (see DMG Volume 3, Subjects Common to all Benefits) the person caring for a child **and**
4. all other conditions of entitlement for an increase are satisfied (see DMG Volume 3, Subjects Common to all Benefits).

*1 SS (IB for D) Regs (NI), reg 14; SS Ben (Dep) Regs (NI), regs 12(1) & 10(3); SS JSA (Transitional Provisions) Regs (NI), reg 9(4); SS (Dep) Regs (NI), reg 12(2); Sch 2 para 7(b)(iv); 2 SS (PRT) Regs (NI), reg 2(1) & (4)*

## European Community law

### General

071854 The guidance in DMG 071834 - 071837 for spouses also applies to persons caring for a child.

### Claimant in Northern Ireland but person caring for a child absent

071855 Whether or not the claimant is also absent from Northern Ireland, an adult dependency increase is payable if the conditions in DMG 071838 are satisfied.

### Person caring for child in Northern Ireland but claimant absent

071856 An adult dependency increase will be payable if the conditions in DMG 071839 are satisfied.

### Claimant and person caring for child both absent from Northern Ireland

071857 An adult dependency increase is payable if the conditions in DMG 071838 are satisfied.

## Reciprocal agreements

### General

071858 The guidance in DMG 071841 - 071842 for spouses or civil partners also applies to an increase for persons caring for a child. An adult dependency increase will therefore remain payable in the circumstances in DMG 071859 - 071860.

### **Claimant in Northern Ireland but person caring for child absent**

071859 An adult dependency increase is payable if the country and benefit are covered as indicated in DMG 071843.

### **Person caring for a child in Northern Ireland but claimant absent**

071860 An adult dependency increase will be payable if the conditions in DMG 071844 are satisfied.

### **Claimant and person caring for a child both absent from Northern Ireland**

071861 An adult dependency increase will be payable if the conditions in DMG 071845 are satisfied.

071862 – 071869

## Child dependency increases

### Conditions in Northern Ireland law

#### General

071870 Child dependency increases were abolished for most benefits from 6.4.03 but certain awards are transitionally protected. Detailed guidance on child dependency increases can be found in DMG Chapter 16 in Volume 3. There are no residence and presence conditions in United Kingdom law for child dependency increases. To be entitled to child dependency increases a claimant must be entitled, or be treated as entitled, to Child Benefit<sup>1</sup>. Questions regarding entitlement to Child Benefit should be referred to Her Majesty's Revenue and Customs.

#### Northern Ireland law - entitlement to Child Benefit

071871 To be entitled to Child Benefit a claimant must satisfy presence conditions in Northern Ireland<sup>1</sup>. If these conditions are not satisfied, a claimant may be treated as being entitled to Child Benefit<sup>2</sup> if

1. the claimant/child are absent in a country where there could have been entitlement to child dependency increase under European Community law or a reciprocal agreement (see DMG 071872) **or**
2. the claimant/child are temporarily absent in a country where there could not have been entitlement to child dependency increase under European Community law or a reciprocal agreement (see DMG 071875) **or**
3. immediately before returning to Northern Ireland the claimant was entitled to child dependency increase (see DMG 071877)
4. the claimant is entitled to another country's family benefits under a reciprocal agreement (see DMG 071878).

*1 SS C&B (NI) Act 92, sec 142(3); 2 SS Ben (PA) Regs (NI), reg 15*

#### Absence from Northern Ireland - possible entitlement under European Community law or reciprocal agreement

071872 A claimant and/or child who is absent from Northern Ireland may be treated as being entitled to Child Benefit if

1. they are in a country in which there would have been entitlement to child dependency increase under European Community law or a reciprocal agreement but for the reason that there is no entitlement to Child Benefit **and**
2. the claimant would have been entitled to child benefit for the child if the presence tests had been satisfied **and**
3. if the child cannot be treated as living with the claimant, the claimant is contributing to the cost of maintaining the child by at least the total of the weekly rates of Child Benefit and child dependency increase **and**
4. no other person is entitled to Child Benefit for the child<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 15*

071873 If a claimant would satisfy the conditions in DMG 071872 except for the fact that the child is in Northern Ireland, the child is treated as being present in the same country as the claimant<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 15(2)*

071874 For the purposes of DMG 071872, the claimant or child may be treated as absent from Northern Ireland even though they have never previously been in Northern Ireland<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 15(4)*

### **Temporary absence from Northern Ireland - no possible entitlement under European Community law or reciprocal agreement**

071875 A claimant and/or child who is absent from Northern Ireland with no possible entitlement to child dependency increase under European Community law or under a reciprocal agreement as in DMG 071872 may be treated as being entitled to Child Benefit if

1. the claimant would have been entitled to Child Benefit for the child if the presence tests had been satisfied **and**
2. if the child cannot be treated as living with the claimant, the claimant is contributing to the cost of maintaining the child by at least the total of the weekly rates of Child Benefit and child dependency increase **and**
3. the claimant's and/or child's absence has always been, and continues to be, intended to be temporary (see DMG 070853 - 070878) **and**
4. no other person is entitled to Child Benefit for the child<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 15(3)*

071876 For the purposes of DMG 071875, if a woman has a child whilst absent from Northern Ireland, that child will be treated as having been present in Northern Ireland on the date on which its mother was last present in Northern Ireland, providing she was pregnant with the child at that time<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 15(4)*

### **Entitled to child dependency increase immediately before return to Northern Ireland**

071877 A claimant may be treated as being entitled to Child Benefit if

1. immediately before returning to Northern Ireland that claimant was entitled to child dependency increase, for example under DMG 071872 **and**
2. on return to Northern Ireland that entitlement would have continued except for the fact that there was no entitlement to Child Benefit **and**
3. the claimant would have been entitled to Child Benefit for the child if the presence tests had been satisfied **and**
4. where the child cannot be treated as living with the claimant, the claimant is contributing to the cost of maintaining the child by at least the total of the weekly rates of Child Benefit and Guardian's Allowance **and**
5. no other person is entitled to Child Benefit for the child<sup>1</sup>.

*1 SS Ben (PA) Regs (NI), reg 15(5)*

### **Claimant in Northern Ireland entitled to another country's family benefits**

071878 A claimant in Northern Ireland may be treated as being entitled to Child Benefit if

1. the claimant, spouse or civil partner residing with the claimant, is entitled to family benefits from another country under a reciprocal agreement **and**
2. consequently is not entitled to Child Benefit **and**
3. would otherwise have been entitled to child dependency increase<sup>1</sup>.

*1 SS Ben (Dep) Regs (NI), reg 4A(4)*

## Conditions in European Community law

### General

071879 If the claimant does not satisfy the residence and presence conditions in Northern Ireland law, the decision maker should consider whether European Community law helps the claim.

071880 In order to be helped by European Community law a claimant must

1. be a European Economic Area national (see DMG 070080) **and**
2. come within the personal scope<sup>1</sup> (see DMG 070050) of European Community law.

*1 Reg (EEC) 1408/71, art 2*

071881 In European Community law child dependency increases for all benefits other than Income Support, income-based Jobseeker's Allowance and Industrial Death Benefit come within the category of **family benefits**<sup>1</sup> and child dependency increase of Widowed Mother's Allowance comes within **family allowances**. Family benefits are all benefits, in kind or in cash, intended to meet family expenses<sup>2</sup>. Family allowances are periodical cash payments based on the number and age of the members of the family<sup>3</sup>.

*1 Reg 1408/71, art 4(1)(h); 2 art 1(u)(i); 3 art 1(u)(ii)*

071882 If a claimant satisfies the conditions in DMG 071880 see

1. the guidance on family benefits under European Community law at DMG 071800 as this applies equally to child dependency increase **and**
2. the guidance on supplements at DMG 071830.

## Reciprocal agreements

### General

071883 If a claimant does not satisfy Northern Ireland law and is not helped by European Community law, the decision maker should consider whether the claim is helped by any reciprocal agreements with other countries. See DMG 070320 which gives guidance on when reciprocal agreements can be used.

071884 Child dependency increases are included in many reciprocal agreements with European Economic Area and other countries (see DMG 070330 - 070333). The agreements with European Economic Area countries have little effect because of the wide provisions in European Community law and so guidance on those agreements is not included. This section contains guidance on the provisions in the agreements with non European Economic Area countries.

071885

### Barbados

071886 If a child is in Barbados, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to a child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Barbados) Order (NI) 92, Sch, arts 5(7) & 22(2)*

### Bermuda

071887 If a child is in Bermuda, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Bermuda) Order (NI) 92, Sch, arts 9(4) & 10(3)*

### Cyprus

071888 If a child is in Cyprus (including the Sovereign Base Areas), the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Cyprus) Order (NI) 83, Sch, art 4(2)*

## Great Britain

071889 The agreement allows periods of presence in Great Britain to be treated as periods of presence in Northern Ireland. This means that a claimant who is entitled to a Northern Ireland personal benefit will continue to be entitled to child dependency increase during any absences, or the child's absences, in Great Britain<sup>1</sup>.

*1 SS (GB Reciprocal Arrangements) Regs (NI), Sch, art 2*

## Guernsey

071890 If a child is in Guernsey, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Jersey and Guernsey) Order (NI) 94, Sch, art 5(5)*

## Isle of Man

071891 The agreement allows periods of presence in the Isle of Man to be treated as periods of presence in the United Kingdom. This means that a claimant who is entitled to a United Kingdom personal benefit will continue to be entitled to child dependency increase during any absences, or the child's absences, in the Isle of Man<sup>1</sup>.

*1 SS (Isle of Man) Order (NI) 77, Sch 1, art 2(1)*

## Israel

071892 If a child is in Israel, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to United Kingdom Retirement Pension, Widow's Benefit and Industrial Injuries benefits **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 NI and II (RA with Israel) Order (NI) 58, Sch, art 9*

## Jamaica

071893 If a child is in Jamaica, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**

2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Jamaica) Order (NI) 97, Sch 1, art 5(3)*

## Jersey

071894 If a child is in Jersey, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Jersey and Guernsey) Order (NI) 94, Sch, art 5(5)*

## Malta

071895 If a child is in Malta, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Malta) Order (NI) 96, Sch, art 4(4)*

## Mauritius

071896 The agreement allows

1. where a claimant is entitled to Retirement Pension only under the United Kingdom scheme, child dependency increase to be paid by the United Kingdom **or**
2. where a claimant is entitled to Retirement Pension only under the Mauritius scheme, an increase for a child to be paid by Mauritius **or**
3. where a claimant is entitled to Retirement Pension under both the United Kingdom and Mauritius schemes, an increase for a child to be paid by the country in which the claimant is habitually resident **and**
4. if a child is in Mauritius, entitlement to child dependency increase to continue if the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and** there would be entitlement to child dependency increase if the child had been in the United Kingdom **and** the claimant is residing with, or

would be residing with if not temporarily absent from, the child and is responsible for the child<sup>1</sup>.

*1 SS (Mauritius) Order (NI) 81, Sch 1, arts 4(3) & 15*

## New Zealand

071897 If a child is in New Zealand, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom **and**
3. the child is **not** usually resident in New Zealand or the eldest, elder or only child in a Widowed Mother's Allowance claim<sup>1</sup>.

*1 SS (New Zealand) Order (NI) 83, Sch, art 3*

## Philippines

071898 The agreement allows

1. where a claimant is entitled to Retirement Pension only under the United Kingdom scheme, child dependency increase to be paid by the United Kingdom **or**
2. where a claimant is entitled to Retirement Pension only under the Philippines scheme, an increase for a child to be paid by the Philippines **or**
3. where a claimant is entitled to Retirement Pension under both the United Kingdom and Philippines schemes, an increase for a child to be paid by the country in which the claimant is habitually resident **and**
4. if a child is in the Philippines, entitlement to child dependency increase to continue if the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and** there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (Philippines) Order (NI) 89, Sch, arts 4(3) & 14*

## Switzerland

071899 A claimant who is entitled to a United Kingdom personal benefit will continue to be entitled to child dependency increase if the child is absent in Switzerland<sup>1</sup>.

*1 FA, NI and II (Switzerland) Order (NI) 69, Sch 1, art 16(3)*

## Turkey

071900 If a child is in Turkey, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 NI and II (RA with Turkey) Order (NI), 61, Sch, art 28(1)*

## United States of America

071901 If a child is in the United States of America, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 SS (USA) Order (NI) 84, Sch 1, art 7(4)*

## Yugoslavia

071902 The reciprocal agreement between the United Kingdom and former Yugoslavia should be treated as separate agreements between the United Kingdom and

1. the State Union of Serbia and Montenegro
2. Bosnia-Herzegovina
3. Croatia
4. the former Yugoslav republic of Macedonia
5. Slovenia.

071903 If a child is in one of the countries in DMG 071902, the claimant will be entitled to child dependency increase if

1. the claimant is entitled to a United Kingdom personal benefit covered by the agreement **and**
2. there would be entitlement to child dependency increase if the child had been in the United Kingdom<sup>1</sup>.

*1 FA, NI and II (RA with Yugoslavia) Order (NI) 58, art 26(1)*

071904 – 071909

# Employment and Support Allowance - Residence and presence conditions

## Introduction

071910 Employment and Support Allowance was introduced for new claimants on 27.10.08. Contribution-based Employment and Support Allowance replaced Incapacity Benefit and income-related Employment and Support Allowance replaced Income Support on grounds of disability.

071911 It is a condition of entitlement to Employment and Support Allowance that the claimant is in Northern Ireland<sup>1</sup>. However

1. in relation to contribution-based Employment and Support Allowance, this condition must be read subject to European Community law
2. there are further residence and presence conditions for entitlement to contribution-based Employment and Support Allowance relating to youth<sup>2</sup>
3. a claimant must also be habitually resident in Northern Ireland for income-related Employment and Support Allowance<sup>3</sup>
4. there are also provisions to allow continued entitlement to Employment and Support Allowance (both contribution-based and income-related) for certain temporary absences from Northern Ireland.

*1 WR Act (NI), sec 1(3)(d); 2 Sch 1, Part 1, para 4(1)(c); 3 ESA Regs (NI), reg 70*

## Contribution-based Employment and Support Allowance - European Community provisions

071912 [See DMG Memo Vol 2/23] [See DMG Memo Vol 2/105] It is a condition of entitlement to Employment and Support Allowance that a claimant is in Northern Ireland<sup>1</sup>. The claimant must be physically present in Northern Ireland on the day or period in question. A claimant is disqualified for receiving contribution-based Employment and Support Allowance and income-related Employment and Support Allowance for any period absent from Northern Ireland<sup>2</sup> unless entitlement continues during a period of temporary absence<sup>3</sup>. When considering entitlement to contribution-based Employment and Support Allowance, however, this condition must be read in conjunction with European law<sup>4</sup> if the claimant is in another European Economic Area member state or Switzerland. The European Economic Area includes all European

Community countries and the 3 European Free Trade Area countries (see DMG 070040).

*1 WR Act (NI), sec 1(3)(d); 2 sec 18(4)(a); 3 ESA Regs (NI), reg 151(2); 4 Reg (EEC) 1408/71*

071913 In order to benefit from European Community regulations, the claimant must normally be a European Economic Area national; but see DMG 070080 et seq. Detailed guidance on how a claimant, first claiming from another European Economic Area state or on moving to another European Economic Area state, might benefit from European Community regulations is in Part 4 of Chapter 7 of the Decision Makers Guide. The guidance therein relates to Incapacity Benefit, but this will equally apply to claims to contribution-based Employment and Support Allowance.

071914 European Community regulations differentiate between sickness benefits<sup>1</sup> and invalidity benefits<sup>2</sup>. For contribution-based Employment and Support Allowance the assessment phase is treated as a sickness benefit and thereafter it is treated as an invalidity benefit.

*1 Title III Chapter 1; 2 Chapter 2*

071915 In particular, European Community provisions may assist the claimant

1. satisfy the contribution conditions - see DMG 073791
2. first claiming Employment and Support Allowance in another European Economic Area state - see DMG 073800 and 073867
3. avoid disqualification if in another European Economic Area state in the assessment phase - see DMG 073860
4. avoid disqualification if in another European Economic Area state after the assessment phase - see DMG 073900.

## **Employment and Support Allowance - reciprocal agreements**

071916 The United Kingdom has some 30 reciprocal Social Security agreements that include provisions on Incapacity Benefits. These agreements were not extended or amended to include Employment and Support Allowance. Thus contribution-based Employment and Support Allowance is not covered by any reciprocal agreement (but see Part 4 of Chapter 7 of the Decision Makers Guide for those moving within the European Community).

071917 However, those claimants who continue to be entitled to Incapacity Benefit after 26.10.08 are still covered by the reciprocal agreements with other countries (see DMG 070330 and 070333).

## Contribution-based Employment and Support Allowance - relating to youth

071918 For Employment and Support Allowance (youth provisions) a claimant must satisfy prescribed conditions of residence and presence in Northern Ireland on any day included in the claim<sup>1</sup>. Claimants must

1. be habitually resident in Northern Ireland<sup>2</sup> (see DMG 070769) **and**
2. not be subject to immigration control<sup>3</sup> (see DMG 070831 - 070836) **and**
3. be present in Northern Ireland<sup>4</sup> **and**
4. have been present in Northern Ireland for a period of (or periods totally) not less than 26 weeks in the previous 52 weeks<sup>5</sup>.

*1 WR Act (NI), Sch 1, para 4(1)(c); 2 ESA Regs (NI), reg 11(1)(a); 3 reg 11(1)(b) & reg 11(3)  
4 reg 11(1)(e); 5 reg 11(1)(d)*

071919 A person is to be treated as having satisfied the conditions in DMG 071918 **1.**, **3.**, and **4.** throughout a period of limited capability for work (see DMG 41024 **7.** for the definition of period of limited capability for work) where those conditions are satisfied on the first day of that period.

071920 Claimants to contribution-based Employment and Support Allowance relating to youth, who are absent from Northern Ireland on any day should, for the purposes of the residence and presence tests, be treated as resident or present in Northern Ireland if on that day they are

1. in prescribed employment on the continental shelf<sup>1</sup> (see DMG 078060 - 078185) **or**
2. aircraft workers or mariners<sup>2</sup> (see DMG 078060 - 078185) **or**
3. living with a serving member of the armed forces<sup>3</sup> (see DMG 078087 and 078182) and are that person's spouse or civil partner, son, daughter, father, father-in-law, mother or mother-in-law<sup>4</sup>.

**Note:** References to 'in-laws' are to be read as including relationships arising through civil partnerships.

*1 ESA Regs (NI), reg 11(2)(b); 2 reg 11(2)(c); 3 reg 2 & Sch 1; 4 reg 11(2)(a)*

071921 – 071929

## Income-related Employment and Support Allowance - habitual residence

071930 [See DMG Memo Vol 2/91] [See DMG Memo Vol 2/96] [See DMG Memo Vol 2/99] [See DMG Memo Vol 2/101, 5/123, 9/58 & 14/79] [See DMG Memo Vol 2/106] The

habitual residence test applies to income-related Employment and Support Allowance in the same way as to Income Support and income-based Jobseeker's Allowance. A claimant who is not habitually resident in the common travel area is a person from abroad<sup>1</sup> and has an income-related Employment and Support Allowance applicable amount of nil<sup>2</sup>.

*1 ESA Regs (NI), reg 70(1); 2 Sch 5, Part 1, para 11*

071931 Regulations provide that a claimant cannot be habitually resident unless he has the right to reside in the common travel area<sup>1</sup>. The common travel area is the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland.

*1 ESA Regs (NI), reg 70(2)*

071932 Detailed guidance on habitual residence and the right to reside is in Part 3 of Chapter 07 of the Decision Makers Guide.

071933 Apart from certain temporary absences from Northern Ireland (see DMG 071940 below), a claimant is not entitled to income-related Employment and Support Allowance unless he is present in Northern Ireland<sup>1</sup>. In European law, income-related Employment and Support Allowance is a special non-contributory benefit<sup>2</sup>, and thus only payable in Northern Ireland.

*1 WR Act (NI), sec 1(3)(d); 2 Reg (EEC) 1408/71, arts 4(2)(a) & 10a & Annex IIA entry Y(c); Reg (EC) 833/04, art 70 & para (e) of UK entry at Annex X*

071934 – 071939

## Temporary absence abroad - contribution-based Employment and Support Allowance and income-related Employment and Support Allowance

### Short absence

071940 A claimant will continue to be entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance for the first four weeks of any absence from Northern Ireland if

1. the absence is temporary **and**
2. the absence is unlikely to exceed 52 weeks **and**
3. he continues to satisfy the other conditions of entitlement to Employment and Support Allowance<sup>1</sup>.

*1 ESA Regs (NI), reg 152*

## Absence to receive medical treatment

071941 A claimant will continue to be entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance for the first 26 weeks of absence from Northern Ireland<sup>1</sup> if

1. the absence is temporary **and**
2. the absence is unlikely to exceed 52 weeks **and**
3. he continues to satisfy the other conditions of entitlement to Employment and Support Allowance **and either**
  - 3.1 the absence is solely to receive treatment for a condition which started before the claimant left Northern Ireland and which is directly related to the claimant's limited capability for work **or**
  - 3.2 the claimant is accompanying a dependant child receiving treatment abroad.

*1 ESA Regs (NI), reg 153(1)(a), (b), (c) & (e)*

071942 Treatment abroad, whether for the claimant or a dependant child, must be by or under the supervision of a person qualified to provide medical treatment, physiotherapy, or similar forms of treatment<sup>1</sup>.

*1 ESA Regs (NI), reg 153(1)(d) & (2)*

## Absence for National Health Service treatment

071943 A claimant will continue to be entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance during any period of absence from Northern Ireland<sup>1</sup> if

1. the absence is temporary **and**
2. he continues to satisfy the other conditions of entitlement **and**
3. the absence is for the claimant to receive treatment at a hospital or similar institution outside Northern Ireland but provided
  - 3.1 under articles 5, 7 and 8 of The Health and Personal Social Services (NI) Order 1972 **or**
  - 3.2 pursuant to arrangements made under article 14A of that Order **or**
  - 3.3 pursuant to arrangements made under paragraph 13 of Schedule 3 to the Health and Personal Social Services (NI) Order 1991.

*1 ESA Regs (NI), reg 154*

## Family members of a member of Her Majesty's Forces

071944 A claimant will continue to be entitled to contribution-based Employment and Support Allowance and income-related Employment and Support Allowance for any period of absence from Northern Ireland<sup>1</sup> if

1. the absence is temporary **and**
2. the claimant is a member of the family of a member of Her Majesty's Forces **and**
3. the absence is because the claimant is living with that member of the forces.

*1 ESA Regs (NI), reg 155*

071945 Member of the family<sup>1</sup> means the spouse, civil partner, son, daughter, step-son, step-daughter, father, father-in-law, step-father, mother, mother-in-law and step-mother. References to "step-parent and step-children and in-laws" are to be read as including such relationships arising through civil partnerships.

*1 ESA Regs (NI), reg 155(2)*

071946 Member of Her Majesty's Forces<sup>1</sup> includes the various reserve forces but only if they give full pay service - see DMG 078087 and 078182.

*1 ESA Regs (NI), reg 2(1), Sch 1, para 1*

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## Appendix 1

### **Attendance Allowance, Carer's Allowance & Disability Living Allowance (Care Component) - pre 21.7.11 guidance (see also Appendix 2)**

#### **Export of benefit to other European Economic Area Member States under European Union law**

**General** [See DMG Memo Vol 1/125, 2/95, 4/154, 8/103, 9/52, 10/80 & 11/31]

1. United Kingdom law does not allow claimants who go to live permanently in another country to export their benefit. If the claimant does not satisfy the residence and presence conditions in United Kingdom law, the decision maker should consider whether European Union law helps the claim.
2. To be helped by European Union law a claimant must
  1. be a European Economic Area national or a family member of a European Economic Area national or a third country national in some circumstances **and**
  2. come within the personal scope<sup>1</sup> of European Union law **and**
  3. have moved within the European Economic Area.

*1 Reg (EEC) 1408/71, art 2 & Reg (EC) 883/04, art 2*

#### **Family member**

3. Family member includes the spouse or civil partner of a European Economic Area national, and the children of such a person who are either minors or dependant on such a person<sup>1</sup>.

*1 Reg (EEC) 1408/71, art 1(f)(ii) & Reg (EC) 883/04 art 1(i)(2)*

#### **Background**

4. Prior to 1.6.92, Attendance Allowance, Disability Living Allowance (both Care and Mobility), and Carer's Allowance were treated as invalidity benefits in light of a decision by the European Court of Justice<sup>1</sup>. Under European Union law<sup>2</sup> an invalidity

benefit cannot be withdrawn solely because the recipient goes to live in another European Economic Area country.

*1 R(M) 1/92, Newton v CAO, Case C-356/89; 2 Reg (EEC) 1408/71, art 10*

5. From 1.6.92, Attendance Allowance, Disability Living Allowance (Care and Mobility), and Carer's Allowance were listed in Reg (EEC) 1408/71 as special non-contributory benefits<sup>1</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence<sup>2</sup>. They could not be exported when someone moved permanently to live in another European Economic Area Member State.

*1 Reg (EEC) 1408/71, art 4(2a) & Annex IIa entry Y(d), (e), & (f);  
2 R(DLA) 5/99 & R(A) 1/99 (Case C-20/96 & C-90/97)*

6. However, the European Court of Justice subsequently ruled<sup>1</sup> on 18.10.07 that, for the purposes of European Union law, Attendance Allowance and Disability Living Allowance (Care Component only) and Carer's Allowance are sickness benefits. Once the relevant domestic conditions of entitlement are satisfied, a sickness benefit may be exported to, or claimed from, another European Economic Area Member State, if certain conditions in European Union law are met<sup>2</sup>.

*1 ECJ Judgement Case C-299/05; 2 Reg (EEC) 1408/71, art 4(1)(a) & Chapter 1 of Title III & Reg (EC) 883/04 art 3(1)(a) & Chapter 1 of Title III*

7. Although this ruling was made on 18.10.07, it relied heavily on an earlier judgement of the European Court of Justice on 8.3.01<sup>1</sup> concerning an Austrian care benefit. In that judgement the European Court of Justice first ruled that the fact that certain benefits were listed as special non-contributory benefits in European legislation was not conclusive, and that the Austrian benefit was a sickness benefit. In view of these two judgements, Attendance Allowance, Disability Living Allowance (Care) and Carer's Allowance should be treated as sickness benefits from 8.3.01. However, decision makers could not have known this until the Judgement C-299/05 was given on 18.10.07, particularly in view of earlier European Court of Justice judgements<sup>2</sup>. See paragraph 16 below for the position from 8.3.01 onwards.

*1 ECJ Case C-215/99 (Jauch); 2 ECJ Cases C-20/96 (Snare) & C-297/96 (Partridge), R(DLA) 5/99 & R(A) 1/99*

8. The ruling does not affect the Mobility Component of Disability Living Allowance which remains a special non-contributory benefit and is not exportable<sup>1</sup> (but see paragraph 9 et seq below for certain claimants who may have transitional protection).

*1 CJEU Judgement case C-537/09*

### **Transitional protection - entitlement continuous from before 1.6.92**

9. A claimant who was continuously entitled to Attendance Allowance, Carer's Allowance, or Disability Living Allowance (Care and/or Mobility Component) from before 1.6.92, and who moved to another European Economic Area Member State before 18.10.07, is transitionally protected to export his benefit when moving to take up residence in that other European Economic Area Member State<sup>1</sup> if he

1. was a national of a European Economic Area Member State (or family member of a European Economic Area citizen) as at 1.6.92 **and**
2. moved to live in another European Economic Area Member State before 18.10.07 **and**
3. the state he moved to was a Member State as at 1.6.92 **and**
4. satisfies all other conditions of entitlement to the benefit other than residence and presence conditions **and**
  - 4.1 was within the scope of relevant European Union law i.e. has worked in the United Kingdom (or any other Member State) at any time as an employed or self-employed person **or**
  - 4.2 is a member of the family of another person who satisfies condition 4.1 above.

**Note:** The transitionally protected, pre - 1.6.92 described above is an “invalidity benefit” for the purposes of the European Union regulations concerning the co-ordination of social security benefits<sup>2</sup>.

*1 Reg (EEC) 1408/71 art 95(b)(8); 2 Reg (EEC) 1408/71 & Reg (EC) 883/04*

10. Claimants who satisfy all the conditions in DMG 071741 are transitionally protected to export awards of Attendance Allowance or Carer’s Allowance or Disability Living Allowance (both components) where they left Northern Ireland before 18.10.07 (but see paragraph 13 below).
11. However, only awards of Disability Living Allowance Mobility Component can still attract transitional protection if a claimant moves to another European Economic Area Member State on or after that date. From 18.10.07, awards of Attendance Allowance, Carer’s Allowance and Disability Living Allowance (Care) can only be exported as sickness benefits, even where the original award pre-dates 1.6.92.
12. A full list of European Economic Area Member States is at DMG 070040, with details of when they first joined the European Union. Transitional protection for Attendance Allowance, Disability Living Allowance, and Carer’s Allowance has never applied to nationals of the European Free Trade Association countries (Iceland, Norway and Liechtenstein) or Switzerland. Additionally, the following countries were not European Economic Area Member States as at 1.6.92:-

Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Sweden.
13. Persons who were entitled to Attendance Allowance, Carer’s Allowance, Disability Living Allowance (Care Component) or Disability Living Allowance (Mobility

Component) since before 1.6.92 who move (before 18.10.07) to one of the countries listed in paragraph 12 can benefit from transitional protection and so will be able to export these benefits but only from the date that country joined the European Union.

### Example

Grace is a United Kingdom national who became entitled to Disability Living Allowance (Mobility Component) from 1.4.92. In April 2002 she moved to live in Hungary. The decision maker decided that, as, at that time, Hungary was not a member of the European Union, the Disability Living Allowance (Mobility Component) could not be exported as a transitionally protected “invalidity benefit”. However, having checked that the conditions of entitlement had been satisfied continuously since 1.4.92, the decision maker decided that Grace could benefit from transitional protection from the date Hungary joined the European Union (i.e. from 1.5.04).

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### Entitlement began on or after 1.6.92

15. From 1.6.92, Attendance Allowance, Disability Living Allowance, and Carer's Allowance were listed as special non-contributory benefits for the purposes of European Union law<sup>1</sup>. Such benefits are payable only in, and at the expense of, the country of habitual residence. A person who became entitled to Attendance Allowance, Disability Living Allowance, or Carer's Allowance on or after 1.6.92 could not export their benefit when moving permanently to live in another European Economic Area Member State<sup>2</sup>, nor could someone claim a special non-contributory benefit when living in another European Economic Area Member State. However, from 8.3.01, Attendance Allowance, Disability Living Allowance (Care) and Carer's Allowance are sickness benefits in European Union law.

<sup>1</sup> Reg (EEC) 1408/71, art 4(2a) & 10(a) & Annex IIa;

<sup>2</sup> ECJ cases C-20/96 & C-297/96, R(DLA) 5/99 & R(A) 1/99

### Export of benefit to another European Economic Area Member State from 8.3.01

16. A claimant with an award of Attendance Allowance, Disability Living Allowance (**Care only**) or Carer's Allowance, who leaves Northern Ireland to live in another European Economic Area Member State on or after 8.3.01 will continue to be entitled to that award where
1. the person is within the personal scope of relevant European Union legislation  
**and**

2. the United Kingdom continues to be the competent state for payment of a sickness benefit **and**
  3. the normal domestic conditions of entitlement are met except that the claimant no longer has to
    - 3.1 be habitually resident in Northern Ireland **or**
    - 3.2 be present in Northern Ireland **or**
    - 3.3 meet the past presence test on an ongoing basis.
17. Where a decision on export of Attendance Allowance, Disability Living Allowance (Care Component) or Carer's Allowance was made on or after 8.3.01 and before 18.10.07, and that decision is subsequently shown to be in error of law in light of European Court of Justice judgement C299/05, that decision can be superseded<sup>1</sup> with effect from the date of request for supersession<sup>2</sup>. Where, in similar circumstances, the decision maker is unable to supersede the incorrect disallowance (for instance where the original disallowance was confirmed by a Tribunal) a claim to Attendance Allowance, Disability Living Allowance (Care Component) or Carer's Allowance can be treated as made on the date of request for supersession or reinstatement. Provided the conditions in paragraph 16 above are met, the claimant will have satisfied the past presence test when they left Northern Ireland and the claimant is not then required to further satisfy this condition at the date of request for reinstatement. The Mobility Component of Disability Living Allowance remains a special non-contributory benefit which cannot be exported unless the claimant has transitional protection (see paragraphs 9 to 13 above).

*1 SS & CS (D&A) Regs (NI), reg 6(2)(b)(i); 2 SS (NI) Order 98, art 11(5)*

### **Personal scope of European Union legislation**

18. The main group within the personal scope of Reg (EEC) 1408/71 is those who are or have been employed or self-employed persons, who have been subject to the legislation of one or more European Economic Area Member States and who are nationals of a European Economic Area Member State, or stateless persons or refugees; and members of their family and survivors<sup>1</sup>. From the introduction of Reg (EC) 883/04 on 1.5.10, all nationals of a Member State, stateless persons and refugees residing in a Member State who have been subject to the legislation of one or more Member States, and members of their family and their survivors, are within the personal scope<sup>2</sup>.

*1 Reg (EEC) 1408/71, art 1 & 2; 2 Reg (EC) 883/04 art 1 & 2*

## Residence and presence conditions

19. Those relying on European Union law rights to export an award of Attendance Allowance or Disability Living Allowance (Care Component) or Carer's Allowance are not required to be habitually resident or present in Northern Ireland. However they are required to satisfy the past presence test<sup>1</sup> on a one-off basis on the first date from which entitlement to benefit whilst abroad can be established for a particular claim to that benefit.

*1 SS (AA) Regs (NI), reg 2(1)(a)(iii); SS (DLA) Regs (NI), reg 2(1)(a)(iii) and SS (ICA) Regs (NI), reg 9(1)(c)*

## Competent state

20. The circumstances in which a competent state is required to export or award a sickness benefit to a claimant living in another European Economic Area Member State are prescribed in European Union law<sup>1</sup>. However, for third country nationals, these rules only apply when the claimant moves to certain of the European Economic Area Member States - see paragraph 34 below.

*1 Reg (EEC) 1408/71 art 1(q) & Chapter 1 Title 111 & Reg (EC) 883/04 Title II & Title III Chapter 1*

21. The United Kingdom will be the competent state (subject to certain exceptions set out below) to pay a sickness benefit for the following groups:

1. claimants in receipt of a pension from the United Kingdom (usually receiving a contributory benefit) and family members of such a person<sup>1</sup> if no other Member State is paying a pension and is competent for sickness
2. those covered by United Kingdom contributions in the relevant income tax years that would enable them to claim contribution-based Employment and Support Allowance (relevant income tax year cover) and family members of someone with relevant income tax year cover<sup>2</sup>
3. certain workers and their family members
4. claimants who retain worker status whilst in receipt of contribution-based Jobseeker's Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, and Maternity Allowance, and their family members.

*1 Reg (EEC) 1408/71 art 28 & Reg (EC) 883/04 arts 24 & 29;*

*2 Reg (EEC) 1408/71 art 1(o), (q), (r), & (s) & Reg (EC) 883/04 art 1(c)(q), (s), (t) & (u)*

## Claimant in receipt of a pension from the United Kingdom (and family members)

22. In receipt of a pension under United Kingdom legislation<sup>1</sup> means entitled to and actually in receipt of

1. state Retirement Pension of any category (except Category D only awards with no contributory element) **or**
  2. main phase contribution-based Employment and Support Allowance, long-term Incapacity Benefit, Severe Disablement Allowance **or**
  3. a bereavement benefit, including widows' benefit and Industrial Injuries Death Benefit (but not a bereavement payment which is not a pension but a Death Grant) **or**
  4. a pension for Industrial Injuries Disablement Benefit (including Reduced Earnings Allowance and Retirement Allowance) **or**
  5. transitionally protected Disability Living Allowance (Mobility).
23. However, for Severe Disablement Allowance and transitionally protected Disability Living Allowance (Mobility) to be treated as a pension, the claimant must firstly fall within the personal scope of European Union legislation (see paragraph 16 above).
- 1 Reg (EEC) 1408/71 art 28 & Reg (EC) 883/04 arts 24 & 29*
24. The claimant will be treated as in receipt of a pension where he has continuing entitlement to a pension but it is not payable because of domestic overlapping benefit rules, such as where long-term Incapacity Benefit is not payable to a claimant in receipt of unemployability supplement paid with a war pension.
25. Where the claimant receives an old-age or invalidity benefit or other pension from the European Economic Area Member State of residence and from another European Economic Area Member State, the state of residence will be the competent state for sickness benefits. If the claimant receives a pension from 2 European Economic Area Member States, but neither is the state of residence, the competent state will be the one whose legislation the claimant was subject to for the longest period of time. If exceptionally, these are equal periods, the state whose legislation the claimant was last subject to will be the competent state for payment of sickness benefits<sup>1</sup>.
- 1 Reg (EEC) 1408/71 art 28(2)(b) & Reg (EC) 883/04 art 25*
26. Where a claimant does not personally satisfy the conditions specified in European Union law, the United Kingdom may still be the competent state to pay a sickness benefit if the claimant is a family member (see DMG 071732) of someone receiving a United Kingdom pension, but only from 1.5.2010 when new European Community Regulations<sup>1</sup> were introduced.

*1 Reg (EC) 883/04 art 29(1) & (2)*

## Person with relevant income tax year cover and family members

27. The United Kingdom will be the competent state<sup>1</sup> for a sickness benefit where the claimant is insured in the United Kingdom for sickness benefits i.e. where he satisfies the normal relevant income tax year contribution conditions that would give title to short-term Incapacity Benefit<sup>2</sup> or contribution-based Employment and Support Allowance<sup>3</sup>. Guidance on relevant income tax year conditions is at parts 41 and 56 of the DMG.

*1 Reg (EEC) 1408/71 art 1(o), (q), (r) & (s) & Reg (EC) 883/04 art 1(c), (q), (s), (t), & (u);  
2 SS C&B (NI) Act 92, sec 30A(2) & Sch 3 part 1 para 2; 3 WR Act 07, s 1(2)(a) & Sch 1 Part 1, paras 1 & 2*

28. Where the claimant does not personally satisfy the conditions specified in European Union law, the United Kingdom may still be the competent state to pay a sickness benefit if the claimant is a family member of someone who has insurance cover against sickness (has relevant income tax year cover).

## Certain workers and their family members

29. The United Kingdom will be the competent state for a sickness benefit for
1. posted workers and their family members
  2. frontier workers who work in the United Kingdom, and their family members
  3. family members of workers living and working in the United Kingdom
  4. claimants in receipt of contribution-based Jobseeker's Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, and Maternity Allowance, and their family members.
30. A posted worker<sup>1</sup> is an employed or self-employed person normally working in the United Kingdom but posted temporarily to work in the territory of another European Economic Area member state, usually for less than 12 months, or less than 24 months from 1.5.2010 (see DMG 070236).

*1 Reg EEC 1408/71 art 14(1) and 14a & Reg (EC) 883/04 art 12 & 13*

31. Frontier worker<sup>1</sup> means an employed or self-employed person who works in the United Kingdom but lives in another European Economic Area member state where he returns daily, or at least once a week.

*1 Reg (EEC) 1408/71 art 1(b) & Reg (EC) 883/04 art 1(f)*

## United Kingdom competency ceases

32. The United Kingdom will automatically cease to be the competent state to pay a sickness benefit where either the claimant or the principal person (family member) on whom the claimant relies to satisfy European Union law

1. starts work in another European Economic Area Member State as an employed or self-employed person<sup>1</sup> (other than as a United Kingdom posted worker of course) **or**
2. is or becomes eligible for a sickness benefit from the state of residence<sup>2</sup> **or**
3. receives an old age or invalidity benefit or other pension from the state of residence<sup>3</sup>.

*1 Reg (EEC) 1408/71 art 34(2) & Reg (EC) 883/04 art 13(3)(a) & 31;*

*2 Reg (EEC) 1408/71 art 19 & 28(1) & Reg (EC) art 21 & 29;*

*3 Reg (EEC) 1408/71 art 27 & 28, & Reg (EC) art 23, 24, & 29*

33. The United Kingdom will also cease to be the competent state to pay a sickness benefit where the claimant or the principal person (family member) on whom the claimant relies to satisfy European Union law

1. no longer has National Insurance cover (the first day on which the claimant would no longer meet relevant income tax year conditions for title to short-term Incapacity Benefit or contribution-based Employment and Support Allowance on a new claim) **or**
2. is no longer entitled to and receiving a pension from the United Kingdom **or**
3. finishes the work from which rights were acquired<sup>1</sup> (see paragraph 29 above)
4. is no longer entitled to and receiving contribution-based Jobseeker's Allowance, short-term Incapacity Benefit, contribution-based Employment and Support Allowance in the assessment phase, or Maternity Allowance

provided that the claimant, or the family member on whom the claimant relies to satisfy European Union law, does not then fall within another category of person for whom the United Kingdom is the competent state as summarised at paragraph 21 (for instance the claimant becomes entitled to a pension from the United Kingdom before relevant income tax year cover ends).

*1 Reg (EC) 883/04 art 11(3)(e)*

### **Third country nationals**

34. An amendment to European Union Regulations<sup>1</sup> extended the provisions of Reg (EEC) 1408/71 to third country nationals from 1.6.2003 provided those nationals were legally resident in the territory of a Member State, were insured workers, and were in a situation that involved more than one state. However the following states did not extend the terms of Reg (EEC) 1408/71 to third country nationals:

Denmark

Iceland

Norway

Liechtenstein

Switzerland.

*1 Reg (EC) 859/2003*

35. Therefore a third country national who has worked will be able to export an award of Attendance Allowance or Disability Living Allowance (Care Component) or Carer's Allowance if he satisfies the same conditions that apply to a European Economic Area national (and the United Kingdom is the competent state for payment of a sickness benefit) **except** where he leaves the United Kingdom to live in Denmark, Iceland, Norway, Liechtenstein, or Switzerland. Of course, the third country national must be legally residing in both the United Kingdom and then the New state of residence that they move to.
36. The United Kingdom is not covered by the extension of rights to third country nationals under Reg (EC) 883/04, which came in to force on 1.5.2010. However third country nationals will continue to be subject to the terms and limitations of Reg (EEC) 1408/71 as summarised above.

### **Claims from abroad under European Union law**

37. For claims to Attendance Allowance, Disability Living Allowance (Care Component), or Carer's Allowance from claimants living in another European Economic Area Member State and who are within the personal scope of European Union law (see paragraph 18 above), the decision maker should first decide whether the United Kingdom is the competent state to pay a sickness benefit as at the first date that entitlement to benefit could potentially be established in accordance with domestic legislation. This will usually be
1. the day after expiry of a current award in "renewal" claims **or**
  2. the date of claim in new claims (or at the end of the qualifying period if later) **or**
  3. the date the claim can be considered from for a Carer's Allowance claim.
38. Where the United Kingdom is the competent state at that date, the claimant will have to satisfy the normal domestic conditions of entitlement at that same date, except that the claimant no longer has to be habitually resident or present in Northern Ireland.
39. The claimant will not have to satisfy the past presence test on an ongoing basis as required for claimants in Northern Ireland. This domestic test is modified for those relying on European Union law rights. A claimant living in another European Economic Area Member State will have to satisfy the past presence test on a one-off

basis at the first date from which entitlement to benefit can be established. The claimant is required to have been present in Northern Ireland for a period of, or periods amounting to, at least 26 weeks in the 52 weeks immediately preceding

1. the date of claim (or the end of the qualifying period if later) **or**
  2. the day after expiry of a current award in renewal claims (but see paragraph 40 below) **or**
  3. the date the claim can be considered from for a Carer's Allowance claim.
40. However, in renewal claims the decision maker may treat the claim as a request for reconsideration of the previous award and consider if the period of the previous award should be extended (whether at the same or a different rate). Where the supersession<sup>1</sup> extends the period of the previous award, the past presence test will already have been met during the currency of the award (as amended on supersession).

*1 SS (NI) Order 98, art 11 & SS & CS (D&A) Regs (NI), reg 7*

41. Those claiming under the special rules for the terminally ill do not have to satisfy the past presence test in domestic legislation. The following groups are treated as satisfying the past presence test, on this limited one-off basis, through the United Kingdom insurance of a worker
1. frontier workers and members of their family
  2. posted workers and members of their family
  3. a family member of someone living and working in the United Kingdom
  4. a person treated as a worker (and their family members) who, although not currently working, is receiving contribution-based Jobseeker's Allowance, contribution-based Employment and Support Allowance in the assessment phase, or Maternity Allowance, or those who continue to be insured for contribution-based Employment and Support Allowance after they cease work.

42. The Mobility Component of Disability Living Allowance, as a special non-contributory benefit<sup>1</sup>, cannot be claimed from abroad; but see paragraph 9 above regarding certain claimants with transitional protection.

*1 Reg (EEC) 1408/71 art 4(2a), art 10a, & Annex IIA, & Reg (EC) 883/04 art 3(3) & art 70 & Annex X & CJEU Judgement case C-537/09*

## Appendix 2

### Export of Attendance Allowance, Disability Living Allowance (Care Component) and Carer's Allowance - claims etc for periods before 18.10.07

Contents	Paragraphs
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Date of claim for Attendance Allowance or Disability Living Allowance Care Component	3
Disability Living Allowance (Care) - age limits	4 - 5
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Meaning of "extra-statutory payment"	7
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#### Introduction

- 1 The European Court of Justice (now called the Court of Justice of the European Union) decided on 18.10.07<sup>1</sup> that Attendance Allowance, Disability Living Allowance Care Component and Carer's Allowance were not special non-contributory benefits under European Union legislation<sup>2</sup>.

<sup>1</sup> ECJ decision case C-299/05, *Commission v Parliament*;

<sup>2</sup> Reg (EEC) 1408/71, art 4(2)(a), Annex 11A, entry Y(d), (e) & (j).

- 2 Guidance on the effect of the European Court of Justice's decision can now be found in DMG 071750 et seq. Regulations<sup>1</sup> ("the amending regulations") have now been made to regularise the position with regard to certain new claims/requests for reconsideration where the European Court of Justice's decision is at issue. These amending regulations take effect from 31.10.11.

<sup>1</sup> SS (DLA, AA & CA) (Misc Amdts) Regs (NI) 2011 [SR 2011 No 356]

## Date of claim for Attendance Allowance or Disability Living Allowance Care Component

- 3 With effect from 31.10.11, a claim for Attendance Allowance or Disability Living Allowance Care Component which is made on or after 18.10.07 and is in respect of a period before 18.10.07 shall be treated as made on 18.10.07 where<sup>1</sup>
1. on or after 8.3.01, the claimant had an award of Attendance Allowance or Disability Living Allowance Care Component **and**
  2. a decision maker made a supersession decision ending that award on the ground that there had been a relevant change of circumstances<sup>2</sup> as a result of the claimant moving from Northern Ireland to a European Economic Area state or Switzerland **and**
  3. that supersession was confirmed on appeal by an Appeal Tribunal **and**
  4. the claimant has not received an extra-statutory payment (see paragraph 7 below) in respect of the Attendance Allowance or Disability Living Allowance Care Component being claimed.

*1 SS (C&P) Regs (NI), reg 6(35); 2 SS & CS (D&A) Regs (NI), reg 6(2)(a)(i)*

**Note::** Decision makers will then need to establish whether the other conditions of entitlement are satisfied from 18.10.07 onwards.

## Disability Living Allowance (Care) - age limits

- 4 The Act<sup>1</sup> says that no person shall be entitled to Disability Living Allowance for any period after they reach age 65, unless an award has been made before that age. However this rule is modified by regulations<sup>2</sup> (see DMG 61551 et seq).

*1 SS C&B (NI) Act 92, sec 75(1); 2 SS (DLA) Regs (NI), reg 3*

- 5 With effect from 31.10.11, where<sup>1</sup> a person makes a claim for Disability Living Allowance Care Component and that claim is treated as made on 18.10.07 in accordance with paragraph 3 above then that person is not excluded from entitlement to Disability Living Allowance Care Component solely on the grounds that they have reached age 65.

*1 SS (DLA) Regs (NI), reg 3(3) & (3A)*

## Date of claim for Carer's Allowance

- 6 A claim for Carer's Allowance which is made on or after 18.10.07 and is in respect of a period before 18.10.07 shall be treated as made on 18.10.07 where<sup>1</sup>
1. on or after 8.3.01 the claimant had an award of Carer's Allowance **and**

2. a decision maker superseded that award to end it on the ground that there had been a change of circumstances as a result of
  - 2.1 the Carer's Allowance claimant moving from Northern Ireland to a European Economic Area state or Switzerland **or**
  - 2.2 the Carer's Allowance claimant no longer caring for a severely disabled person as defined in specific legislation<sup>2</sup> because that person's award of Attendance Allowance or Disability Living Allowance Care Component had ended because they had moved to a European Economic Area state or Switzerland **and**
3. the Carer's Allowance claimant has not received an extra - statutory payment (see paragraph 7 below) in respect of Carer's Allowance.

*1 SS (C&P) Regs (NI), reg 6(36); 2 SS C&B (NI) Act 92, sec 70(2)*

**Note:** Decision makers will then need to establish whether the other conditions of entitlement are satisfied from 18.10.07 onwards.

## Meaning of “extra-statutory payment”

- 7 The term “extra-statutory payment” used in paragraphs 3 and 4 above means<sup>1</sup> a payment made to (or in respect of) the claimant equivalent to the amount of
1. Attendance Allowance **or**
  2. Disability Living Allowance **or**
  3. Carer's Allowance

which would have been payable to the claimant had their awards not been superseded and terminated as in paragraphs 3.2 or 6.2 above from 18.10.07.

*1 SS (C&P) Regs (NI), reg 6(37)*

## Supersession

- 8 As explained in DMG 071751, where a claimant applied for reconsideration of an earlier disallowance made on the grounds that Attendance Allowance, Disability Living Allowance Care Component or Carer's Allowance was not exportable to another European Economic Area state or Switzerland, the only option previously available was supersession on the grounds of error of law<sup>1</sup> and the effective date of such a supersession was the date the claimant's application was received<sup>2</sup>. The amending regulations change this effective date to 18.10.07 in the circumstances set out in paragraph 9 below.

*1 SS & CS (D&A) Regs (NI), reg 6(2)(b)(i); 2 SS (NI) Order 98, art 11(5)*

- 9 With effect from 31.10.11 where<sup>1</sup>
1. on or after 8.3.01 the claimant had an award of Attendance Allowance, Disability Living Allowance Care Component or Carer's Allowance **and**
  2. a decision maker superseded that award to terminate it on the ground that there had been a relevant change of circumstances as a result of the claimant (or in the case of Carer's Allowance the severely disabled person) moving from the United Kingdom to a European Economic Area state or Switzerland **and**
  3. the claimant continues to satisfy the other conditions of entitlement for Attendance Allowance the Disability Living Allowance Care Component or Carer's Allowance **and**
  4. after 31.10.11, a decision maker then supersedes the termination referred to in paragraph 6.2. above on the grounds that it was erroneous in law<sup>2</sup>

the effective date of that supersession will be 18.10.07<sup>3</sup>,

*1 SS & CS (D&A) Regs (NI), reg 7(9A); 2 reg 6(2)(b)(i); reg 7(9A)*

**Note:** Where, before 31.10.11, the termination has already been superseded on the grounds of error of law in accordance with the guidance in DMG 071751, it cannot be superseded again under the provisions described above.

## Competent State

- 10 With effect from 31.10.11, the Act<sup>1</sup> is amended so as to confirm that, under Northern Ireland law, European Economic Area citizens who have moved within the European Economic Area are only entitled to Attendance Allowance, Disability Living Allowance Care Component or Carer's Allowance in Northern Ireland where the United Kingdom is the competent state for the payment of sickness benefits in cash to those persons under European Union law<sup>2</sup>.

*1 SS C&B (NI) Act 92, sec 65(7), sec 70(4A) & sec 72(7B);  
2 Reg (EEC) 1408/71 Chapter 1 of Title III & Reg (EC) 883/04 Chapter 1 of Title III*

### Example

Pierre is a French national aged 55. He was born in France and had worked there for some 35 years. He receives a French invalidity pension. He moved to the United Kingdom for the first time in June 2011 and, in December 2011 he claimed Disability Living Allowance Care Component. The decision maker decided that the United Kingdom was not the competent state for the payment of sickness benefits in Pierre's case and decided that he was not entitled to Disability Living Allowance Care Component.

## Appendix 3 [See DMG Memo Vol 2/75] [See DMG Memo Vol 2/81] [See DMG Memo Vol 2/100] [See DMG Memo Vol 2/103] [See DMG Memo Vol 2/111]

### Deciding the competent state to pay cash sickness benefits

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## Introduction

- 1 This appendix expands the guidance in DMG Chapter 7 for deciding the competent State to pay cash sickness benefits. It also incorporates Regulation (EC) 883/2004.

### General rule

- 2 In general a person is only subject to the legislation of one European Union Member State<sup>1</sup>.

*1 Reg (EC) 883/04, art 11(1)*

- 3 A person will not be entitled to Attendance Allowance<sup>1</sup>, Carer's Allowance<sup>2</sup> or Disability Living Allowance care component<sup>3</sup> unless the United Kingdom is the competent State for payment of cash sickness benefits to that person.

*1 SS C&B (NI) Act 92, sec 65(7); 2 sec 70(4A); 3 sec 72(7B)*

- 4 Special Non-Contributory Cash Benefits can only be paid to people by and in their Member State of residence. In the United Kingdom

1. State Pension Credit **and**
2. income-based Jobseeker's Allowance **and**
3. Disability Living Allowance mobility component **and**
4. income-related Employment and Support Allowance

are Special Non-Contributory Cash Benefits<sup>1</sup>.

*1 Reg (EC) 883/2004, Annex X*

### Additional voluntary insurance

- 5 Although a person is subject to compulsory insurance in one European Union Member State, that person may voluntarily decide to join the optional insurance scheme in another European Union Member State for the purposes of entitlement to

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

*1 Reg (EC) 883/04, art 14(3)*

## Deciding whose legislation applies

### General rules

- 6 [See DMG Memo Vol 2/78] The general rules are<sup>1</sup> that
1. a person pursuing activity as an employed or self-employed person in a European Economic Area Member State is subject to the legislation of that Member State
  2. a civil servant is subject to the legislation of the Member State to which the administration employing him is subject
  3. a person receiving unemployment benefits in accordance with a specific provision in the European Union co-ordination Regulations<sup>2</sup> from the Member State of residence is subject to the legislation of that Member State
  4. a person called up or recalled for military or civilian service by a Member State, is subject to the legislation of that Member State
  5. any other person to whom sub-paragraphs 1. - 4. do not apply is subject to the legislation of the Member State of residence.

**Note:** The rule in sub-paragraph 5. operates subject to any other rules in the European Union co-ordination Regulations which may guarantee a person benefits under the legislation of one or more Member States.

*1 Reg (EC) 883/04, art 11(3); 2 art 65*

- 7 Except in relation to the benefits listed at paragraph 8, for the purposes of paragraph 6, a person receiving cash sickness benefits because of, or as a consequence of, their activity as an employed or self-employed person shall be considered to be pursuing that activity<sup>1</sup>.

*1 Reg (EC) 883/04, art 11(2)*

- 8 The benefits to which the rule detailed in paragraph 7 do not apply are<sup>1</sup>
1. invalidity benefits **or**
  2. old age or survivors' pensions **or**
  3. pensions in respect of accidents at work or occupational diseases **or**
  4. sickness benefits in cash which are for treatment for an unlimited period.

*1 Reg (EC) 883/04, art 11(2)*

### Meaning of “legislation”

- 9 In paragraph 6 “legislation” means<sup>1</sup> the laws, regulations, statutory provisions and all other implementing measures relating to the branches of social security listed in the co-ordinating Regulations.

*1 Reg (EC) 883/04, art 1(l)*

### Meaning of “competent member state”

- 10 The “competent Member State” means<sup>1</sup> the Member State in which the competent institution is situated.

*1 Reg (EC) 883/04, art 1(s)*

### Meaning of “competent institution”

- 11 The “competent institution” means<sup>1</sup> the institution
1. with which the person concerned is insured at the time of the application for benefit **or**
  2. from which the person concerned is or would be entitled to benefits if he or a member of his family resided in the Member State in which the institution is situated **or**
  3. designated by the competent authority of the Member State concerned.

*1 Reg (EC) 883/04, art 1(q)*

### Meaning of “competent authority”

- 12 “Competent authority” means<sup>1</sup> the Minister or other equivalent authority responsible for social security schemes throughout (or in any part of) the Member State in question.

*1 Reg (EC) 883/04, art 1(m)*

### Posted to another European Economic Area country

- 13 An employed person who is posted by their employer to another European Economic Area State remains subject to the legislation of the Member State where the employer is based and where that person normally works, provided
1. the work is not expected to last more than twenty-four months **and**
  2. that person has not been sent to replace somebody who has completed a posting<sup>1</sup>.

*1 Reg (EC) 883/04, art 12*

## Working in more than one Member State

14 Persons who normally pursue activity as an employed person in two or more Member States will be subject to the legislation of<sup>1</sup>

1. the Member State of residence if they
  - 1.1 pursue a substantial part of their activity in that Member State **or**
  - 1.2 are employed by two or more employers, at least two of which have registered offices or places of business in Member States different to that of the Member State of residence **or**
2. the Member State in which the employer's registered office or place of business is situated, if the person does not pursue a substantial part of his work in the Member State of residence, and either
  - 2.1 the person is employed by only one employer **or**
  - 2.2 the person is employed by two or more employers, all of which have their registered office or place of business in only one Member State.

*1 Reg (EC) 883/04, art 13(1)*

15 A person who normally pursues activity as a self-employed person in two or more Member States shall be subject to the legislation of<sup>1</sup>

1. the Member State of residence if they pursue a substantial part of their activity in that Member State **or**
2. if the person does not reside in one of the Member States in which they pursue a substantial part of their activity, the Member State in which the centre of interest of their activities is situated.

*1 Reg (EC) 883/04, art 13(2)*

16 If a person spends less than a quarter of their time on their activities as an employed or self-employed person in a Member State, that shall be taken as an indication that a person is not pursuing a substantial part of their activities in that Member State<sup>1</sup>.

*1 Reg (EC) 987/2009, art 14(8)*

## Employed on a ship

17 Subject to paragraph 18 below, activity as an employed or self-employed person normally pursued on board a vessel at sea, flying the flag of a Member State is deemed to be an activity pursued in that Member State<sup>1</sup>.

*1 Reg (EC) 883/04, art 11(4)*

18 However<sup>1</sup> a person employed on board a vessel flying the flag of a Member State who is paid by an undertaking or person whose registered office or place of business

is in a Member State other than that in which the vessel is registered is subject to the legislation of the latter Member State if they reside in that Member State.

*1 Reg (EC) 883/04, art 11(4)*

### Example

A claimant is employed on a cruise ship that flies the United Kingdom flag. The claimant lives in France and she is paid by a company registered in France. The claimant is subject to the legislation of France.

## Civil servants

- 19 Civil servants, and people treated as Civil servants, are subject to the legislation to which the administration employing them is subject<sup>1</sup>.

*1 Reg (EC) 883/04, art 11(3)(b)*

### Example

A United Kingdom official is working in Brussels but remains employed by a United Kingdom department. That person remains subject to United Kingdom legislation.

## Members of the armed forces

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

*1 Reg (EC) 883/04, art 11(3)(d)*

## Claims from pensioners

- 21 As a general rule, if a claimant receives a pension and is entitled to benefits in kind from a single Member State, that Member State is competent for the payment of cash sickness benefits to that person<sup>1</sup>.

*1 Reg (EC) 883/04, art 24(2)(a)*

### Example

A claimant resides in the United Kingdom, and only receives a pension from Greece. Greece is the competent state for cash sickness benefits.

- 22 Where a claimant

1. receives a pension from two or more Member States **and**
2. resides in one of those Member States **and**
3. is entitled to benefits in kind under the legislation of that Member State

the Member State of residence will be competent for payment of cash sickness benefits to that person<sup>1</sup>.

*1 Reg (EC) 883/2004, art 23, article 29(1)*

### Example

A claimant resides in the United Kingdom and receives a pension from both Greece and from the United Kingdom. The United Kingdom is the competent State for benefits in kind and for the payment of cash sickness benefits.

**Note:** The general rule ceases to apply if the person receiving a pension from another Member State undertakes activity as an employed or self-employed person in the Member State of residence. In these circumstances, the Member State of residence may become competent for the payment of cash sickness benefits to that person for such time as that person is employed or self-employed.

23 If a claimant

1. receives a pension from two or more Member States **and**
2. is consequently entitled to benefits in kind from two or more Member States **but**
3. is not entitled to a pension from the State of residence

the competent Member State for payment of cash sickness benefits is the Member State to whose legislation the claimant has been subject for the longest period of time<sup>1</sup>.

*1 Reg (EC) 883/04, art 24(2)(b)*

### Example

A claimant resides in Spain and receives pensions from the United Kingdom, Germany and France. The claimant worked in the United Kingdom for 6 years, Germany for 12 years and France for 20 years. France is the competent state for cash sickness benefits.

## Derived rights

### Family members

24 Claimants can derive a right to payment of benefits<sup>1</sup> from their family members<sup>2</sup>. Family members are

1. a spouse **or**
2. civil partner

3. a parent of a child under 18 or
4. a parent of a child over 18 who is a dependant.

*1 Reg (EC) 883/04, art 2(1); 2 Reg (EC) 883/04, art 1(i)(2)*

### **Prioritising rights**

- 25 Claimants may have both an independent right to benefits and a derived right to benefits at the same time. An “independent right” to benefits is a right a person has acquired independently themselves as a consequence of, for instance, their activity as an employed or self-employed person in a Member State, their residence in a Member State, or their receipt of a pension from a Member State. A derived right is a right to benefits a person can derive from a family member. Subject to paragraphs 26 and 27 below, an independent right to cash sickness benefits should take priority over a derived right to cash sickness benefits as the family members of those covered by the Regulation<sup>1</sup>.

*1 Reg (EC) 883/04, art 32(1)*

#### **Example**

A claimant who is a Polish national is in receipt of a Polish pension and a disability benefit also from Poland. He arrives in the United Kingdom to be with his wife. His wife has been working in the United Kingdom and paying National Insurance contributions for the last 5 years. As the claimant is in receipt of a pension from Poland he has an independent right to cash sickness benefits from Poland. However, he also has a derived right to benefits in the United Kingdom which he derives from his working wife. As the general rule is that a person’s independent right to benefits takes priority over their derived right, the claimant’s independent right to benefits in Poland takes priority and Poland is therefore the competent state for the payment of cash sickness benefits to the claimant.

- 26 However, where a claimant has an independent right to cash sickness benefits arising purely from their residence in a Member State, any rights they derive from a family member who is, for example, receiving a pension from, or who is employed in, another Member State will take priority over that claimant’s independent right to benefits<sup>1</sup>.

*1 Reg (EC) 883/04, art 32(1)*

#### **Example 1**

A claimant has returned to reside in the United Kingdom, having been resident in another European Union Member State. The claimant’s husband lives and works in Germany but the couple are still together. The claimant is not working in the United Kingdom. The claimant has an independent right to cash sickness benefits in the United Kingdom arising solely out of their residence in the United Kingdom. The claimant also has a right to benefits in Germany derived from her husband, who is

living and working in Germany. In these circumstances, Germany is the competent State for payment of cash sickness benefits to that claimant.

**Note:** Should the claimant in the above example start work in the United Kingdom then the United Kingdom would become the competent state, as the claimant's independent right to benefits would no longer arise solely out of her residence in the United Kingdom.

### Example 2

A claimant returns to live in the United Kingdom having been resident in another European Union Member State. The claimant is self-employed in the United Kingdom. The claimant's husband lives and works in Spain. In this situation, the independent rights of the claimant do not arise solely out of her residence in the United Kingdom. The United Kingdom is therefore the competent state for payment of cash sickness benefits to the claimant.

- 27 Where a claimant is employed or self-employed in a Member State their independent right takes priority over a derived right even if they have a family member employed in or receiving a pension from another Member State<sup>1</sup>.

*1 Reg (EC) 883/04, art 32(1)*

### Example

A claimant lives and works part-time in the United Kingdom but is financially dependent on their parent. Their parent lives and works in Germany. The United Kingdom is the competent State for cash sickness benefits for the claimant.

**Note:** Should the claimant in the above example stop working in the United Kingdom then Germany would become the competent state, as the claimant's independent right to benefits would arise solely out of their residence in the United Kingdom.

## Step parents

- 28 As a general rule, a child cannot derive rights from a step parent as the step parent does not come within the definition of "family member" set out in paragraph 24 above.

### Example

A child moves from Spain to the United Kingdom with his mother and step-father. The child's biological father lives and works in Spain. Whilst the step-father is in full-time employment in the United Kingdom the mother is not working. As the mother is not in employment in the United Kingdom but the child's father is in employment in Spain, the right to benefits the child derives from the parent working in Spain is prioritised, and Spain is therefore the competent State for cash sickness benefits for the child.

## Exchange of claims between members states

29 If on considering the claim the decision maker decides that the United Kingdom is not the competent State the decision maker should forward the claim without delay to the competent institution in the Member State the decision maker considers competent<sup>1</sup>.

*1 Reg (EC) 883/04, art 81*

30 Where the decision maker receives a claim from another Member State the date of claim will be the date the claim was made in the other Member State<sup>1</sup>.

*1 Reg (EC) 883/04, art 81*

## Appendix 4

### Action to take once competency has been decided

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#### Introduction

- 1 This Appendix expands the guidance for decision makers on the approach to take to cases where a decision on competency has been reached.

#### The decision maker decides that the United Kingdom is the competent State for the payment of cash sickness benefits

- 2 Where the decision maker decides that the United Kingdom is the competent State to pay cash sickness benefits to a person, the decision maker should then go on to consider whether the relevant domestic conditions of entitlement are met.

## The decision maker decides that the United Kingdom is not the competent state for the payment of cash sickness benefits

### Scenario one: Where there is no acceptable evidence of a dispute regarding competence between Member States

3 Where the decision maker decides that the United Kingdom is not the competent State they should

1. refuse the claim **and**
2. immediately forward the claim to the Member State the decision maker considers is competent<sup>1</sup>.

*1 art 81 Reg (EC) 883/04; [2015] AACR 26*

### Scenario two: Difference of opinion between Member States as to competence

4 Where there is a difference of opinion between the United Kingdom and one or more other Member States as to the identification of the State competent to provide cash benefits to a person, then either the

1. State where the claimant resides **or**
2. Member State where the claim was first made (if the claimant does not reside in any of the Member States concerned in the dispute)

will provide cash benefits to that person on a provisional basis, provided that person meets the relevant domestic eligibility criteria<sup>1</sup>.

*1 Reg (EC) 987/09, art 6(2)*

**Note:** Competency is not contingent on the other Member State having a similar benefit to the one applied for by the claimant. Therefore the position regarding competence will not be altered if the other Member State does not have a similar benefit to the one applied for by the claimant. Further, payment on a provisional basis will not need to be made in these circumstances.

5 Should a dispute regarding competence arise between the United Kingdom and another Member State the decision maker should not await

1. an appeal **or**
2. the outcome of an appeal

before making provisional payments<sup>1</sup>.

*1 [2015] AACR 26*

## Resolving the dispute

- 6 Where no agreement can be reached between the Member States as to who is competent the decision maker should refer the matter to Decision Making Services. Decision Making Services will liaise with DMA Leeds policy and legal services to decide whether to refer to the Administrative Commission<sup>1</sup>.

*1 Reg (EC) 987/09, art 6(3)*

- 7 The Administrative Commission will try to reconcile the dispute within 6 months<sup>1</sup>.

*1 Reg (EC) 987/09, art 6(3)*

- 8 Where the United Kingdom has paid benefit on a provisional basis and the Administrative Commission decides another Member State is competent that Member State will reimburse the United Kingdom benefits paid<sup>1</sup>.

*1 Reg (EC) 987/09, art 73*