

Part 3 - Habitual residence & right to reside Income Support / Jobseeker's Allowance / State Pension Credit / Employment and Support Allowance

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Habitual residence

Introduction [See DMG Memo Vol 2/86, DMG Memo Vol 2/89, DMG Memo Vol 2/91, DMG Memo Vol 2/93 & 7/54 & DMG Memo Vol 2/96]

072770 [See DMG Memo Vol 2/98] [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 Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and State Pension Credit. A claimant who is not habitually resident in the common travel area

1. is a person from abroad and has an applicable amount of nil for Income Support, income-based Jobseeker's Allowance and income-related Employment and support Allowance¹ **and**
2. is treated as not in Northern Ireland for State Pension Credit².

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

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

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

072772 – 072779

General principle

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

072781 – 072785

Common travel area

072786 The legislation requires that a claimant is habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland. This is known as the common travel area¹.

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

072787 – 072790

When the test should be applied

072791 **[See DMG Memo Vol 2/106]** If other conditions of entitlement to benefit are satisfied the decision maker should consider whether the claimant is excluded from benefit by being a person subject to immigration control. If not the decision maker should consider

1. whether the claimant is excluded from treatment as a person from abroad in consequence of European Community law or under other specific exclusions
if not
2. whether the claimant has the right to reside in the common travel area
3. whether that right to reside is excluded.

If the claimant has the right to reside in the common travel area which is not excluded the decision maker should apply the test for actual habitual residence.

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

072793 – 072799

Persons who are not a “person from abroad/person not in Northern Ireland”

072800 A claimant who

1. is a European Economic Area national and a qualified person as a worker or a self-employed person under European Community law¹ (see DMG 072810 & 072481) **or**
2. is a European Economic Area national who retains worker or self-employed status under European Community law² (see DMG 072821 & 072861) **or**

3. is a family member of one of the above³ (see DMG 072900) **or**
4. is a person exempted from the normal rule concerning the right of permanent residence⁴ (see DMG 073174) **or**
5. is a refugee⁵ (see DMG 073175) **or**
6. is a person who⁶
 - 6.1 has been granted discretionary leave to enter or remain in the United Kingdom outside the Immigration Rules (see DMG 073178) **or**
 - 6.2 has been granted leave to remain outside the Immigration Rules under the Domestic Violence concession (see DMG 073181) **or**
 - 6.3 is deemed to have been granted leave outside the Immigration Rules by virtue of specific legislation⁷ which, in accordance with a European Union directive⁸ provides temporary protection to persons affected when the Council of the European Union decides that there is (or will be) a mass influx of displaced persons who cannot return to their country of origin.

Note: Decision makers will be notified when the provision in **6.3** is triggered **or**

7. has humanitarian protection granted under the Immigration Rules⁹ (see DMG 073175) **or**
8. is a person who is not subject to immigration control and who is in the United Kingdom as a result of his deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom¹⁰

is neither a person from abroad nor a person not in Northern Ireland.

1 Directive 2004/38/EC, art 7(1)(a); 2 art 7(3); 3 art 2(2); 4 art 17; 5 Convention relating to the Status of Refugees, art 1 (as extended); 6 IS (Gen) Regs (NI), reg 21AA(4)(h); JSA Regs (NI), reg 85A(4)(h); ESA Regs (NI), reg 70(4)(h); SPC Regs (NI), reg 2(4)(h); 7 Displaced Persons (Temporary Protection) Regs 2005, reg 3; 8 Directive 2001/55/EC; 9 IS (Gen) Regs (NI), reg 21AA(4)(hh); JSA Regs (NI), reg 85A(4)(hh); ESA Regs (NI), reg 70(4)(i); SPC Regs (NI), reg 2(4)(hh); 10 IS (Gen) Regs (NI), reg 21AA(4)(i); JSA Regs (NI), reg 85A(4)(i); ESA Regs (NI), reg 70(4)(j); SPC Regs (NI), reg 2(4)(i)

072801 The amendment to DMG 072800, removing certain Croatians who are not persons from abroad, does not affect the exemption from the habitual residence test of those Croatians covered by DMG 073678.

072802 – 072809

Workers

072810 **[See DMG Memo Vol 2/85]** A national of another European Economic Area state who is in genuine and effective employment in the United Kingdom is a worker for European Union purposes. A person who has retained worker status (see DMG

072821) is also not a person from abroad. A person who moves from one Member State to another in order to seek work is not a worker for European Union regulations² and is subject to the habitual residence test (but see DMG 073768).

¹ *Imm (EEA) Regs 2016, reg 4(1)(a) & Case C-53/81 D.M. Levin v Staatssecretaris van Justitie.*;

² *Case C-138/02 Collins v Secretary of State for Work and Pensions*

072811 However in order for a person to be exercising their European Union law rights of free movement as a “worker”, there must be a genuine link between that person and the labour market of the host member state. A worker must be actively pursuing activities as an employed person¹. Accordingly, before considering the guidance below about whether the work itself is genuine and effective, decision makers should consider the preliminary question of whether the claimant is genuinely exercising their European Union rights as a “worker”. In deciding this question, decision makers can look at all the circumstances, including the person’s primary motivation in taking up employment and whether, during periods when they were not employed, the person seriously wished to pursue employment by actively looking for work with a genuine chance of being engaged. Thus it is open to decision makers to conclude that (for example) a person who does a very brief period of part-time work solely in order to establish a right to reside and thus entitlement to benefit is not exercising their European Union rights as a worker.

¹ *De Biasi v Secretary of State for the Home Department [2012] EWCA Civ 1015*

Example

Thijs is a Dutch national. He first came to the United Kingdom in 1999 and has resided in the United Kingdom ever since. He claimed Income Support on 2.1.13. The decision maker established that the only work Thijs had done in the United Kingdom was a period of 8 weeks in November and December 2012 when he worked as a part-time cleaner for 8 hours per week at an hourly rate of £10 per hour. There was no evidence that he had been self-sufficient at any time since 1999, nor that he had genuinely been seeking employment during that period. The decision maker concluded that Thijs was not a worker and that accordingly he had not retained worker status.

072812 – 072815

Genuine and effective work

072816 **[See DMG Memo Vol 2/85]** The decision maker should be satisfied that the work is genuine and effective and is not on such a small scale as to be marginal and ancillary¹. As the terms “genuine and effective” and “marginal and ancillary” are not defined in European Community law the decision maker should decide each case on

its own merit. The decision maker should take account of all work done in the United Kingdom and consider, amongst other things

1. the period of employment
2. the number of hours worked
3. the level of earnings
4. whether the work was regular or erratic.

1 CH/3314/2005; CIS/3315/2005 paras 21-30; Case C-357/89 Raulin (1992) ECR 1027

Note: See DMG 073049 et seq for further guidance in relation to genuine and effective work.

Example

A European Economic Area national arrives in the United Kingdom and stays with a relative who has a shop. She does not have an offer of a job but helps out in the shop for an hour or two when she can, for which she is paid £20 per week. She claims Jobseeker's Allowance immediately on arrival. The claimant is not a refugee and has not been given exceptional leave to remain in the United Kingdom.

The decision maker considers whether the work in the United Kingdom was genuine and effective. As she only worked for a few hours a week, in work that was irregular and low paid the decision maker decides that the work was not genuine and effective because it was on such a small scale as to be marginal and ancillary. The claimant is not a worker and in order to qualify for benefit would need to be able to demonstrate an alternative right to reside.

072817 Work that is part time or low paid is not necessarily always marginal and ancillary. A part time worker may be considered a worker for European Community purposes and retain a right to residence in the United Kingdom as long as the work is genuine and effective.

Example

A European Economic Area national who claims Jobseeker's Allowance shows that he has been working for three hours per day, five days per week for the last four months. The decision maker decides that the work is genuine and effective because it is not on such a small scale as to be marginal and ancillary. The work was on a regular basis continuing for a reasonable length of time.

072818 – 072820

Retaining worker status

Temporary illness or accident

072821 A worker retains worker status when he

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

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

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

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

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

Involuntary unemployment - employed in the United Kingdom for one year or more

072822 **[See DMG Memo Vol 2/83]** Workers retain worker status when they stop working, after having worked as an employee in the United Kingdom for **one year or more** provided¹ the person

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

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

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

Involuntary unemployment - employed in the United Kingdom for less than one year

072823 **[See DMG Memo Vol 2/83]** DMG 072822 sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee for one year or more and then becomes involuntarily unemployed. This paragraph sets out the conditions for a right to reside as a worker who retains worker status after having

worked as an employee in the United Kingdom for **less than one year**. A person who¹

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

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

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

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

Vocational training

072824 Workers can retain worker status when they

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

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

072825

Meaning of “registered as a jobseeker”

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

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

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

072827 Consequently, with effect from 18.12.09 onwards where a claimant

1. makes a claim for Income Support, income-related Employment and Support Allowance or State Pension Credit **and**

2. is a migrant worker from another European Economic Area state **and**
 3. has worked in the United Kingdom but is currently unemployed **and**
 4. has declared on the claim form or otherwise in the course of making the claim (including on the habitual residence form) that they are looking for work, but has **either**
 - 4.1 not claimed Jobseeker's Allowance or National Insurance credits **or**
 - 4.2 has made a claim for Jobseeker's Allowance or National Insurance credits which has failed **and**
 5. can establish that they continue to seek employment in the United Kingdom
- it should be accepted that the claimant is not a person from abroad/person not in Northern Ireland.

Involuntary unemployment

072828 [See **DMG Memo Vol 2/83**] DMG 072822 and 072823 set out the conditions which need to be satisfied for a person to retain their worker status¹. These conditions are that

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

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

The meaning of “involuntary employment”

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

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

Note: The reasons why the previous employment ended are relevant considerations as to whether or not the claimant is genuinely still in the labour market, but those

reasons are not necessarily the determining factor. They provide the context for a person's activities after they have left their employment².

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

Undue delay

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

1 CIS/2423/2009

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

Example

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

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

When the decision maker considers the one month delay in Maria's claim to Jobseeker's Allowance, Maria explains that she had not claimed Jobseeker's Allowance immediately after ceasing employment because she was confident of

getting another job quickly. She had provisionally been offered a job which was due to start the day before she made her claim to Jobseeker's Allowance, but at the last minute, the job had fallen through. Maria produced a letter from the company giving details of why the job was no longer available. The decision maker determines that there are reasonable grounds for the delay and that Maria remained in the labour market between the ending of her employment and the date of making her claim to Jobseeker's Allowance. Consequently Maria retains her worker status.

072832 – 072840

Self-employed persons

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

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

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

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

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

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

072842 **[See DMG Memo Vol 2/109]** Questions may arise as to whether (for the purposes of the European Union right to reside) at any particular moment in time a claimant is a self-employed person. An Upper Tribunal Judge has said this¹

“I do not accept that a claimant who is for the moment doing no work is necessarily no longer self-employed. There will commonly be periods in a person's self-employment when no work is done. Weekends and holiday periods are obvious examples. There may also be periods when there is no work to do. The concept of self-employment encompasses periods of both feast and famine. During the latter, the person may be engaged in a variety of

tasks that are properly seen as part of continuing self-employment: administrative work, such as maintaining the accounts; in marketing to generate more work; or developing the business in new directions. Self-employment is not confined to periods of actual work. It includes natural periods of rest and the vicissitudes of business life. This does not mean that self-employment survives regardless of how little work arrives. It does mean that the issue can only be decided in the context of the facts at any particular time. The amount of work is one factor. Whether the claimant is taking any other steps in the course of self-employment is also relevant. The claimant's motives and intentions must also be taken into account, although they will not necessarily be decisive."

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

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

072843 **[See DMG Memo Vol 2/85]** In order for a person to be regarded as self-employed for the purposes of the right to reside, the condition that the work involved be genuine and effective must also be satisfied (see DMG 072816 & 072817).

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

1. periods of actual work
2. monies received for such work
3. administration tasks relating to the business
4. maintaining accounts
5. marketing work to generate more work
6. development of business in new directions
7. receipts for tools, stock or materials purchased.

This is not an exhaustive list.

072845 **[See DMG Memo Vol 2/109]** A person must have more than an intention to be self-employed. They must provide evidence of the steps taken, or the ways used to set up their self-employment¹.

1 R(IS) 6/00

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

072847 – 072860

Retaining the status of being a self-employed person

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

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

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

072862 **[See DMG Memo Vol 2/84, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54]** A person who is no longer in self-employment continues to be treated as a self-employed person¹ provided that person

1. is in duly recorded involuntary unemployment after having worked as a self-employed person in the United Kingdom for at least one year² provided the person
 - 1.1 has registered as a jobseeker with the relevant employment office **and**
 - 1.2 satisfies condition D (DMG 072863) and condition E (DMG 072864) **or**
2. is in duly recorded involuntary unemployment after having worked as a self-employed person in the United Kingdom for less than one year³ provided the person
 - 2.1 has registered as a jobseeker with the relevant employment office **and**
 - 2.2 satisfies condition D (DMG 072863) and condition E (DMG 072864) **or**
3. is involuntarily no longer in self-employment and has embarked on vocational training⁴ **or**
4. has voluntarily ceased self-employment and has embarked on vocational training that is related to the person's previous occupation⁵.

Note: A person to who sub-paragraph **2.** applies, only retains their status as a self-employed person for a maximum of six months⁶.

1 Florea Gusa (case C-442/16); Imm (EEA) Regs 2016, reg 6(4); 2 reg 6(4)(b); 3 reg 6(4)(c); 4 reg 6(4)(d); 5 reg 6(4)(e); 6 reg 6(4A)

Condition D

072863 Condition D¹ is that the person

1. entered the United Kingdom as a self-employed person, or in order to seek self-employment **or**
2. is present in the United Kingdom seeking employment or self-employment, immediately after enjoying a right to reside as a self-employed person; a self-sufficient person; or a student (disregarding any period during which self-employed status was retained pursuant to DMG 072862 **2.** or DMG 072862 **3.**).

1 Imm (EEA) Regs 2016, reg 6(4B)

Condition E

072864 [See DMG Memo Vol 2/83, DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54] Condition E¹ is that the person

1. provides evidence of seeking employment or self-employment **and**
2. has a genuine chance of being engaged.

1 Imm (EEA) Regs 2016, reg 6(4C)

072865 – 072899

Family members of workers and self-employed persons

[See DMG Memo Vol 2/80, DMG Memo Vol 2/84, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54]

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

1. spouse (husband or wife) or civil partner

2. direct descendants of the European Economic Area national, his spouse or civil partner who are
 - 2.1 under the age of 21 or
 - 2.2 dependants of his, his spouse or civil partner
3. direct ascendant relatives of the European Economic Area national, his spouse or civil partner, who are dependants.

Note: If certain conditions are met, family members of British citizens have the same European Union law rights to reside as they would if they were a family member of another European Economic Area state² (see DMG 073254 et seq for full details of the conditions). Thus where the conditions are satisfied and the British citizen would fall within the terms of DMG 072800 1. and 2. if they were a national of another European Economic Area state, their family members should be treated in the same way as a family member described in DMG 072800 3..

As such they will not be a “person from abroad” for the purposes of Income Support, income-based Jobseeker’s Allowance and income-related Employment and Support Allowance. Nor will they be a person treated as not in Northern Ireland for the purposes of State Pension Credit.

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

Meaning of “dependent”

072901 Direct descendants aged 21 or over (see DMG 072900 2.2) and any relatives in the ascending family line (see DMG 072900 3.) must prove they are dependent on the European Economic Area national or his spouse or civil partner. An Upper Tribunal Judge has analysed the European Union case law on the meaning of “dependent” in this context. He summarised that case law¹ as finding that²

1. a person is only dependent who actually receives support from another
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 material³, although not necessarily financial, and must provide for, or contribute towards the basic necessities of life.

1 Case C-316/85, Centre Public D’Aide Sociale de Courcelles v Lebon; Case C-2000/02, Chen v Secretary of State for the Home Department; Case C-1/05, Jia v Migrationsverket; 2 CIS/2100/07; 3 C-423/12 Reyes

072902 – 072985

Three month residence requirement

072986 [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 1.1.14 (in addition to the right to reside requirement) an income-based Jobseeker's Allowance claimant (who is not in the exempt group) (see DMG 072800) cannot be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland **unless** that claimant has been "living in" any of those places for the past three months¹ ("the three month rule"). Where this condition is not met, such a claimant will be a person from abroad and not entitled to income-based Jobseeker's Allowance. Where the three month rule condition is met and the claimant has a qualifying right to reside, the decision maker will need to go on to consider whether the claimant is actually habitually resident, in accordance with guidance at DMG 073707.

Note 1: The three month period could be made up of, for example, 1 month living in the Channel Islands immediately followed by 2 months living in the United Kingdom.

Note 2: Questions of whether the person was actually habitually resident in accordance with guidance at DMG 073707 only arises once a person has satisfied the three month rule.

Note 3: For guidance in relation to posted worker exemptions, see DMG 073011 - 073027.

1 JSA Regs (NI), reg 85A(2)(a)

Example 1

Milan is a Belgian citizen. He entered the United Kingdom for the first time on 6.1.14 to look for work. He was unable to find a job and claimed income-based Jobseeker's Allowance. The date of claim was 17.3.14. There was no question of backdating and the first day of potential entitlement would have been 20.3.14. On 20.3.14, the decision maker decided that Milan could not be treated as habitually resident in the United Kingdom until 6.4.14. He was therefore a person from abroad with an applicable amount of nil. The decision maker accordingly disallowed the claim.

Example 2

Andreea is a Romanian citizen. She arrived in the United Kingdom for the first time on 2.1.14 in order to look for work. The date of her claim for income-based Jobseeker's Allowance was 7.4.14. There was no question of backdating. On 10.4.14, the decision maker decided the claim. The decision maker decided that the claimant had a European Union law right to reside in the United Kingdom as a jobseeker. She determined that the claimant had completed a period of three months

living in the United Kingdom on 1.4.14. Finally the decision maker also concluded that Andreea was (actually) habitually resident in the United Kingdom as at the date of claim. The decision maker therefore decided that Andreea was entitled to income-based Jobseeker's Allowance and made an award accordingly.

072987 – 072989

Applying the three month rule

072990 [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] In deciding whether there is entitlement to income-based Jobseeker's Allowance where the three month rule applies, decision makers will need to consider the period from the first day of possible entitlement down to the date they make a decision on the claim (see DMG 2428). If the three months is completed during that period the decision maker will need to make a decision that the claimant

1. is not entitled to income-based Jobseeker's Allowance from the date of claim up to and including the date before the three month rule is satisfied **and**
2. is entitled to income-based Jobseeker's Allowance from the first day on which the three month rule is satisfied.

Example

Hans is a German national. He entered the United Kingdom for the first time on 2.1.14, in order to look for work. He was unable to find a job and claimed income-based Jobseeker's Allowance on 24.3.14. The decision maker decided the claim on 4.4.14. The decision maker determined that Hans had completed three months living in the United Kingdom on 1.4.14 and accordingly decided that Hans was not entitled to income-based Jobseeker's Allowance from 24.3.14 up to and including 1.4.14, but was entitled from and including 2.4.14.

072991 – 072993

Meaning of "living in"

072994 This expression is not defined within the regulations and as such should be given its ordinary everyday meaning.

072995

Temporary absences

072996 If, during the three month period the claimant has spent some time outside the common travel area, the decision maker will have to make a judgement as to whether the claimant ceased to be “living in” the common travel area during that absence. It is not possible for this guidance to deal with all the circumstances in which a temporary absence from the common travel area will mean that a person has or has not ceased to be living in the common travel area. Decision makers should take a common sense approach by applying the normal everyday meaning of “living in”.

Example 1

Louis is a Belgian national. On 9.1.14 he came to the United Kingdom to look for work. Having been unable to find a job he claimed income-based Jobseeker's Allowance. The date of claim was 14.4.14. It emerged from questions asked in relation to the claim that, since arriving, Louis had lived in a rented flat in the United Kingdom and that he had spent the period 2.3.14 to 15.3.14 in Belgium. His father had died and he had attended the funeral and had stayed in his mother's house. The decision maker decided that, as at 14.4.14, Louis had lived in the United Kingdom continuously for 3 months. The 2 week absence did not mean that Louis had ceased to live in the United Kingdom.

Example 2

Mia is a German national. She came to the United Kingdom alone in 2.1.14 in order to look for work. She rented a bedsit on a short-term one month tenancy and stayed in the United Kingdom until 1.2.14, when she returned to Germany. In Germany she stayed with her husband and children in the family home until 30.3.14. She did not work in Germany during that time. When she came back (again alone) to the United Kingdom on 30.3.14, she took up a 6 month tenancy on a flat. On 7.4.14 Mia claimed income-based Jobseeker's Allowance. On 8.4.14, the decision maker decided that Mia had a right to reside as a jobseeker but that she was not to be treated as habitually resident in the United Kingdom because she had not lived here for three months prior to her claim. The decision maker therefore decided that Mia was not entitled to income-based Jobseeker's Allowance.

072997

Saving rule

072998 The three month rule does not apply to a claim for income-based Jobseeker's Allowance which is

1. made or

2. treated as made

before 1.1.14.

Example 1

Tereza is a national of the Czech Republic. She entered the United Kingdom for the first time on 21.12.13 in order to look for work. Having been unable to find any work in the interim, she claimed income-based Jobseeker's Allowance on 31.12.13. The decision maker decided that the three month rule did not apply to her. The decision maker proceeded to consider whether Tereza was actually habitually resident in the United Kingdom.

Example 2

Rasmus is an Estonian national. He entered the United Kingdom for the first time on 9.12.13. He was unable to find any work and he claimed income-based Jobseeker's Allowance on 2.1.14. The decision maker decided that because there had been a domestic emergency on 31.12.13, the claim could be backdated and accordingly treated the claim as made on 31.12.13. The decision maker therefore concluded that the three month rule did not apply to Rasmus and proceeded to consider whether Rasmus was actually habitually resident in the United Kingdom.

Contribution-based Jobseeker's Allowance

072999 The habitual residence test (including the new three month rule) does not apply to contribution-based Jobseeker's Allowance.

073000 – 073010

Three Month Residence Requirement - posted worker exemptions

073011 From 9.11.14¹ amendments are made to the definition of 'person from abroad'², introducing exemptions from the three month residence requirement for returning United Kingdom, European Economic Area and non-European Economic Area nationals who originally left the United Kingdom as a result of being posted to work abroad.

Note: Although these regulation changes came into force on 9.11.14, operationally they took effect from 10.11.14.

1 JSA (Hab Res) (Amdt) Regs (NI) 14, reg 1; 2 JSA Regs (NI), reg 85A

073012

Person from abroad

073013 A person cannot be treated as habitually resident unless they have been living in the common travel area for a qualifying period of three months and they have a right to reside in the common travel area. A claimant who is not habitually resident in the common travel area is a person from abroad, who has an applicable amount of Nil and is therefore not entitled to income-based Jobseeker's Allowance¹.

1 JSA Regs (NI), reg 85, 85A & Sch 4, para 14

073014 The introduction of the three month residence requirement (see DMG 072986 - 072999) limits access to benefits for all United Kingdom and European Economic Area jobseekers until they have established residency in the United Kingdom and a link to the United Kingdom labour market. This has affected individuals who were previously habitually resident in the United Kingdom but left as a result of accepting a posting to work abroad for a period exceeding three months and subsequently returned to the United Kingdom at the end of this employment. Specified legislation¹ is amended to exempt stipulated categories of posted workers from the three month residence requirement if they maintained their connection to the United Kingdom economy during this absence, for example by making Class 1 or Class 2 National Insurance contributions whilst working abroad. The exemption can apply to a returning United Kingdom, European Economic Area and non-European Economic Area posted worker with a right to reside in the common travel area.

1 JSA Regs (NI), reg 85A

073015 DMG 072800 provides guidance on when a claimant cannot be habitually resident in the common travel area. Specified legislation¹ is amended to provide that a claimant cannot be habitually resident in the common travel area unless the claimant

1. subject to the exceptions at DMG 073017, has been living in the common travel area for the past three months **and**
2. has a right to reside in the common travel area, other than a right to reside which is excluded under specified legislation² (see DMG 073450 - 073483).

1 JSA Regs (NI), reg 85A(2); 2 reg 85A(3)

073016

Exempt group

073017 The exceptions¹ referred to in DMG 073015 1. are where, at any time during the past three months, the claimant has

1. paid either Class 1 or Class 2 National Insurance contributions² whilst working abroad³ **or**

2. been a Crown servant posted overseas to perform the duties of a Crown servant⁴ **or**
3. been a member of Her Majesty's Forces posted overseas to perform the duties of a member of Her Majesty's Forces⁵.

Note 1: The existing requirement at DMG 073015 2. to have a right to reside in the common travel area, remains.

Note 2: Claimants who are excluded⁶ from treatment as a person from abroad are also exempt from the three month residence requirement.

1 JSA Regs (NI), reg 85A(2A); 2 SS (Conts) Regs 01, reg 114, 118, 146 or 147 or SS A (NI) Act 92, sec 155;

3 JSA Regs (NI), reg 85(2A)(a); 4 reg 85(2A)(b); 5 reg 85(2A)(c); 6 reg 85A(4)

073018

Evidence of National Insurance contributions

073019 One pay slip is sufficient evidence to demonstrate that United Kingdom National Insurance contributions, relating to the claimant's absence whilst working abroad, have been paid at some time during the three month period prior to making his claim. Alternative evidence may include a letter or contract from the employer, detailing the rate of pay.

Note: For self-employed persons who have continued to pay Class 2 National Insurance contributions whilst working abroad and those National Insurance contributions have been paid at some time during the three month period prior to making their claim, evidence may include a business bank statement showing those Class 2 National Insurance contributions have been paid via direct debit.

Example 1

Georg, an Austrian national, has been resident and working in genuine and effective employment in the United Kingdom for the last 6 months. Georg is then posted to work at his company's Barcelona branch for a period of 6 months. On completion of his 6 months working in Spain, Georg's contract ends and he returns immediately to the United Kingdom where he makes a claim to Jobseeker's Allowance. Georg provides a pay slip which shows that at some time during the three month period prior to making his claim to Jobseeker's Allowance, he has paid Class 1 United Kingdom National Insurance contributions for the period whilst working in Spain. The decision maker therefore determines that Georg is European Economic Area posted worker and is therefore exempt from the three month residence requirement, so can immediately be treated as habitually resident. Georg is entitled to Jobseeker's

Allowance as a jobseeker for a total period of 6 months before being subject to a genuine prospect of work assessment.

Example 2

Enora, a Belgian national, is resident and working in the United Kingdom on an 18 month contract for an international charity. For the final 4 months of her contract, Enora is posted to work at the company's Paris office, where she continues to pay Class 1 United Kingdom National Insurance contributions. On completion of that 4 month period in Paris, Enora's contract ends and she is returned to the United Kingdom where she immediately makes a claim to Jobseeker's Allowance. The decision maker determines that as Enora has paid Class 1 United Kingdom National Insurance contributions at some time during the three month period prior to making her claim to Jobseeker's Allowance, she is a posted worker who is exempt from the three month residence requirement and is entitled to Jobseeker's Allowance for a period of 6 months before being subject to a genuine prospect of work assessment.

Example 3

Alec, a United Kingdom national, was posted to his company's Madrid branch where he continued to pay Class 1 United Kingdom National Insurance contributions. When the company downsized Alec lost his job so immediately returned to the United Kingdom and made a claim to Jobseeker's Allowance. As he had been paying United Kingdom National Insurance contributions from abroad at some time during the three month prior to the date of his claim, Alec was exempt from the three month residence requirement. A decision maker determined that he was a United Kingdom national with a right of abode and could be treated as habitually resident immediately on his return to the United Kingdom.

Example 4

Keith, a United Kingdom national, took a job with a United Kingdom-based tour operator to work as a holiday rep. On taking the job his employer posted Keith to the company's Spanish holiday resort in May. Keith was paid a basic salary of £250 per month. His employers provided accommodation. During Keith's employment as a holiday rep he did not pay Class 1 or Class 2 United Kingdom National Insurance contributions. Keith's contract ended at the end of the holiday season in September that year and immediately returned to the United Kingdom and made a claim to Jobseeker's Allowance. Keith was living outside the United Kingdom for the previous 5 months. As he had not lived in the United Kingdom for 3 months prior to his claim and had not paid United Kingdom National Insurance contributions at any point during these 3 months, the decision maker determined that Keith could not be treated as habitually resident immediately on his return to the United Kingdom.

Note: Decision makers should be mindful of the potential for contribution-based Jobseeker's Allowance entitlement from exporting contributions that have been paid abroad (see DMG 075333).

073020

European Economic Area jobseeker

073021 A European Economic Area jobseeker that is exempt from the three month residence requirement as a result of falling within the posted worker exempt group (see DMG 073017) will be entitled to Jobseeker's Allowance for a period of 3 months + 91 days before being subject to a genuine prospect of work assessment.

073022

Meaning of Crown Servant

073023 Crown servant¹ means a person holding an office or employment under the Crown.

1 JSA Regs (NI), reg 1(2)

073024

Meaning of Her Majesty's Forces

073025 Her Majesty's Forces¹ has the meaning given in specified legislation².

1 JSA Regs (NI), reg 1(2); 2 Armed Forces Act 2006

073026

Savings provision

073027 The exceptions at DMG 073017 do not apply to a claim for Jobseeker's Allowance which is

1. made **or**
2. treated as made

before 9.11.14¹.

Note: Please see the **Note** to DMG 073011 regarding the operational date that this guidance took effect i.e. 10.11.14.

1 JSA (Hab Res) (Amdt) Regs (NI) 14, reg 3

073028 – 073030

Minimum earnings threshold

073031 Person with certain rights to reside are deemed not to be person from abroad¹ (see DMG 072810). Consequently for the purposes of income-based Jobseeker's Allowance/Income Support, income-related Employment and Support Allowance and State Pension Credit they do not have to satisfy the requirement that

1. they have lived in one of the territories of the common travel area for the previous 3 months **and**
2. if 1. is satisfied that they are habitually resident in one of those territories.

*1 IS (Gen) Regs (NI), reg 21AA(4); JSA Regs (NI), reg 85A(4);
ESA Regs (NI), reg 70(4); SPC Regs (NI), reg 2(4)*

073032 Amongst this exempt group are European Economic Area nationals who are

1. workers
2. persons who retain their worker status because
 - 2.1 they are in duly recorded involuntary employment after having been employed in the United Kingdom, as long as they have registered as a jobseeker with the relevant employment office **or**
 - 2.2 work as an employee in the United Kingdom has stopped because the person is temporarily unable to work due to illness or accident
3. self-employed persons **or**
4. persons who retain the status of self-employed person because they are temporarily unable to pursue their activities as a self-employed person as a result of illness or accident¹

and family members (see DMG 072900) of persons described in 1. to 4. above².

Note: The following guidance is to provide more detailed advice on the criteria for deciding whether a person is or was a “worker” or a “self-employed” person.

*1 IS (Gen) Regs (NI), reg 21AA(4)(za); JSA Regs (NI), reg 85A(4)(za); ESA Regs (NI), reg 70(4)(za);
SPC Regs (NI), reg 2(4)(za); 2 IS (Gen) Regs (NI), reg 21AA(4)(zb); JSA Regs (NI), reg 85A(4)(zb);
ESA Regs (NI), reg 70(4)(zb); SPC Regs (NI), reg 2(4)(zb)*

073033 – 073034

Meaning of “worker” - two tier approach

073035 It is well established in European Union law that, in order to be a worker or self-employed, the person must be doing work which is genuine and effective and is not on such a small scale as to be marginal and ancillary¹. In order to clarify the position for decision makers the Department has decided to apply a minimum earnings threshold, as part of a two tier process.

Tier 1: whether the minimum earnings threshold has been met for a required period; and

Tier 2: in cases where the minimum earnings threshold criteria have not been met whether the European Economic Area national was in genuine and effective work assessed against a set of secondary criteria.

With respect to claims for and entitlement to income-based Jobseeker's Allowance, this two tier assessment process must be applied with effect from 1.3.14. With respect to claims for entitlement to Income Support and income-related Employment and Support Allowance, the two tier assessment process should be applied from 6.10.14 and in respect of State Pension Credit, from 3.11.14.

1 Case C-55/81 D.M. Levin v Staatssecretaris van Justitie

073036 – 073037

Tier 1 - minimum earnings threshold

073038 A European Economic Area national who has worked as an employee or in a self-employed capacity will be automatically considered as a worker or self-employed person for the purposes of European Union law if

1. their average gross earnings from employment or self-employment in the United Kingdom were more than £681 per calendar month (£157 a week) in 2017/18 **and**
2. the gross earnings were at or above that level for a continuous period of 3 months immediately before the date from which benefit has been claimed.

If these conditions are met, decision makers should accept that the work activity was genuine and effective and that while the work was done, the European Economic Area national had worker or self-employed status, as appropriate, in European Union law. In this case there is no need to apply the Tier 2 assessment.

Note: The level of the minimum earnings threshold is linked to the level of the Her Majesty's Revenue and Customs primary earnings threshold (see DMG Chapter 27, Appendix 2), which is the point at which employees must pay Class 1 National Insurance contributions. Self-employed have to pay Class 2 and Class 4 National Insurance contributions around this point too. As the primary earnings threshold level is uprated every April, decision makers should ensure that they use the primary earnings threshold level relevant to the 3 month period of earnings under consideration. Where this period spans the April primary earnings threshold uprating, decision makers should use the pre-uprating primary earnings threshold rate for the entire 3 month period.

073039

Tier 2 - minimum earnings threshold criteria not met

073040 In all cases where a European Economic Area national's average gross earnings from employment of self-employment fall below the minimum earnings threshold and/or their earnings have not been at or above that level for a continuous period of 3 months, the decision maker will need to examine each case as a whole, taking account of all circumstances, to determine whether the European Economic Area national's activity was genuine and effective, and not marginal and ancillary and decide whether the person is or was a "worker" or a "self-employed person", applying the guidance set out below.

073041

Deciding if a person is/was a "worker" - factors to take into account

073042 Article 45 of the Treaty on the Functioning of the European Union (TFEU) says that freedom of movement for workers shall be secured within the European Union and specified legislation¹ defines "worker" as meaning a worker within the meaning of Article 45 (see DMG 072810 - 072811).

1 Imm (EEA) Regs 2016, reg 4(1)(a)

073043 The following principles can be derived from European Union case law

1. the term "worker" has a European Union law meaning¹ and may not be interpreted restrictively²
2. the term "worker" applies to employees rather than the self-employed. In European Union law terms the essential characteristic of an employment relationship is that a person performs services for and under the direction of another person in return for which he receives remuneration³
3. in deciding whether a person is a worker account should be taken of all the occupational activities the person has undertaken in the host member state³
4. a person working part-time can be a "worker" provided that the work undertaken is genuine and effective, but not where activities are on such a small scale as to be regarded as purely marginal or ancillary⁴
5. as a "worker" must receive remuneration, unpaid voluntary activity is not "work"⁵
6. the mere fact that there is a legally binding employment relationship is not of itself conclusive of whether the employee is a worker⁶

7. as long as the work is “genuine and effective” it is irrelevant whether it yields an income lower than the amount considered the minimum required for subsistence in the host Member State⁷ (in the case of the United Kingdom, the relevant applicable amount for an income-related benefit)
8. the fact that a person seeks to supplement the remuneration from his work by means of financial assistance drawn from public funds does not preclude him from being regarded as a worker⁸
9. once it has been established that the person is genuinely exercising his right of free movement as a worker, the motives which have prompted the worker to work in another Member State are irrelevant⁹ provided the work is genuine and effective
10. a person employed under an ‘on-call’ or ‘zero-hour’ contract is not precluded from being a worker provided the work is genuine and effective¹⁰
11. an employee undertaking genuine and effective work is a worker even if the person is employed under a contract that is performed illegally¹¹
12. a Commissioner has held that a claimant’s physical incapacity to do the work she had undertaken and the fact that she had been dismissed from it after a short period were relevant to the issue of whether the work was genuine and effective¹².

¹ Case C-75/63 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*;

² Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie*; ³ Case C-357/89 *Raulin* (1992) ECR 1027;

⁴ Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* (para 17); ⁵ CIS/868/08 & CIS/1837/06;

⁶ Case C-344/87 *Bettray v Staatssecretaris van Justitie*; ⁷ Case C-53/81 *D.M. Levin v*

Staatssecretaris van Justitie; ⁸ Case C-139/85 *Kempf v Staatssecretaris van Justitie*;

⁹ Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* (para 23); ¹⁰ Case C-357/89 *Raulin* (1992)

ECR 1027; ¹¹ *JA v SSWP (ESA)* [2012] UKUT 122 (AAC), CE/2190/11; ¹² CSIS/467/07

073044 Where the minimum earnings threshold is not met the decision maker will need to consider two questions

1. is the person exercising the European Union freedom of movement rights as a “worker” (see DMG 073046 - 073047) **and**
2. is the work “genuine and effective” (see DMG 073049 to 073050).

073045

Is the person exercising their rights as a worker?

073046 In order for a person to be exercising their European Union law rights of free movement as a “worker”, there must be a real link between that person and the labour market of the host member state (see DMG 072811). A worker must be actually

pursuing activities as an employed person or seriously wish to pursue activities as an employed person¹. Accordingly, before considering the guidance below about whether the work itself is genuine and effective, decision makers may consider the preliminary question of whether the claimant is genuinely exercising their European Union rights as a “worker”.

I MDB (Italy) v Secretary of State for the Home Department [2012] EWCA Civ 1015

073047 In deciding this question, decision makers can look at all the circumstances, including the person’s primary motivation in taking up employment and whether, during periods when they were not employed, the person seriously wished to pursue employment by actively looking for work with a genuine chance of being engaged¹.

Note: If a person is exercising their European Union rights, their conduct before and after periods of employment (including their primary motivation) are not relevant when considering whether work is genuine and effective (see DMG 073049 to 073050).

I MDB (Italy) v Secretary of State for the Home Department [2012] EWCA Civ 1015

073048

Genuine and effective work

073049 Provided the decision maker is satisfied that the claimant is in fact exercising his rights as a worker in accordance with DMG 073046 - 073047 above, then the decision maker can consider whether the work is genuine and effective and not marginal or ancillary (see DMG 072816).

073050 When determining whether or not someone is a worker, the following can be relevant considerations

1. whether work was regular or intermittent
2. the period of employment
3. whether the work was intended to be short-term or long-term at the outset
4. the number of hours worked
5. the level of earnings.

In some cases the decision maker will have to weigh, for example, low hours against long duration of work as part of their overall assessment of whether work is genuine and effective. However, case law does not identify one consistent approach to applying these and other factors: each case must be decided on its own merits.

073051

Part time work

073052 Work below the minimum earnings threshold that is part time or low paid is not necessarily always marginal and ancillary. A part time worker may be considered a worker for European Community purposes and retain a right to residence in the United Kingdom as long as the work is genuine and effective.

Note: It is not possible to provide a formula of hours, earnings and periods of work which determine whether or not a person is a worker.

EXAMPLES

Example 1

A European Economic Area national arrives in the United Kingdom and stays with a relative who has a shop. She does not have an offer of a job but helps in the shop for an hour or two when she can, for which she is paid £20 per week. She claims Jobseeker's Allowance immediately on arrival on 10.3.14. The claimant has not been given discretionary leave to remain in the United Kingdom. As the earnings were clearly below the minimum earnings threshold, the decision maker considered whether the work in the United Kingdom was genuine and effective. The decision maker decided that given the low number of hours, the irregularity of the work and the relationship between the claimant and the shop owner, the work here is marginal and ancillary. The decision maker therefore decided that the claimant is not a "worker". The decision maker accepted however that the claimant had a right to reside as a jobseeker. As such she had to satisfy the condition that she had been living in the United Kingdom for the three months immediately before the date of claim (see DMG 072986 - 072999). The decision maker decided that the claimant had not satisfied this condition and that therefore she was a person from abroad and thus not entitled to income-based Jobseeker's Allowance.

Example 2

Wolfgang is a German national who came to the United Kingdom on 18.6.13. On 20.6.13 he made an arrangement with a British family to act as an au pair. The agreement was that he would work 13 hours per week in return for which he would receive £35 and free board and lodging. At the outset the intention was that the arrangement would be long term but the arrangement was terminated by the family on 28.7.13 and on 31.7.13 a claim was made for income-based Jobseeker's Allowance. The decision maker considered that the claimant had not yet been in the United Kingdom for long enough for his residence here to have become habitual. However she considered whether the claimant might be exempt from that requirement as a worker who had become involuntarily unemployed. The decision maker decided that Wolfgang had been a worker: his activities as an au pair had been genuine and

effective: he had provided services of economic value to his employers in return for remuneration. Finally the arrangement had been intended at the outset to be long term and had terminated unexpectedly early.

Example 3

The claimant is a Dutch national. He worked in the Netherlands from 1995. The firm he was working for in the Netherlands closed down in June 2010 and so he came to the United Kingdom to look for work. In October 2013 he claimed Employment and Support Allowance. It emerged that in the period since June 2010 the claimant had been looking for work and that between 2010 and 2012 he had been doing unpaid voluntary work. The decision maker decided that the claimant was a person from abroad because he did not have a qualifying right to reside for the purposes of entitlement to income-related Employment and Support Allowance. In particular the claimant wasn't a person who retained worker status because he had never been a "worker" in the United Kingdom. His activities had consisted of voluntary community work which was outside the "economic" form of activity for remuneration which is an essential factor in being a "worker".

Example 4

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

Example 5

A European Economic Area national who claims income-related Employment and Support Allowance shows that he has been working for three hours per day, five days a week for the last four months. The decision maker decides that the work is genuine and effective because it is not on such a small scale as to be marginal and ancillary. The work was on a regular basis continuing for a reasonable length of time.

073053 – 073055

Self-employment

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

Note: See DMG 073216 in relation to self-employment and the Court of Justice of the European Union judgment of Saint Prix.

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

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

1. average profits (before tax and National Insurance) are more than £681 per calendar month (£157 per week) in 2017/18 (see **Note 2** below) **and**
2. average profits have been at or above that level for a continuous period of 3 months

the decision maker should accept that the self-employment is genuine and effective and they can be considered as self-employed persons under European Union law.

Note 1: If average profits are less than £681 per calendar month (£157 per week) (see **Note 2** below) and/or have not been at or above that level for a continuous period of 3 months, the decision maker will need to examine the case under the Tier 2 process (see DMG 073040) with a view to determining whether the self-employment is genuine and effective.

Note 2: The level of the minimum earnings threshold is linked to the level of Her Majesty's Revenue and Customs Primary Earnings Threshold, which is the point at which employees must pay Class 1 National Insurance contributions. Self-employed have to pay Class 2 and Class 4 National Insurance contributions around this point too. As the Primary Earnings Threshold level is uprated every April, decision makers should ensure that they use the Primary Earnings Threshold level relevant to the 3

month period of earnings under consideration. Where this period spans the April Primary Earnings Threshold uprating, decision makers should use the pre-uprating Primary Earnings Threshold rate for the entire 3 month period.

- 073058 Decision makers should exercise care in applying the guidance on European Union case law in DMG 073043 and 073044 (on the meaning of “worker”) to the question of whether self-employment is genuine and effective. Account must be taken of the different nature of self-employment: it may include periods of relative inactivity (see DMG 072842) and there will be periods particularly as a business is starting up when the person may be working long hours but not yet receiving much profit.

Examples of self-employment

Example 1

The claimant was a Czech national who came to the United Kingdom on 4.1.14. He claimed Jobseeker’s Allowance on 11.12.14. The claimant said that he had a right to reside as a self-employed person. He had a contract with a local business under which he provided bookkeeping services for a local business. The contract was for 2 hours work per month, at a fee of £25 an hour and the claimant had completed the work for January 2014 on 1.2.14. He had not advertised his services nor had he sought any other contracts. On 14.2.14 a decision maker considered the claim and decided that the claimant’s self-employment activities were marginal rather than genuine and effective, so the claimant did not have a right to reside as a self-employed person. The decision maker accepted however that the claimant had a right to reside as a jobseeker. However the claimant could not be treated as habitually resident because he had not been living in the United Kingdom for the 3 months period immediately prior to the date of claim. The decision maker decided therefore that the claimant was a person from abroad and not entitled to income-based Jobseeker’s Allowance.

Example 2

The claimant was a French national. She came to the United Kingdom on 6.10.14 and claimed State Pension Credit on 17.12.14. It emerged that the claimant had been working on a self-employed basis as an interpreter. Since arriving she had worked for 12 hours per week on average charging a fee of £15 per hour. The decision maker decided that the claimant’s activity as a self-employed person was genuine and effective and that consequently the claimant had a right to reside as a self-employed person and was therefore not a person from abroad. As she had a right to reside as a self-employed person she was deemed in law not to be a person from abroad and

so did not have to satisfy the habitual residence test and was awarded State Pension Credit accordingly.

073059 – 073079

Genuine prospects of work - income-based Jobseeker's Allowance

Introduction

073080 [See DMG Memo Vol 2/83] European Economic Area nationals who have been unemployed and claiming Jobseeker's Allowance for

1. 6 months as a retained worker **or**
2. a total of 91 days as a jobseeker

will lose their European Union right to reside in the United Kingdom, **unless** they provide **compelling evidence** that they are continuing to seek employment and that they have a genuine chance of being engaged. In which case, a short extra period of income-based Jobseeker's Allowance will be allowed.

Note: This paragraph will not apply to anyone with a right to reside other than as a jobseeker (see DMG 073084) or person retaining worker status (see DMG 073085).

073081 [See DMG Memo Vol 2/83] The key changes deal with the length of period of residence as a jobseeker and the extent to which it is possible to enjoy repeat periods of residence as a jobseeker or person retaining worker status, from 1.7.14.

073082 – 073083

Jobseekers

073084 [See DMG Memo Vol 2/83, DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/92] DMG 073240 explains a jobseeker's right to reside. With effect from 1.1.14, the definition of a jobseeker¹ is a person who

1. either
 - 1.1 entered the United Kingdom in order to seek employment² **or**
 - 1.2 is present in the United Kingdom and seeking employment immediately after having a right to reside as a worker, self-employed person, a self-sufficient person or a student³ **and**

2. can provide evidence that they are seeking employment and have a genuine chance of being engaged⁴.

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

1 Imm (EEA) Regs 2016, reg 6(1); 2 reg 6(5)(a); 3 reg 6(5)(b); 4 reg 6(6); 5 reg 6(2)(b) & 6(2)(c)

Retaining worker status

073085 **[See DMG Memo Vol 2/83]** DMG 072821 and 072822 set out the conditions for a right to reside as a worker who retains worker status after having worked as an employee and then becoming involuntarily unemployed.

Employed in the United Kingdom for less than one year

073086 **[See DMG Memo Vol 2/83, DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/92]** A person who¹

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

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

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

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

073087 **[See DMG Memo Vol 2/83]** This group will cease to have a right to reside as retained workers after 6 months (there has been no change in the immigration rules for this group). However, in practice if a claimant falls into this group, and makes a claim after 1.1.14, they will be subject to a genuine prospect of work assessment at the end of 6 months and the reclaiming rules apply (see DMG 073111).

073088 **[See DMG Memo Vol 2/83]** However, if a claimant in this group made a claim before 1.1.14, they will cease to have a right to reside as a retained worker after 6 months but they may

1. be entitled to be treated as jobseekers **and**
2. make a new claim to Jobseeker’s Allowance **and**

3. receive Jobseeker's Allowance for 6 months before having a genuine prospect of work assessment.

073089

Employed in the United Kingdom for one year or more

073090 [See DMG Memo Vol 2/83, DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/92] From 1.1.14, a person who¹

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

retains worker status for 6 months starting with the first day of duly recorded involuntary unemployment. After that they can only retain worker status if they can provide compelling evidence that they are continuing to seek employment and have a genuine chance of being engaged² (see DMG 073099). However again under transitional provisions³, in calculating that 6 months, any claim where entitlement to Jobseeker's Allowance commenced prior to 1.1.14 is disregarded. Therefore the changes only affect claims made, or treated as made, on or after 1.1.14.

1 Imm (EEA) Regs 2016, reg 6(2)(b), (5) & (6); 2 reg 6(7); 3 Imm (EEA) Amdt No. 2 Regs, Sch 3, para 1(b)

073091

The genuine prospect of work test [See DMG Memo Vol 2/70]

073092 [See DMG Memo Vol 2/83, DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/92] With effect from 1.1.14, a European Economic Area national cannot have a right to reside as

1. a jobseeker (as defined in DMG 073084) **or**
2. a person who has retained worker status in accordance with DMG 072862 **1.** and **2.**

for longer than the relevant period unless they can provide **compelling evidence** that they are continuing to seek employment and have a **genuine chance of being engaged**¹. This is assessed through the genuine prospect of work test.

1 Imm (EEA) Regs 2016, reg 6(7)

The relevant period

073093 [See DMG Memo Vol 2/83] The meaning of the relevant period¹

1. in relation to a retained worker who becomes involuntarily unemployed following a period of more than 12 months in work, is defined as a continuous period of 6 months **or**
2. in relation to a jobseeker, is defined as 91 days, minus the cumulative total of any days during which jobseeker status has been enjoyed previously, not including any days prior to a continuous absence from the United Kingdom of at least 12 months.

Note 1: In practice, prior to 10.11.14 when the relevant period for a jobseeker was 182 days (see **Note 2**), decision makers should not apply the distinction between the relevant periods in **1.** and **2.** above. Decision makers should apply **a period of 6 months** to a jobseeker falling within **2.**.

Note 2: From 10.11.14 (see DMG 073142) in relation to a jobseeker at **2.** above, the relevant period was amended from 182 days to 91 days.

1 Imm (EEA) Regs 2016, reg 6(1)

When does the relevant period start?

073094 [See DMG Memo Vol 2/83] The relevant period starts from the first day of any successful claim to Jobseeker's Allowance made on or after 1.1.14. But see guidance at DMG 073101 to 073108 about the effect of interruptions occurring during the relevant period.

Note: Waiting days (see DMG 20901) count towards calculating the relevant period.

073095 [See DMG Memo Vol 2/83] The relevant period starts from the date of the successful claim to Jobseeker's Allowance, where the 3 month residence requirement has already been satisfied.

Standard of proof

073096 [See DMG Memo Vol 2/83] Whether a person has a genuine chance of being engaged in genuine and effective work (*Antonissen* (see DMG 073240)) is a matter which falls to be decided on the civil standard of proof (see DMG Chapter 1 (1343 et seq)). That is proof that

1. the fact more probably occurred than not **and**

2. common sense, not law, requires that in deciding the question, regard should be given to inherent probabilities (see DMG Chapter 1 (1392)).

Within this context, the evidence provided by the claimant for having a genuine chance of being engaged must outweigh the fact that the claimant has been unable to find work after 6 months of unsuccessful jobseeking.

Genuine chance of being engaged

073097 [See DMG Memo Vol 2/83] The requirement to provide compelling evidence applies both to

1. continuing to seek genuine and effective employment (see DMG 21522 - 21791) **and**
2. having a genuine chance of being engaged.

Note: The need for the chance should be founded on something objective (i.e. that it is **genuine** as opposed to illusory or speculative), but also the **likelihood** that the **chance** will come to fruition within a reasonable period of time. There has to be a chance of real prospect of success in obtaining work that is genuine and effective. The evidence provided at the end of the relevant period must show that their circumstances have changed in such a way that merits a continuation of their jobseeker status¹.

1 [2017] AACR 6

Actively seeking employment

073098 [See DMG Memo Vol 2/83] The claimant is required to be actively seeking employment for each week of their Jobseeker's Allowance claim. This means taking steps that the claimant can reasonably be expected to take, to give them the best chance of getting employment. The requirement to have a chance of being engaged requires a degree of looking forward over a foreseeable period, on the balance of probability. However it should also be borne in mind that, during any forward looking period, there will still be the requirement for the claimant to be actively seeking employment each week in relation to any continued payments of their Jobseeker's Allowance claim.

Compelling evidence of continuing to seek employment and having a genuine chance of being engaged

073099 [See DMG Memo Vol 2/83] The decision maker can extend the claimant's Jobseeker's Allowance entitlement where the claimant has provided compelling

evidence that a change of their circumstances has now given them a genuine chance of being engaged. This may be

1. where the claimant has provided reliable evidence that they have a genuine offer of a specific job which will be genuine and effective work (see DMG 073112 to 073113). In this case the relevant period can be extended for a foreseeable period if this is within 3 months (see **Note** below) and extended up to the day before the job actually starts or is due to start (whichever is the earlier) **or**
2. where the claimant can provide proof during the relevant period that a change of circumstance has given them genuine prospects of employment (which will be genuine and effective work) (see DMG 073112 to 073113) and as a result they are awaiting the outcome of job interviews. In these cases the relevant period can be extended for a foreseeable period, in this case up to the day before the substantial change of circumstances if this is within 3 months (see **Note** below). Any extension is backdated to the date of change of circumstances. However, time within the current relevant period is disregarded and as such, any change that occurs more than 3 months before the last day of the relevant period will not, in practice, result in any extension beyond the six month point.

Note: The claimant is required to continue to satisfy both elements of the genuine prospect of work test: actively seeking employment and a genuine chance of engagement for each week of the period of extension, up to the date of the substantial change of circumstances e.g. starting work. The element of actively seeking employment is reviewed following each week of jobseeking; whereas the element of a genuine chance of engagement requires a degree of looking forward over a foreseeable period, to reasonably determine, based on the balance of probability and on the evidence provided, when a claimant is likely to change their circumstances (e.g. start work). Therefore, taking into account both elements, it would be reasonable for decision makers to consider a short period of extension where a change of circumstances is likely to occur within 3 months. A substantial change of circumstances to show a genuine chance of being engaged should be one which comes to fruition within a reasonable period of time (see DMG 073097 to 073098). If following the assessment of evidence, decision makers are unable to determine a “reasonable period” for a change of circumstance, please refer the case to Decision Making Services for guidance. Please see DMG 073098 with regard to the claimant’s requirement to be actively seeking employment during any extension period.

073100 **[See DMG Memo Vol 2/83]** Inherent probability does not mean giving the benefit of the doubt. It is a material consideration to take into account a period of six months or

more of unsuccessful jobseeking as part of the assessment of genuine evidence to determine whether the claimant has provided compelling evidence of a genuine chance of being engaged. Examples of genuine evidence which may be taken into account in assessing whether, on the balance of probability, there is a genuine chance of being engaged may include

1. length of the period of unsuccessfully seeking work
2. a definite job offer of genuine and effective work
3. awaiting the outcome of a job interview
4. completion of a training course which offers real prospects of success in obtaining genuine and effective work
5. previous genuine and effective work history
6. acquisition of qualifications which enhances the claimant's employment prospects
7. relocation to an area where there are improved chances in obtaining genuine and effective work
8. steps taken by the claimant to improve their prospects of being offered genuine and effective work within a reasonable period.

These examples are not exhaustive. It is open to the decision maker to obtain other evidence which is considered to be compelling.

Note 1: The evidence of whether a claimant has a genuine chance of being engaged is a matter decided on the civil standard of proof (see DMG 073096). The evidence provided should be substantial enough to demonstrate that the change of circumstances has significantly improved the claimant's genuine chance of engagement and that the chance of engagement will come to fruition within a foreseeable period.

Note 2: See DMG 073112 to 073113 for guidance on genuine and effective work.

Example 1

Pavel, a Polish national attends his genuine prospect of work assessment interview on 1.8.14 and provides a letter from an employer. This shows that Pavel has been guaranteed a job to start once he has passed the security course he has been undertaking. The position will be permanent and the pay will be £200 per week. Pavel has obtained top grades throughout his coursework and has already sat the exam. The results of his exam are awaited and due on 22.8.14. As the work is genuine and

effective the decision maker grants an extension up to the date that the exam results are due. Once Pavel receives his exam results he returns with another letter from the employer. Because of the nature of the work, employees cannot start without a security check. Pavel will therefore not be able to start work until 1.10.14. The decision maker determines that, as the delay is outside Pavel's control but the work is still due to start within a reasonable period, an extension is appropriate until 30.9.14.

Example 2

Solange, a Portuguese national, has been a jobseeker for the relevant period and attends her genuine prospect of work assessment interview on 23.7.14. She provides a letter saying that she is due to start genuine and effective work on 25.8.14, following the completion of a one week training programme. The training programme commences 18.8.14 and has already been booked and paid for. The decision maker determines that Solange has demonstrated that she has a genuine chance of being engaged. The decision maker therefore determines that Solange is entitled to an extension until 24.8.14.

Example 3

Christophe, a French national, after being unsuccessful in obtaining employment for 5 months and 1 week, relocated from Manchester to Dorset and is now attempting to find work in tourism. He applied for some jobs in the area before moving. As it is the start of the season he has found numerous vacancies, has had a couple of interviews in the past week and has a number of upcoming interviews. He is expecting the outcome of the interviews within the next 2 weeks. Christophe feels very hopeful of these as he speaks English well and worked in tourism in France before coming to the United Kingdom.

The decision maker determines that, in the field in which Christophe is now looking, at this time of year and this area he has a genuine chance of being engaged. As Christophe has only recently relocated the decision maker determines that an extension is appropriate. The decision maker grants an extension of 2 weeks on the basis that Christophe has been told in the last couple of interviews he had had to expect a decision from the employer by then. The decision maker considers that a longer extension would be inappropriate as he had applied for jobs before he moved and has had a number of interviews, the season has started and employers are likely to have all the staff they need shortly.

Example 4

Magda, a Hungarian national, has been claiming Jobseeker's Allowance for the relevant period and has been invited to attend a genuine prospect of work

assessment. At interview she states that 4 months ago she moved from Inverness to Newcastle as she is an experienced production line worker and believed that this would give her more chances of finding work. She provides evidence to show that since her move she has been able to apply for more jobs in her line of work than in Inverness where she was principally limited to hospitality work; she has also found more employers to send her CV to. However, as yet she has had very few interviews and these have been unsuccessful. She has no upcoming interviews.

The decision maker determines that although the reason for Magda's move was to put herself in a better labour market this has not been shown to be successful on the basis of her jobseeking activity during the last 4 months. The decision maker determines that Magda has not shown that she has a genuine chance of being engaged in the foreseeable future and an extension is not appropriate. The decision maker therefore determines that Magda no longer has a qualifying right to reside and has an applicable amount of nil.

Example 5

Kurt, a German national, is invited to provide compelling evidence to show that he has a genuine prospect of work assessment on 1.8.14 as he has now been in receipt of Jobseeker's Allowance for the relevant period.

At his interview Kurt provides a letter from an agency "Right4Work" offering him a job which is due to start in 2 weeks time. The offer does not contain any further details of the hours to be worked, the wages or the length of the contract. Before the job offer can be considered, Kurt is asked to provide further information about the job from the agency.

Kurt provides a letter from the agency saying that they will always endeavour to arrange a placement for their workers but this cannot be guaranteed. The work is minimum wage, but as it is dependant on the requirements of the clients, neither the hours per week or the duration of the placements can be guaranteed. No contract is deemed to exist when the worker is not on a placement.

The decision maker determines that although he has a job offer, there is no compelling evidence that the work will be genuine or effective because the income, hours per week and duration cannot be confirmed.

The decision maker therefore determines that Kurt has not provided compelling evidence to show a genuine chance of being engaged. Kurt no longer has a right to reside as either a retained worker or a jobseeker and is a person from abroad.

Other relevant considerations

073101 **[See DMG Memo Vol 2/83]** The relevant period provided to jobseekers, in order to look for work, may be spread over a number of different periods as a jobseeker, but not exceeded¹. A person is always entitled to retain worker status for 6 months.

1 Imm (EEA) Regs 2016, reg 6(1)

073102 **[See DMG Memo Vol 2/83]** Where a claimant who was previously claiming Jobseeker's Allowance and whose claim ended before the genuine prospect of work assessments makes a subsequent claim to Jobseeker's Allowance, then they get the balance of the relevant period remaining **unless** they had

1. obtained genuine and effective work and had worker status in that job **or**
2. been outside the United Kingdom for a continuous period of 12 months or more.

If **1.** or **2.** applies then they will be entitled to a fresh right to reside, and consequently entitled to Jobseeker's Allowance, for 6 months. At the end of that 6 month period, the genuine prospect of work assessment is conducted as normal.

073103 – 073105

Contribution-based Jobseeker's Allowance

073106 **[See DMG Memo Vol 2/83]** Contribution-based Jobseeker's Allowance is not subject to a right to reside condition. However there will be cases where when they first become unemployed, claimants satisfy the conditions for contribution-based Jobseeker's Allowance only and then later become entitled to income-based Jobseeker's Allowance. Time spent on contribution-based Jobseeker's Allowance would only be relevant to the genuine prospect of work assessment, where a person, reaching their 6 month point for receiving contribution-based Jobseeker's Allowance, seeks to transfer from contribution-based Jobseeker's Allowance to income-based Jobseeker's Allowance.

Note 1: Whilst contribution-based Jobseeker's Allowance is limited to 6 months, this is a separate period to the relevant genuine prospect of work period.

Note 2: In some circumstances income-based Jobseeker's Allowance can be paid in addition to contribution-based Jobseeker's Allowance (see DMG Chapter 23 for guidance).

073107 **[See DMG Memo Vol 2/83]** Only periods of entitlement to contribution-based Jobseeker's Allowance or income-based Jobseeker's Allowance count towards the relevant period. Periods of credits only and periods between claims do not count towards calculating the relevant period. However, what the claimant has done

between periods of claim will affect whether a further relevant period applies, e.g. whether the claimant has worked since his last claim and retained worker status.

Note: Credits only claims are not subject to the habitual residence test. However, the period of a contribution-based Jobseeker's Allowance claim can be taken into account when calculating the balance of time to the genuine prospect of work end date.

Example 1

Salvatore, an Italian national, first came to the United Kingdom on 31.1.14 and immediately claimed Jobseeker's Allowance. Although he had jobseeker status he had not been in the United Kingdom for 3 months and his claim was disallowed. However he was awarded credits from 1.2.14. On 1.5.14 Salvatore made a new claim to income-based Jobseeker's Allowance. He now satisfied the 3 month residency requirements and was subsequently able to satisfy the habitual residence test and general Jobseeker's Allowance entitlement conditions. Accordingly, the decision maker decided he was entitled to income-based Jobseeker's Allowance from 1.5.14. On 16.6.14 Salvatore ended his claim to Jobseeker's Allowance. Salvatore made a new claim to Jobseeker's Allowance on 18.8.14.

The decision maker considered that Salvatore satisfied the 3 month residence requirement (he had not left the United Kingdom or common travel area between his two claims) and satisfied the habitual residence test as a European Economic Area jobseeker. The decision maker then had to consider Salvatore's previous claims when calculating date for the genuine prospect of work. When calculating part months an average month is 30 whole days (this is based on 365/12). The decision maker did not include the period 1.2.14 - 30.4.14 as this was prior to a successful claim to Jobseeker's Allowance, when Salvatore had not satisfied the 3 month residence requirement but the period when he was claiming credits. The period 1.5.14 - 15.6.14 is 1 month 15 days. Therefore 4 months 15 days remains towards the relevant period. Therefore, as the interval between claims does not count, the decision maker determined that Salvatore's genuine prospect of work due date was 1.1.15.

Example 2

Maria, a Dutch national, has been living and working in the United Kingdom for 3 years when she is laid off due to a downturn in the business. She claims contribution-based Jobseeker's Allowance. Although this is not subject to the habitual residence test she was given the genuine prospect of work fact sheet at her new jobseeker interview.

After 6 months her contribution-based Jobseeker's Allowance exhausts and she completes a claim for income-based Jobseeker's Allowance. The decision maker determines that she has already been claiming Jobseeker's Allowance for 6 months (during which time she had a right to reside as a person who retained worker status) her genuine prospect of work is due immediately and must be completed before a final decision can be given or her right to reside. If she cannot show a genuine prospect of work at this time, she will no longer have a right to reside as either a retained worker or a jobseeker and her entitlement to Jobseeker's Allowance will end.

073108 **[See DMG Memo Vol 2/83]** Certain interruptions will be disregarded in calculating when the relevant period ends. Where the claimant offers evidence at their genuine prospect of work interview that they have previously been treated as available for (see DMG 21309 - 21419) and actively seeking work (see DMG 21690 - 21791), consideration can be given to an extension of the genuine prospect of work end date. Examples for consideration may include periods of

1. up to 13 weeks when the claimant is a victim of domestic violence and is treated as available for work in accordance with the guidance at DMG 21369 et seq
2. temporary absence from the United Kingdom (see DMG 075350 et seq)
3. sickness.

Note: The above list is not exhaustive. However, the period that the claimant was treated as available for and actively seeking work must have been previously accepted by the employment office and must have been noted on the system.

073109 – 073110

Further claim to Jobseeker's Allowance made after genuine prospect of work assessment

073111 **[See DMG Memo Vol 2/83]** Where a claimant makes a further claim to Jobseeker's Allowance after having a genuine prospect of work assessment and they

1. obtained genuine and effective work and had retained their worker status (see DMG 072821 - 072822) through that job **or**
2. had been outside the United Kingdom for
 - 2.1 a continuous period of 12 months or more **or**
 - 2.2 less than 12 months, and they satisfy the genuine prospect of work at the point of this further claim

they may be entitled to a new period of Jobseeker's Allowance¹. They must satisfy the habitual residence test, and if they have had more than a short absence from the United Kingdom, they must also satisfy the 3 month residence requirement (see DMG 072986 - 072999). Then, if either **1.** or **2.1** are met, they are entitled to a new relevant period on Jobseeker's Allowance before a genuine prospect of work assessment is due.

Note 1: If **2.2** applies (i.e. they have been absent from United Kingdom for less than 12 months and at the point of this claim they have met the compelling evidence² requirements for the genuine prospect of work at DMG 073100), they are entitled to claim Jobseeker's Allowance up until the job start date (if they have one) or for the relevant period, followed by a genuine prospect of work assessment.

Note 2: If neither **1.** or **2.1** or **2.2** are met, the claimant is not entitled to Jobseeker's Allowance.

1 Imm (EEA) Regs 2016, reg 6(8); 2 reg 6(10)

Genuine and effective work

073112 **[See DMG Memo Vol 2/83]** Decision makers should only accept that the claimant has provided compelling evidence of good prospects of employment or self-employment if, after applying the criteria described in DMG 073031 - 073058, the prospective employment or self-employment would be genuine and effective work.

073113 **[See DMG Memo Vol 2/83]** If, following the examination of the case

1. the decision maker decides that the employment or self-employment will not be genuine and effective work, he should decide that the claimant has not provided compelling evidence that he has good prospects of employment **or**
2. the decision maker decides that the employment or self-employment will be genuine and effective, he should decide that the claimant has provided compelling evidence that he has good prospects of employment and extend the relevant period as per DMG 073099.

073114 – 073119

Part-time work

073120 **[See DMG Memo Vol 2/83]** Where a claimant is undertaking work activity at the date of claim which (although part-time) is determined by the decision maker to be genuine and effective (see DMG 073031 to 073058), the claimant has current "worker"¹ or "self-employed"² status as appropriate. They are not subject to genuine prospect of

work while they have this status. The right to reside status should be reviewed if the work activity ends.

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

073121 **[See DMG Memo Vol 2/83]** Where a claimant is undertaking work activity at the date of claim which is not determined by the decision maker to be genuine and effective (i.e. that the work is on such a small scale as to be marginal and ancillary), the claimant has not gained “worker” status and therefore cannot retain worker status (see DMG 073085). Although they are working, the claimant would have “jobseeker” status¹. The claimant would be subject to a genuine prospect of work assessment as usual.

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

What happens if the claimant fails the genuine prospect of work test?

Joint claims

073122 **[See DMG Memo Vol 2/83]** Where a claimant (claimant 1) loses their right to reside following a genuine prospect of work assessment in which they fail to demonstrate a genuine prospect of work, claimant 1 will no longer be entitled to Jobseeker’s Allowance. In circumstances where the claimant’s partner (claimant 2) then makes a claim to Jobseeker’s Allowance, demonstrating their own right to reside as a retained worker or jobseeker (having satisfied the 3 month residence requirement and the habitual residence test), claimant 2 will be entitled to Jobseeker’s Allowance for the relevant period. Claimant 1 can also be included within the claim made by claimant 2, as claimant 1 now derives a right to reside from claimant 2. If claimant 2 then loses their right to reside following a genuine prospect of work assessment, neither claimant 1 or claimant 2 will be eligible for further Jobseeker’s Allowance unless they can demonstrate a new right to reside in such circumstances as are described in this guidance.

Family members

073123 **[See DMG Memo Vol 2/83]** Decision makers will need to be aware that if a Jobseeker’s Allowance claimant has lost their European Union rights to reside it may be that there are family members whose European Union right to reside derives from the claimants who will, as a consequence, also lose their European Union rights to reside. The following are family members¹ for these purposes

1. spouse (husband or wife) or civil partner **or**

2. direct descendants of the European Economic Area national, his spouse or civil partner who are
 - 2.1 under the age of 21 or
 - 2.2 dependants of his, his spouse or civil partner
3. direct ascendant relatives of the European Economic Area national, his spouse or civil partner, who are dependants.

Where this applies the decision maker should decide that the claimant is not entitled to income-based Jobseeker's Allowance. If a family member makes a claim for income-based Jobseeker's Allowance the decision maker should also decide that they are also not entitled to income-based Jobseeker's Allowance.

Note 1: "Spouse" within this paragraph includes civil partners in a same sex relationship.

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

Note 3: This paragraph also applies to family members who make a claim for Income Support, income-related Employment and Support Allowance or State Pension Credit, whose only European Union right to reside is derived from the claimant.

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

073124 – 073125

Extending genuine prospect of work assessment to stock European Economic Area nationals

Introduction

073126 [See DMG Memo Vol 2/83] From 1.1.14, European Economic Area nationals who had been unemployed and claiming Jobseeker's Allowance for six months lost their European Union right to reside as either a jobseeker or retained worker, unless they provide compelling evidence that they continued to have a genuine prospect of work (DMG 073080 - 073123). From 10.11.14, further measures have been introduced for European Economic Area jobseekers (the position for retained workers remains the same as introduced at 1.1.14) which reduces that six month period to 91 days (after serving the three month residence requirement) (DMG 072986 to 073027). If claimants are able to provide compelling evidence at their genuine prospect of work assessment interview, a short extension period of income-based Jobseeker's Allowance may be allowed (DMG 073099 to 073100).

073127 **[See DMG Memo Vol 2/83]** For ease of operational implementation, the above measures were initially applied to all new claims to Jobseeker's Allowance made on or after 1.1.14. From 9.2.15, the process of applying genuine prospect of work assessments to all remaining European Economic Area nationals whose entitlement to income-based Jobseeker's Allowance started prior to 1.1.14 ("stock cases") commenced. Genuine prospect of work assessments are applied to stock cases with effect from 9.5.15 (i.e. after a three month notification period has elapsed) (see DMG 073129 to 073130 below).

Does legislation allow for genuine prospect of work to be applied to claims before 1.1.14?

073128 **[See DMG Memo Vol 2/83]** Immigration Regulations¹ allow decision makers to apply the genuine prospect of work provisions to claims made before 1.1.14. However where the award commenced prior to 1.1.14, only periods from 1.1.14 count towards the time limit for calculating the relevant period as a jobseeker or retained worker.

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

1 Imm (EEA) Regs 2016; 2 Imm (EEA) (Amdt) (No 2) Regs 13, Sch 3, para 1(b)

Three month notification

073129 **[See DMG Memo Vol 2/83]** From 9.2.15, existing income-based Jobseeker's Allowance stock cases were identified and claimants advised that a review of their right to reside in the United Kingdom and their continued entitlement to income-based Jobseeker's Allowance will be undertaken in three months time, at their genuine prospect of work assessment interview.

Note: A European Economic Area retained worker stock case will be subject to the same three month notice period as a European Economic Area jobseeker stock case (see DMG 073134 below).

073130 **[See DMG Memo Vol 2/83]** If the claimant has not found work within the three month notification period, they will be invited to attend a genuine prospect of work assessment interview, to enable the claimant to provide

1. evidence to show what their right to reside is (see DMG 073131 to 073133 below for alternative rights to reside) **and**

2. where the person seeks to rely on their right to reside as a jobseeker, compelling evidence to show that they have a genuine prospect of work (see DMG 073135, 073138 and 073139 below on compelling evidence).

Alternative right to reside

073131 **[See DMG Memo Vol 2/83]** During the genuine prospect of work assessment interview, the claimant may offer an alternative right to reside (see DMG 073234 et seq). Where the claimant is exercising an alternative right to reside, they are advised to provide supporting evidence.

073132 **[See DMG Memo Vol 2/83]** Alternative rights to reside may include

1. self-sufficient persons with comprehensive sickness insurance (DMG 073244 to 073246) **or**
2. self-sufficient students with comprehensive sickness insurance (DMG 073248) **or**
3. family members (DMG 073250) of
 - 3.1 a qualified person (DMG 073238) **or**
 - 3.2 a British citizen (if certain conditions are satisfied) (DMG 073254 to 073264) **or**
 - 3.3 a student (DMG 073248) **or**
 - 3.4 a European Economic Area national with a permanent right of residence (DMG 073351) **or**
4. family members who retain their right of residence (DMG 073300) **or**
5. extended family members (DMG 073294) **or**
6. permanent rights of residence (DMG 073350 et seq) **or**
7. derivative rights of residence (DMG 073381 - 073413).

This is not an exhaustive list.

073133 **[See DMG Memo Vol 2/83]** Supporting evidence could include

1. job contracts
2. letters from employers
3. evidence of permanent residence, which may include evidence of
 - 3.1 5 years as a qualified person

- 3.2** certified accounts, tax returns or Her Majesty's Revenue and Customs registration (self-employed people)
 - 3.3** evidence of previous work
 - 3.4** P45s
 - 3.5** study and comprehensive sickness insurance (Students)
 - 3.6** self-sufficiency and comprehensive sickness insurance
 - 3.7** Worker Registration and Work Authorisation documents (Accession state nationals)
- 4.** evidence of a derivative right to reside e.g. evidence of a child in general education (DMG 073387 **2.3**), evidence that the child's European Economic Area national parent was working in the United Kingdom whilst the child resided in the United Kingdom (DMG 073387 **2.2**)
- 5.** evidence of the claimant's nationality (where this is not already held).

This is not an exhaustive list.

Is the relevant period being applied to stock cases?

073134 **[See DMG Memo Vol 2/83]** The relevant period (DMG 073093 - 073095) is not applied to stock cases, as all claimants will already have had much longer than this period by the time of their genuine prospect of work assessment interview. European Economic Area jobseekers and European Economic Area retained workers are given notice that their continued entitlement to income-based Jobseeker's Allowance will be reviewed in three months time at their genuine prospect of work assessment interview, allowing them time to prepare.

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

Compelling evidence

073135 **[See DMG Memo Vol 2/83]** Where the claimant is exercising a right to reside as a jobseeker or retained worker, they must provide compelling evidence that they have a genuine prospect of work at the genuine prospect of work assessment interview, or evidence to show that they have an alternative right to reside. If they cannot provide such evidence, their right to reside will end and their award of income-based Jobseeker's Allowance will terminate.

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

Changes in circumstance

Extensions

073136 **[See DMG Memo Vol 2/83]** Where the claimant provides compelling evidence that a change in their circumstances has now given them a genuine chance of being engaged, the decision maker can extend the claimant's Jobseeker's Allowance entitlement.

073137 **[See DMG Memo Vol 2/83]** As the relevant period is not being applied to stock cases (see DMG 073134 above), in order to be eligible for an extension, the change of circumstance should have taken place within the three month notification period (see DMG 073129 to 073130 above).

073138 **[See DMG Memo Vol 2/83]** If there is a genuine offer of a specific job, which is

1. genuine and effective work (see DMG 073031 - 073058) **and**
2. due to commence within 3 months

an extension may be allowed to the day before the job actually starts, or is due to start (whichever is the earlier) (see DMG 073099 **1.** and DMG 073100, Example 1 and 2).

073139 **[See DMG Memo Vol 2/83]** Where the claimant

1. provides evidence that a change in their circumstance has given them a genuine prospect of employment (see DMG 073112 to 073113) (for example, relocation to an area where there are improved labour market conditions) **and**
2. is awaiting the outcome of job interviews

an extension of up to 3 months may be allowed (see DMG 073099 **2.** and 073100, Examples 3 and 4).

Loss of Housing Benefit

073140 **[See DMG Memo Vol 2/83]** European Economic Area nationals who lose their right to reside and lose their entitlement to income-based Jobseeker's Allowance also lose their entitlement to Housing Benefit. Housing Benefit Memo 3/14 provides guidance

in relation to the removal of entitlement to Housing Benefit in respect of European Economic Area jobseekers.

Right to reside as a jobseeker - income-based Jobseeker's Allowance

Introduction

073141 **[See DMG Memo Vol 2/83]** From 1.1.14 Immigration Regulations were amended to restrict the right to reside for European Economic Area jobseekers to six months, unless they provide compelling evidence that they have a genuine chance of being engaged. Further amendments were introduced from 10.11.14¹ which mean that a European Economic Area national who comes to the United Kingdom to look for work will still have a total of six months residence as a European Economic Area jobseeker in the United Kingdom, but that this will be made up of the initial three month right of residence², followed by a right to claim income-based Jobseeker's Allowance as a jobseeker for the latter of 91 days. This also applies where the claimant has resided in the United Kingdom for more than 3 months prior to the date of claim. In such cases, the claimant will still only received income-based Jobseeker's Allowance for 91 days.

Note 1: For genuine prospect of work guidance from 1.1.14, please see DMG 073092 - 073123.

Note 2: A European Economic Area national with a right to reside as a jobseeker may be exempt from the three month residence requirement³, if they are posted workers. In these cases the claimant will be entitled to access income-based Jobseeker's Allowance for 3 months + 91 days (see DMG 072800 and 073011 - 073027).

1 Imm (EEA) (Amdt) (No 3) Regs 14, (2014 No 2761), reg 1;

2 Imm (EEA) Regs 2016, reg 13; 3 JSA Regs (NI) reg 85A(2A)

Relevant period

073142 **[See DMG Memo Vol 2/83]** Guidance at DMG 073093 advises on the meaning of relevant period. The relevant period during which a person is entitled to enjoy a right to reside in the United Kingdom as a jobseeker (see DMG 073093 2.) was amended from 182 days to 91 days from 10.11.14¹.

1 Imm (EEA) Regs 2016, regs 6(1) & 6(8)(b)

On entry jobseeker

073143 [See DMG Memo Vol 2/83] On or after 10.11.14 a European Economic Area national, **who for the first time** relies on their right to reside as a jobseeker

1. has arrived in the United Kingdom **and**
2. has completed their initial three month right of residence¹ (see DMG 072986 - 072999)

will enjoy 91 days of residence as a jobseeker, before being required to provide compelling evidence that they have a genuine chance of being engaged in employment². The 91 day period starts from the first day of a successful claim to income-based Jobseeker's Allowance made on or after 10.11.14.

Note: Where a European Economic Area national has been resident in the United Kingdom for longer than the required three month residence period prior to making a successful claim to income-based Jobseeker's Allowance, that person would still enjoy 91 days of residence as a jobseeker before undergoing a genuine prospect of work assessment.

1 Imm (EEA) Regs 2016, reg 13; 2 reg 6(1) & 6(7)

Example 1

Piotr, a Polish national, came into the United Kingdom to seek work in June 2014. He made a claim to Jobseeker's Allowance on 16.11.14. The decision maker determined that Piotr had satisfied the three month residence requirement and found him to be factually habitually resident. The decision maker determined that Piotr's award of income-based Jobseeker's Allowance would end after 91 days on 14.2.15, unless Piotr could show a genuine chance of being engaged. Although there was evidence that Piotr had already been in the United Kingdom for five months when he made his claim to Jobseeker's Allowance on 16.11.14, he will be entitled to 91 days, from the start of his successful claim to Jobseeker's Allowance, before his genuine prospect of work is due.

Note: Waiting days (see DMG 20901) count towards calculating the relevant period.

Example 2

Georg, an Austrian national, has been resident and working in genuine and effective employment in the United Kingdom for the last 6 months. Georg is then posted to work at his company's Barcelona branch for a period of 6 months. On completion of his 6 months working in Spain, Georg's contract ends and he returns immediately to the United Kingdom where he makes a claim to Jobseeker's Allowance. Georg provides a pay slip which shows that at some time during the 3 month period prior to

making his claim to Jobseeker's Allowance, he has paid United Kingdom Class 1 National Insurance Contributions for the period whilst working in Spain. The decision maker therefore determines that Georg is a European Economic Area posted worker and is exempt from the three month residence requirement, so can immediately be treated as habitually resident. Georg is entitled to income-based Jobseeker's Allowance as a jobseeker for a total period of 3 months + 91 days before being subject to a genuine prospect of work assessment.

073144

Jobseeker - previous right to reside in another capacity other than as a jobseeker since 1.1.14

073145 [See DMG Memo Vol 2/83x, DMG Memo Vol 2/86 & DMG Memo Vol 2/89] On or after 10.11.14, a European Economic Area national who prior to their claim to Jobseeker's Allowance

1. exercised a right to reside in the United Kingdom in another capacity¹ (for example as a worker or student) **and**
2. transfers to residence in a jobseeking capacity

will enjoy 91 days residence as a jobseeker², starting from the first day of a successful claim to Jobseeker's Allowance, before being required to provide compelling evidence that they have a genuine chance of being engaged in employment³.

Note: A jobseeker is entitled to exercise a right to reside for up to 91 days after serving their three month right of residence (for breaks in claim, see DMG 073153). Any period where the claimant was receiving income-based Jobseeker's Allowance with a different right to reside (see 1.) must not be deducted from the 91 days.

1 Imm (EEA) Regs 2016, reg 6(5)(b); 2 reg 6(8)(b); 3 reg 6(7)

Example

Anton, a Hungarian national, worked in genuine and effective employment until due to a lack of work he became involuntarily unemployed when his contract ended in December 2014. He claimed Jobseeker's Allowance immediately and was determined to have retained his worker status. He was entitled to six months before his genuine prospect of work assessment.

In April 2015, Anton returned to Hungary for 2 weeks to visit his family and his entitlement to income-based jobseeker's Allowance ended, having been in receipt of it for approximately 4½ months. On his return to the United Kingdom, Anton made a new claim to Jobseeker's Allowance from 1.5.15. The decision maker determined

that Anton now had jobseeker status, was subject to the three month residence requirement, but determined that as Anton's absence was temporary it did not mean that Anton had ceased to be living in the United Kingdom during that absence. The decision maker determined that Anton was habitually resident. As he held retained worker status during the previous award this is not deducted from the relevant period for this new claim. Anton is entitled to 91 days before his genuine prospect of work, so his relevant period ends on 30.7.15. His genuine prospect of work will be booked to take place on or soon after 31.7.15.

073146

Retained worker

073147 **[See DMG Memo Vol 2/83]** A European Economic Area national who, on or after 10.11.14, satisfies the conditions in DMG 072821 and retains worker status will continue to enjoy six months residence as a person who retains worker status before being required to provide compelling evidence that they have a genuine chance of being engaged in employment¹.

1 Imm (EEA) Regs 2016, regs 6(1) & 6(7)

Example

Andrzej, an Estonian national, provided evidence at his genuine prospect of work interview on 5.10.14 that he had a full time job to start on 26.10.14. An extension was granted until 25.10.14.

The contract ended after six months and Andrzej made a new claim to Jobseeker's Allowance from 1.5.15. As he retained his worker status, Andrzej had a new six month period before his genuine prospect of work was due.

073148

Absence from the United Kingdom of 12 months or more

073149 **[See DMG Memo Vol 2/83, DMG Memo Vol 2/86 & DMG Memo Vol 2/89]** Before being required to provide compelling evidence that they have a genuine chance of being engaged in employment¹, a European Economic Area jobseeker who is returning to jobseeking following an absence from the United Kingdom of 12 months or more, will be

1. treated as an on entry jobseeker (DMG 073143) and
2. required to satisfy the three month residence requirement

before they can enjoy the 91 days period as a jobseeker.

1 Imm (EEA) Regs 2016, reg 6(7) & 6(8)(b)

Example

Ernst, a German national, claimed Jobseeker's Allowance and was given a genuine prospect of work due date of 1.12.14. He was unable to provide evidence of a genuine prospect of work at his genuine prospect of work assessment and his right to reside as a jobseeker ended. He left the United Kingdom to return to Germany where he found work, but came back to his country on 4.1.16. As he had been away from the United Kingdom for more than a temporary period, he was subject to the three month residence requirement.

Ernst made a new claim to Jobseeker's Allowance from 4.4.16. As he had previously reached genuine prospect of work stage and had then left the United Kingdom for a continuous period of 12 months or more, Ernst is entitled to a new period of 91 days as an on entry jobseeker.

073150

Absence from the United Kingdom of less than 12 months

073151 **[See DMG Memo Vol 2/83]** Where, since last claiming Jobseeker's Allowance, the claimant has been out of the United Kingdom for a continuous period of less than 12 months, the claimant may only enjoy a period of 91 days of jobseeker status, starting from the first day of a successful claim to Jobseeker's Allowance, if they are able to provide compelling evidence of a genuine prospect of engagement from the outset¹. Such claimants are subject to an immediate "Post genuine prospect of work New Claim Assessment" to provide them with the opportunity to demonstrate this.

Note: For guidance relating to the "Post genuine prospect of work New Claim Assessment", please refer to operational guidance.

1 Imm (EEA) Regs 2016, reg 6(8) - 6(10)

Example 1

Nils, a Swedish national, has previously been in receipt of income-based Jobseeker's Allowance for six months as a retained worker. As a result of moving labour market to a better area for the type of work he was looking for, Nils was granted a short extension at genuine prospect of work stage pending the outcome of some interviews he had attended. However, the expected work did not materialise and when income-based Jobseeker's Allowance ended Nils returned to Sweden for a month to visit family.

On his return Nils made a new claim to Jobseeker's Allowance from 3.3.15. His only potential right to reside would be as a jobseeker. As he has only been out of the United Kingdom temporarily to visit family, the decision maker determines that he was subject to the three month residence requirement but decided that the absence was temporary and that Nils had not ceased to be living in the United Kingdom during that absence, and could be treated as habitually resident. However as Nils has already had a genuine prospect of work decision and has left the United Kingdom for less than 12 months, the decision maker determines that Nils must go through the "Post-genuine prospect of work New Claim Assessment" before a final decision can be made on the right to reside. The decision maker telephones Nils and completes the assessment form over the phone. Taking into account the information provided by Nils, the decision maker determines that he has not shown an improved prospect of work and makes the decision that Nils has no qualifying right to reside. Nils must therefore be treated as a person from abroad and has no entitlement to income-based Jobseeker's Allowance.

Example 2

Sergej, a Lithuanian national, claimed Jobseeker's Allowance and was given a genuine prospect of work due date of 11.11.14. Due to a busy diary the Jobcentre were unable to book his genuine prospect of work interview until 17.11.14. However, Sergej signed off on 14.11.14, before going through the genuine prospect of work interview. He returned to Lithuania for 4 months.

On 16.3.15 Sergej returned to the United Kingdom. He needed to satisfy the three month residence requirement, during which time he gained an HGV licence and applied for jobs. He made a new claim to Jobseeker's Allowance from 16.6.15.

Although Sergej had not previously had a genuine prospect of work interview, records show that he had exhausted his allowed period before a genuine prospect of work was due. As this is the case the decision maker follows the post genuine prospect of work new claim process and telephones Sergej to complete the assessment form.

Sergej is able to show that he has significantly improved his prospects of work by gaining an HGV licence. He is also able to provide evidence to show that he has 10 live applications for work related to his new qualification and is awaiting the outcome of a number of interviews.

The decision maker determines that Sergej is entitled to a new period of 91 days before genuine prospect of work.

073152

Breaks in claim

073153 **[See DMG Memo Vol 2/83]** A European Economic Area jobseeker who breaks their claim before reaching their genuine prospect of work assessment should, upon their return to jobseeking, enjoy the balance (if any) of their original 91 day period¹ starting from the first day of their successful claim to Jobseeker's Allowance (unless they have an absence abroad of 12 months or more (see DMG 073149)).

Note 1: This paragraph follows the same principle for those claimants whose original claim was calculated with a six month genuine prospect of work due date (see DMG 073102).

Note 2: Where a claim to Jobseeker's Allowance is made prior to 10.11.14 and there is no break in the claim, the claimant will enjoy the full 6 months as a jobseeker.

1 Imm (EEA) (Amdt) (No 3) Regs 14, reg 4

073154 **[See DMG Memo Vol 2/83]** In the case of a European Economic Area jobseeker who made a claim to Jobseeker's Allowance on or after 1.1.14, so began their claim with a six month genuine prospect of work due date, but who, before reaching their six month genuine prospect of work assessment

1. breaks their claim to Jobseeker's Allowance before 10.11.14 but makes a new claim to Jobseeker's Allowance on or after 10.11.14 **or**
2. breaks their claim to Jobseeker's Allowance on or after 10.11.14 then makes a new claim to Jobseeker's Allowance

will only be given the remaining balance (if any) of a 91 day period.

Note 1: An immediate genuine prospect of work assessment may be required in some cases.

Note 2: See DMG 073162 - 073163 for transitional provisions.

073155

Contribution-based Jobseeker's Allowance

073156 **[See DMG Memo Vol 2/83]** Contribution-based Jobseeker's Allowance is not subject to the Habitual Residence Test. A European Economic Area national who meets the conditions of entitlement to contribution-based Jobseeker's Allowance will continue to receive contribution-based Jobseeker's Allowance for a period of six months.

073157 **[See DMG Memo Vol 2/83]** Where a claim is made to Jobseeker's Allowance, a European Economic Area national who satisfies the conditions for entitlement to both contribution-based Jobseeker's Allowance and income-based Jobseeker's

Allowance, who does not retain their worker status, would receive income-based Jobseeker's Allowance as a jobseeker for 91 days before being required to undergo a genuine prospect of work assessment. If at that genuine prospect of work assessment, the claimant was unable to provide compelling evidence of a genuine chance of being engaged in employment, they would no longer be able to exercise their right to reside as a jobseeker and their entitlement to income-based Jobseeker's Allowance would end. However as their entitlement to contribution-based Jobseeker's Allowance is for a period of six months, if at the time entitlement to income-based Jobseeker's Allowance ends, their entitlement to contribution-based Jobseeker's Allowance has not yet exhausted, contribution-based Jobseeker's Allowance would remain in payment after the income-based Jobseeker's Allowance ends. For further guidance relating to contribution-based Jobseeker's Allowance, please see DMG 073106 - 073107.

Note: System case controls will be set to notify decision makers of entitlement to contribution-based Jobseeker's Allowance.

Example

Gustav, a Norwegian national, lives with his civil partner who is unable to work due to health problems. He made a claim to Jobseeker's Allowance from 1.2.15. He satisfied the conditions to receive contribution-based Jobseeker's Allowance, having paid enough National Insurance contributions during the relevant tax years. However, as he had left his job voluntarily he did not retain worker status. A decision maker determined that he had status as a jobseeker and had satisfied the three month residence requirement. The relevant period of 91 days was due to end on 2.5.15. For this period he received additional income-based Jobseeker's Allowance as he was also claiming for an inactive partner.

Gustav was unable to demonstrate a genuine prospect of work when required and could no longer exercise a right to reside as a jobseeker and his entitlement to income-based Jobseeker's Allowance ended.

As he was entitled to contribution-based Jobseeker's Allowance for 182 days this element of the claim remained in payment after the income-based Jobseeker's Allowance ended.

Note: Contribution-based Jobseeker's Allowance and income-based Jobseeker's Allowance may not always start on the same date (see DMG 073158).

073158 **[See DMG Memo Vol 2/83]** Where a European Economic Area jobseeker makes a claim to Jobseeker's Allowance and is entitled to contribution-based Jobseeker's Allowance, but as a result of a change of circumstances later becomes entitled to

income-based Jobseeker's Allowance, the calculation of the relevant 91 day period, starts from the point that their contribution-based Jobseeker's Allowance claim started. An immediate genuine prospect of work assessment may be required in some cases.

073159

Joint claims

073160 **[See DMG Memo Vol 2/83]** DMG 073122 provides guidance on joint claims where claimant 1 loses their right to reside and is no longer entitled to Jobseeker's Allowance following their failure at a genuine prospect of work assessment to demonstrate a genuine chance of being engaged, and claimant 2 then makes a claim to Jobseeker's Allowance, demonstrating their own right to reside as a retained worker or jobseeker (and the jobseeker having satisfied the three month residence requirement and habitual residence test). In such circumstances where, for example, claimant 2 demonstrates a right to reside as a jobseeker, claimant 2 will be entitled to 91 days before their genuine prospect of work due date. Claimant 1 can also be included within the claim made by claimant 2, as claimant 1 now derives a right to reside from claimant 2.

Example

Louis, a French national, made a claim to Jobseeker's Allowance from 1.1.15 and is awarded income-based Jobseeker's Allowance. The decision maker determined that he retained worker status and had six months before genuine prospect of work, his relevant period ending on 30.6.15. During this time his wife, Anne, also French, is treated as his family member rather than exercising her own rights. As Anne is his partner she is not subject to a habitual residence test interview. On 1.7.15 Louis attended a genuine prospect of work interview but could not provide compelling evidence that he had a genuine prospect of work. He no longer had a right to reside and his income-based Jobseeker's Allowance claim closes. Anne no longer derives rights from him as he has no right to reside.

Following the genuine prospect of work decision on Louis' claim, the couple decide that Anne should become the principal claimant. Anne therefore makes a claim to Jobseeker's Allowance with herself as the principal claimant. A habitual residence test decision is made on Anne. The decision maker determines that as she cannot be treated as retaining worker status she has a right to reside as a jobseeker and is habitually resident. She is entitled to 91 days before her genuine prospect of work is due. During this time Louis is able to derive a right to reside from Anne.

073161

Transitional provisions

073162 **[See DMG Memo Vol 2/83]** Any period after 31.12.13, but prior to 10.11.14, during which a person has enjoyed a right to reside as a jobseeker is to be taken into account¹ for the purposes of determining

1. the relevant period in relation to that person **and**
2. whether that person has previously enjoyed a right to reside under specified legislation².

Note: Where there has been no break in the claim, and the 6 month relevant period was determined to start prior to 10.11.14 and end after 10.11.14, the claimant will continue to enjoy the full 6 month period before being subject to a genuine prospect of work assessment.

1 Imm (EEA) (Amdt) (No 3) Regs 14, reg 4(1); 2 Imm (EEA) Regs 2016, reg 6(8)

073163 **[See DMG Memo Vol 2/83]** Where the relevant period in DMG 073162 1. would result in a negative balance, the relevant period is to be treated as though it were zero days¹.

1 Imm (EEA) (Amdt) (No 3) Regs 14, reg 4(2)

Example

Antonia, an Italian national, previously made a claim to Jobseeker's Allowance in May 2014 when it was determined that she had jobseeker status and was awarded income-base Jobseeker's Allowance for approximately 4½ months until 14.9.14. She then signed off in order to start a college course but after a couple of months decided that it did not suit her. She returned to the labour market and started applying for jobs.

Antonia made a new claim to Jobseeker's Allowance from 24.11.14. The decision maker determined that, as she had previously been a jobseeker and had the same right to reside again, the duration of the previous claim must be deducted from the relevant period of 91 days. However as the previous claim lasted 4½ months, which is more than 91 days, the relevant period is treated as zero days and Antonia is subject to an immediate genuine prospect of work assessment. The decision maker makes the right to reside decision specifying that Antonia has jobseeker status and that her genuine prospect of work is due immediately. An award of benefit must not be made until the genuine prospect of work decision is made.

Jobcentre staff call Antonia in for an immediate genuine prospect of work assessment at which she provides a letter offering her a job which is due to start on 15.12.14. As there is evidence that this work will satisfy the minimum earnings threshold the decision maker determines that Antonia has shown a genuine prospect of work and is entitled to an extension of her jobseeker status until 14.12.14.

073164 – 073165

Genuine prospect of work and extended periods of sickness

Introduction

073166 [See DMG Memo Vol 2/83] From 30.3.15, specified legislation¹ was amended to allow Jobseeker's Allowance claimants to remain entitled to Jobseeker's Allowance despite being unable to work due to illness, for a period of up to 13 weeks. This means that claimants can elect to remain in receipt of Jobseeker's Allowance, rather than making a claim to Employment and Support Allowance. The following paragraphs (DMG 073167 to 073173) provide guidance on the effect that such a situation has on the calculation of a European Economic Area national's genuine prospect of work assessment interview date.

1 JSA Regs (NI), reg 55ZA

Extended period of sickness

073167 [See DMG Memo Vol 2/83] In addition to the existing short periods of sickness consisting of a period of no more than two weeks, no more than twice in a 12 month jobseeking period (see DMG 20961), an extended period of sickness of up to 13 weeks is introduced. This means that a claimant, who is treated as having met the entitlement conditions for both the short periods of sickness and the extended period of sickness, can have two periods of up to two weeks and one period of up to 13 weeks in any 12 month jobseeking period. However, a claimant cannot start a short (2 week) period of sickness immediately after the last day of a 13 week extended period of sickness¹.

Note: For full guidance about extended periods of sickness, please see DMG Chapter 20.

1 JSA Regs (NI), reg 55(6)(b)

Can a genuine prospect of work assessment interview be conducted during an extended period of sickness

073168 [See DMG Memo Vol 2/83] Guidance within DMG Chapter 20 advises that for Jobseeker's Allowance claimants who, notwithstanding their illness, could be reasonably expected to take steps to seek employment, their actively seeking employment should be determined with regard to the steps that they take to seek employment.

073169 **[See DMG Memo Vol 2/83]** However, where a claimant is treated as available for and actively seeking employment during an extended period of sickness, that claimant would not be expected to undertake a genuine prospect of work assessment interview to establish whether they had a genuine prospect of work until their extended period of sickness had ceased.

Interruptions that affect when the relevant period ends

073170 **[See DMG Memo Vol 2/83]** Guidance at DMG 073108 **3.** advises that periods of sickness during the relevant period (see DMG 073093) (where the claimant has been treated as available for and actively seeking work), are treated as interruptions in jobseeking and those periods are added to the relevant period.

Note: Decision makers are reminded that the period that the claimant was treated as available for and actively seeking work must have been previously accepted by the employment office and must have been noted on the system.

Extended period of sickness occurs during relevant period, but ends before genuine prospect of work assessment date

073171 **[See DMG Memo Vol 2/83]** If a claimant experiences an extended period of sickness during their relevant period, but the extended period of sickness ends before their genuine prospect of work assessment due date is reached, the genuine prospect of work assessment date should be extended by the total allowable periods of sickness within their relevant period. However, see DMG 073173 with regard to the maximum extension period, and the note to DMG 073170 above.

Example

Person A, a German national, will have been in receipt income-based Jobseeker's Allowance as a jobseeker for 91 days on 3.11.15. On 8.9.15, Person A submits a fit note to the department to say that he is unable to work as a result of pneumonia, for a period of 6 weeks. Person A's extended period of sickness is set from 8.9.15 to 19.10.15.

Person A recovers from the pneumonia as expected and returns to his normal jobseeking activities on 20.10.15. The decision maker calculates that Person A's genuine prospect of work assessment should be extended by 6 weeks, from 4.11.15 to 16.12.15.

Claimant within an extended period of sickness at genuine prospect of work assessment date

073172 [See DMG Memo Vol 2/83] The maximum that a claimant can be treated as being available for and actively seeking employment due to an extended period of sickness is 13 weeks from the extended period of sickness start date. Where the claimant is within an extended period of sickness at their genuine prospect of work assessment date, an extension can be granted for a period that either

1. equals the “treated as” period that has already been exercised by the end of their relevant period **or**
2. equals the balance of the extended period of sickness outstanding at their genuine prospect of work assessment date

whichever is the longer.

Example 1

Person A, an Austrian national, will have been in receipt of income-based Jobseeker's Allowance as a retained worker for 6 months on 28.10.15. On 1.10.15, Person A suffers an injury and submits a fit note to the department to say that he had sustained a serious fracture to his left leg whilst playing football and has to have extensive surgery to his leg during the following 10 weeks. His extended period of sickness is set for the period 1.10.15 to 9.12.15. During his relevant period, Person A had also sustained a hamstring injury which required bed rest for 2 weeks from 19.8.15 to 1.9.15, and had a separate injury to his collar bone requiring a further 2 week period of sickness from 16.9.15 to 29.9.15. Person A was treated as available for and actively seeking employment for each of these 2 week periods.

The decision maker calculates that, by the end of his relevant period on 28.10.15, Person A has had periods of sickness totalling 8 weeks:

19.8.15 to 1.9.15	=	2 weeks
16.9.15 to 29.9.15	=	2 weeks
1.10.15 to 28.10.15	=	4 weeks (of his 10 week extended period of sickness)
Total	=	8 weeks

As Person A's extended period of sickness was set for a 10 week period to 9.12.15, he has a balance of 6 weeks extended period of sickness outstanding (29.10.15 - 9.12.15) at the original genuine prospect of work due date (29.10.15).

As the 8 week total period of Person A's sickness (which he has already exercised by the end of his relevant period - see 1. above) is longer than the 6 week balance of

extended period of sickness that is outstanding at the date of his genuine prospect of work assessment due date (see 2. above), the decision maker extends Person A's genuine prospect of work assessment date to 24.12.15 (i.e. by the 8 weeks already used).

However, as the maximum period of extended period of sickness that could be awarded is 13 weeks (if further fit notes are provided), the decision maker allows that the extension could be increased by a further 3 weeks to 14.1.16 (if required) without further referral to the decision maker. Person A will be given the opportunity to provide evidence of a genuine prospect of work when his extended period of sickness is over.

Example 2

Person B, a Spanish national, will have been in receipt of income-based Jobseeker's Allowance as a retained worker for 6 months on 4.11.15. On 8.10.15, Person B suffers an injury and submits a fit note to say that she is unfit to work for 13 weeks, as a result of sustaining a torn ligament which requires complete rest, followed by extensive physio treatment. Person B's extended period of sickness is set from 8.10.15 to 6.1.16. During her relevant period, Person B has previously had a 2 week period (10.6.15 to 23.6.15) of illness due to influenza, and a further 2 week period (5.8.15 to 18.8.15) of illness as a result of a chest infection. Person B was treated as available for and actively seeking employment for each of these 2 week periods.

The decision maker calculates that by the end of her relevant period on 4.11.15, Person B will have had periods of sickness totalling 8 weeks:

10.6.15 to 23.6.15	=	2 weeks
5.8.15 to 18.8.15	=	2 weeks
8.10.15 to 4.11.15	=	4 weeks (of her 13 week extended period of sickness)
Total	=	8 weeks

As Person B's extended period of sickness was set for 13 weeks ending on 6.1.16, the decision maker determines that she will have a balance of 9 weeks (5.11.15 to 6.1.16) outstanding at the date of her original genuine prospect of work assessment due date (under 2. above). As this 9 week period is longer than the 8 weeks which Person B would have exercised at the end of her relevant period (under 1.), the decision maker allows a fixed extension of 9 weeks (under 2.) and extends her relevant period to 6.1.16. Person B will be required to attend a genuine prospect of work assessment interview on 7.1.16.

Maximum extension period [See DMG Memo Vol 2/83]

073173 An extension to the relevant period, in respect of sickness could never be awarded for more than 13 weeks for a jobseeker. This is because, in circumstances where the claimant has

1. been treated as within a period of sickness from the start of their claim (i.e. throughout their 91 day relevant period), the total period of sickness already exercised by the end of the claimant's relevant period (DMG 073172 1.) exceeds any balance of extended period of sickness that may be outstanding at their genuine prospect of work assessment due date (DMG 073172 2.) **or**
2. provided a 13 week fit note shortly before their genuine prospect of work assessment due date, so is within an extended period of sickness at their genuine prospect of work assessment due date, the balance of the extended period of sickness outstanding under DMG 073172 2. would exceed the period already exercised under DMG 073172 1.

but, in neither 1. or 2., would ever exceed 13 weeks.

Note: However, a retained worker could receive an extension of up to 17 weeks, if 13 of those weeks were as a result of an extended period of sickness.

Example

Person A, an Estonian national, has been in receipt of income-based Jobseeker's Allowance as a retained worker for 6 months on 29.10.15. During his relevant period, Person A has had a 2 week period of sickness (from 21.5.15 to 3.6.15), suffering from vertigo. This was followed by a further 2 week period of sickness (from 18.6.15 to 1.7.15), when Person A experienced lower back pain. He was treated as available for and actively seeking employment for each of these 2 week periods.

On 16.7.15 Person A was involved in a car accident, where he sustained fractures to his arm and clavicle. He submitted a fit note to say that he was unfit for work for 13 weeks. Person A's extended period of sickness was set from 16.7.15 to 14.10.15. On 15.10.15, he recovers as expected and resumes his normal jobseeking activities.

The decision maker calculates that by the end of Person A's relevant period on 29.10.15, he will have had periods of sickness totalling 17 weeks:

21.5.15 to 3.6.15	=	2 weeks
18.6.15 to 1.7.15	=	2 weeks
16.7.15 to 14.10.15	=	13 weeks (extended period of sickness)
Total	=	17 weeks

The decision maker allows a fixed extension of 17 weeks (see DMG 073171 above) and extends Person A's relevant period to 25.2.16. He will be required to attend a genuine prospect of work assessment on 26.2.16.

Exemptions to the Habitual Residence Test

Persons exempted from the general rule on the right of permanent residence

073174 The general rule on the right of permanent residence requires that European Economic Area nationals and their family members have resided legally in the United Kingdom for five years¹ (see DMG 073350 et seq). Workers or self-employed persons, and their family members, who have ceased activity acquire the right to reside in the United Kingdom permanently without that requirement². To be a "worker or self-employed person who has ceased activity" a person must be a European Economic Area national who either

1. stops working **and**
 - 1.1 has reached the age at which he is entitled to a state pension on the day he stops working **or**
 - 1.2 if he is a worker, stops working to take early retirement **and**
2. was working in the United Kingdom for at least twelve months before stopping **and**
3. resided in the United Kingdom continuously for more than three years before stopping³ **or**
4. stops working in the United Kingdom because of a permanent incapacity to work **and**
 - 4.1 has resided in the United Kingdom continuously for over two years before stopping **or**
 - 4.2 the incapacity resulted from an accident at work or an occupational disease entitling him to a pension payable in full or in part by an institution in the United Kingdom⁴
5. a person who was the family member of a worker or self-employed person where
 - 5.1 the worker or self-employed person has died
 - 5.2 the family member resided with him immediately before his death **and**

- 5.3** the worker or self-employed person had resided continuously in the United Kingdom for at least two years immediately before his death or the death was the result of an accident at work or an occupational disease⁵.

Where the spouse or civil partner of the worker or self-employed person is a United Kingdom national the conditions on length of residence or time working will not apply⁶.

1 Imm (EEA) Regs 2016, reg 15(1)(a) & (b) & Directive 2004/38/EC, art 16; 2 reg 15(1)(c) & (d); 3 reg 5(2); 4 reg 5(3); 5 reg 15(1)(e); 6 reg 5(6)

Refugees/persons granted humanitarian protection

073175 Refugees¹ are people who are outside their country of origin and are unwilling to return there for fear of persecution because of their

1. race
2. religion
3. nationality
4. political opinion
5. membership of a social group.

1 Convention relating to the Status of Refugees, art. 1 (as extended)

073176 People recognized as refugees by the Immigration and Nationality Directorate are granted asylum. From 30 August 2005 they will have been granted limited leave to enter or remain for five years, rather than indefinite leave. Spouses, recognized civil partners, and dependent children under the age of 18 are normally allowed to join a refugee in the United Kingdom immediately, and are also granted asylum. Refugees, their spouses or recognized civil partners and dependants who are granted asylum are not persons from abroad (or persons not treated as in Northern Ireland for State Pension Credit purposes).

073177 The Home Office may grant humanitarian protection within the immigration rules to persons who have not been recognised as refugees but who are considered likely to face serious harm in their country of origin. As with refugees the family members of a person granted humanitarian protection are allowed to join that person and are granted the same leave. Under European Community law common criteria for the identification of persons genuinely in need of international protection are applied across European Union Member States¹. A new category of protection is introduced, known as subsidiary protection, which is aligned with the present category of humanitarian protection.

1 Directive 2004/83/EC

Discretionary leave

073178 The Home Office may alternatively grant discretionary leave outside the immigration rules.

073179 Humanitarian protection and discretionary leave replaced exceptional leave to enter or remain from 1 April 2003 but there will still be residual cases of exceptional leave to 2007.

Whereas indefinite leave to remain gave a right to permanent residence limited leave, humanitarian protection, discretionary leave and exceptional leave do not guarantee that right.

073180 The Home Office may refer to

1. limited leave given to refugees **or**
2. exceptional leave to remain **or**
3. leave to remain on an exceptional basis **or**
4. humanitarian protection **or**
5. discretionary leave.

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

Migrant Victims of Abuse Concession previously known as Destitution Domestic Violence Concession

073181 Since 1.4.12, individuals who came to the United Kingdom or were granted leave to stay in the United Kingdom as the spouse or partner of

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

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

073182 The Home Office consider whether

1. the applicant entered the United Kingdom or was given leave to remain in the United Kingdom as a spouse, civil partner, unmarried or same sex partner of a British citizen or someone present and settled in the United Kingdom **and**
2. the relationship has broken down due to domestic violence **and**
3. they do not have the means to access accommodation or to support themselves and need financial help **and**
4. they will apply for Indefinite Leave to remain and enter (domestic violence or abuse) to stay permanently in the United Kingdom¹.

If the Home Office accepts that someone satisfies all 4 of the conditions above it will issue the applicant with letters notifying the start and end date for 3 months limited leave to remain in the United Kingdom. During this 3 month period the claimant must apply to stay permanently¹.

1 Indefinite Leave to remain or enter (domestic violence or abuse)

073183 If the person has made an application to stay permanently within the 3 month period but the Home Office has not yet made a decision by the end of the 3 month period, the period of limited leave under the Migrant Victims of Domestic Abuse Concession continues until the final decision is made. In these circumstances (i.e. where an application has been made within the 3 month period but the Home Office has not made a decision within that 3 month period) where the final decision is a refusal to grant indefinite leave to remain, the limited leave continues for a further 10 days after the Home Office decision is sent to the applicant.

073184 During any period when a person has limited leave under the Migrant Victims of Domestic Abuse Concession (including the periods of extension described in DMG 073183), that person does not have to satisfy the requirement that they be habitually resident in the common travel area¹ and therefore (provided they satisfy the other conditions of entitlement) will be eligible for Income Support, income-related Employment and Support Allowance, income-based Jobseeker's Allowance or State Pension Credit, as the case may be.

*1 IS (Gen) Regs (NI), reg 21AA(4)(h); ESA Regs (NI), reg 70(4)(h); JSA Regs (NI), reg 85A(4)(h)
SPC Regs (NI), reg 2(4)(h); HB Regs (NI), reg 10(5)(h)*

Asylum seekers

073185 A person who is awaiting a decision on an application for asylum is given temporary admission and is lawfully present in the United Kingdom¹. However, unless and until granted asylum, an asylum seeker is a person subject to immigration control.

1 R(IS) 2/06

073186 A person subject to immigration control is not normally entitled to any benefits¹ (see DMG 070831 et seq) but there are some exceptions (see DMG 070835). For means-tested benefits these exceptions include any nationals of countries which have ratified either European Convention on Social and Medical Assistance or the Council of Europe Social Charter who are lawfully present in the United Kingdom².

¹ *Immigration and Asylum Act 1999, s 115;*

² *SS (Immigration & Asylum) Consequential Regs 2000, reg 2(1) & Para 4 of Sch Part 1*

073187 Therefore an asylum seeker from Macedonia, or Turkey is not precluded from income related benefits under section 115. However, an asylum seeker on temporary admission has neither a right to reside nor can be habitually resident. Simple lawful presence following temporary admission does not equate to a right to reside¹.

¹ *R(IS) 8/07 & R(IS) 3/08*

Claimant unable to provide documentary evidence of nationality

[See DMG Memo Vol 2/74]

073188 The claimant has primary responsibility to provide documentary evidence of their nationality, to support their continued residence in the United Kingdom. If the claimant has not provided sufficient evidence to the decision maker to confirm that they have leave to enter or remain in the United Kingdom with recourse to public funds, they will be a person subject to immigration control.

073189 Evidence of nationality must be in the form of

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

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

073190 The evidence in DMG 073189 should contain information detailing

1. the type of leave to enter or remain that has been granted (where limited leave to enter or remain has been granted, an expiry date should also be shown) **and**
2. whether the person has been granted recourse to public funds.

073191 Where the claimant declares that they have leave to enter or remain in the United Kingdom with recourse to public funds, but are awaiting documentation from the

Home Office to confirm this, the decision maker should allow the claimant a reasonable timescale to provide supporting evidence before making a decision.

Continuation of leave

073192 Where a person has a limited period of leave to remain in the United Kingdom and they make a timeous application (i.e. before their existing leave to remain expires) to the Home Office to have their leave extended, the person's existing leave continues until the Home Office has made a decision on the application (or until the application is withdrawn)¹. If the application to extend the leave period is made after the applicant's current leave has expired, the applicant's leave period is not extended and the person is treated as an 'overstayer'.

1 Immigration Act 1971, s 3C

Section 67 Leave To Remain

073193 The United Kingdom Government is required¹ to make arrangements as soon as possible to relocate and support a specified number of unaccompanied child asylum seekers who have been accepted for transfer from another European state to the United Kingdom (commonly known as the "Dubs Amendment"). The number of children must be in addition to the resettlement of children under the Vulnerable Persons Relocation Scheme.

1 Immigration Act 2016, s 67

Relocation and support of unaccompanied child asylum seekers from Europe

073194 From 5.7.18 new Immigration Rules¹ are introduced by the Home Office, setting out the basis on which the transfer² of unaccompanied child asylum seekers will be made from another European state to the United Kingdom.

1 Immigration Rules, paras 352ZG - 352ZS; 2 Immigration Act 2016, s 67

073195 Upon arrival to the United Kingdom, the child will be granted temporary admission as an asylum seeker (see DMG 070671 & DMG 073185). Following the processing of their asylum seeking application, the Home Office may grant the child

1. refugee status (see DMG 070800 et seq & DMG 073175 - 073177) **or**
2. humanitarian protection (see DMG 070693 et seq & DMG 073175 - 073177)
or
3. section 67 leave to remain¹.

1 Immigration Act 2016, s 67

073196 Section 67¹ is a new type of leave to remain. Those who hold this status are not refugees, persons granted humanitarian protection, nor asylum seekers. They will not be persons subject to immigration control and will have access to public funds. Consequently they will have access to claim Jobseeker's Allowance, Employment and Support Allowance, Income Support or State Pension Credit (provided all other entitlement conditions are met). For the purposes of Jobseeker's Allowance, Employment and Support Allowance, Income Support or State Pension Credit, section 67 cases do not fall within the specified category² of persons to be exempt from the habitual residence test.

Note: The Home Office have confirmed that the Biometric Residence Permit will have "SECTION 67 LEAVE" printed on it to identify this cohort.

1 Immigration Act 2016, s 67; 2 IS (Gen) Regs (NI), reg 21AA(4); ESA Regs (NI), reg 70(4); JSA Regs (NI), reg 85A(4); SPC Regs (NI), reg 2(4)

Evidence

073197 Evidence of nationality must be in the form of a valid passport or Biometric Residence Permit (see DMG 073189). The evidence within these documents should contain information detailing

1. the type of leave to enter or remain that has been granted (where limited leave to enter or remain has been granted, an expiry date should also be shown) **and**
2. whether the person has been granted recourse to public funds.

Note: Where the claimant declares that they have leave to enter or remain in the United Kingdom with recourse to public funds, but are awaiting documentation from the Home Office to confirm this, the decision maker should allow the claimant a reasonable timescale to provide supporting evidence before making a decision.

073198 – 073202

Court of Justice of the European Union Judgment - Saint Prix v. Secretary of State for Work and Pensions

Introduction

073203 In its judgment¹, delivered on 19.6.14, the Court of Justice of the European Union considered a case involving a European Economic Area national who was exercising a right to reside as a worker in the United Kingdom and who ceased work due to pregnancy 11 weeks before her expected date of confinement.

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

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

Note 1: There may be other benefit claims that may be relevant to this guidance. More complex cases may need referral to Decision Making Services (DMG 073214).

Facts of the case

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

Court of Justice of the European Union ruling

073206 In their judgment, the Court of Justice of the European Union ruled

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

Reasonable period

073207 The Court of Justice of the European Union ruled that a pregnant woman in Ms Saint Prix’s circumstances could only retain worker status if she returns to work or finds another job within a “reasonable period” after the birth of her child. The Court of Justice of the European Union didn’t determine what constitutes a “reasonable period”, but stated that it was for the national court (in Ms Saint Prix’s case) to

determine this. The Court of Justice of the European Union gave guidance that the national court should take account of all the specific circumstances of the case and the applicable national rules on the duration of maternity leave, in accordance with Article 8 of the Council Directive 92/85/EEC (which relates to the health and safety of pregnant women at work and those who have recently given birth).

- 073208 Under domestic legislation, pregnant women in employment are entitled to 26 weeks maternity leave. Where they are not entitled to Statutory Maternity Pay or Maternity Allowance, they may be able to claim Income Support¹, for a period which is aligned with the 26 week maternity leave period (up to 11 weeks before the expected week of confinement and 15 weeks after childbirth). There has therefore been Departmental agreement to use the 15 week period after childbirth as a yardstick for considering whether a European Economic Area national in Ms Saint Prix's circumstances returned to work within a "reasonable period".

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

Decision maker action

- 073209 In line with the Saint Prix judgment, decision makers may make an award of Income Support to a European Economic Area national worker who

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

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

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

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

1. was the claimant in genuine and effective work and did she give up work due to the late stages of pregnancy?
2. was the claimant complying with the conditions for retained worker status (see DMG 072821 **2.**) when she gave up looking for work due to the late stages of pregnancy?

3. does the claimant intend to go back to work?
4. does the claimant have a job to return to?
5. what is the timescale for their return to work?

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

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

073212 Where the claimant indicates at the outset of the Income Support claim that they have no intention of returning to any work within the 15 week period after childbirth or they plan to return to work much later (e.g. when the child is one year old), the conditions in the Saint Prix judgment will not be satisfied, the claimant will not retain worker status and Income Support cannot be awarded.

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

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

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

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

Example 1

Magda, a Hungarian national, began work as a cleaner on a six month temporary employment contract on 24 February 2014. In March she found out that she was pregnant with an unexpected confinement date of 20 October 2014. Towards the end of July, she was finding it difficult to carry her cleaning equipment and to bend over when cleaning floors. On 5 August she gave up her job and claimed Income Support on 12 August (she was not entitled to Maternity Allowance as she had not work for at least 26 weeks in 66 week period before her baby was due). Her employer told her

she could return to her job under a new contract when she was able to after she gave birth, and it was her intention to return to work. As she was within 11 weeks of her expected date of confinement, the decision maker considered that Magda had retained worker status (in line with the judgment in Saint Prix). The decision maker therefore awarded Income Support from 12 August until 15 weeks after the (expected date of) birth of her child.

Example 2

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

Complex cases

- 073214 If decision makers are dealing with claims that cannot be resolved using this guidance, please contact Decision Making Services for further assistance.

Entitlement to Statutory Maternity Pay or Maternity Allowance

- 073215 Pregnant women may be entitled to claim Statutory Maternity Pay (from their employer) or Maternity Allowance (from the Department) if they had been working. Both are payable for a maximum period of 39 weeks. Statutory Maternity Pay or the standard rate of Maternity Allowance is generally paid at a higher rate than the standard rate of Income Support, and entitlement to Statutory Maternity Pay or Maternity Allowance is not subject to the right to reside test. Decision makers should therefore ensure that any pregnant European Economic Area national claiming Income Support is made aware of a possible entitlement to Statutory Maternity Pay or Maternity Allowance, as this would likely be more advantageous to claim than Income Support.

Self-employment

- 073216 Self-employed persons do not fall within the scope of the Saint Prix judgment. The Court of Justice of the European Union only considered the retention of "worker" status under Article 45 TFEU.

Income Support - right to reside - worker status and pregnancy

Background

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

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

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

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

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

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

Judgment of the Upper Tribunal

To whom are *Saint Prix* rights available?

073219 The Upper Tribunal held that the *Saint Prix* right is available to workers and retained workers (paragraph 25 of the judgment).

073220 The question of whether the *Saint Prix* right would be available to pure jobseekers was not decided by the Upper Tribunal (paragraph 25 of the judgment). It remains the Department's position that a *Saint Prix* right is not available to pure jobseekers (see DMG 073213 2.).

When does the *Saint Prix* right start?

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

How long does the reasonable period last?

073222 Following delivery of the *Saint Prix* Court of Justice of the European Union judgment, DMG guidance was produced to advise decision makers that the 26 week period of ordinary maternity leave should be used as a benchmark for the “reasonable period”. That 26 week period commences 11 weeks before the expected date of confinement and ends 15 weeks after (but a shorter award period may be relevant if the claim is made closer to the expected date of confinement) (see DMG 073209).

073223 From 10.9.15, for new Income Support claims from claimants who fall within the scope of *Saint Prix*, DMG guidance at 073208 and 073209 should no longer be followed in respect of the length of the reasonable period.

073224 The Upper Tribunal adopted the approach that in the United Kingdom the “reasonable period”, for the purposes of a *Saint Prix* right, is to be determined by taking account of the national rules on the duration of maternity leave (in accordance with specified legislation¹). That is the 52 week period made up of ordinary maternity leave and additional maternity leave. The Upper Tribunal also emphasised that there had to be a fact specific consideration of any case in which those circumstances arose. However, the Upper Tribunal noted that it would be an unusual case in which the period was other than the 52 week period (paragraphs 27 to 37 of the judgment).

¹ Directive 92/85/EEC, art 8

073225 For benefit purposes, guidance relating to entitlement to Income Support for reasons of pregnancy provides that unless the woman is incapable of work by reason of pregnancy, a 26 week period of entitlement is applied i.e. 11 weeks before the expected date of confinement and ending 15 weeks after the date the pregnancy ended (DMG 20160 - 20162). Once the period of Income Support entitlement for reasons of pregnancy has ended, a European Economic Area national with a *Saint Prix* right can only continue to receive Income Support for the remainder of the

‘reasonable period’, if they fall within one of the prescribed categories of persons¹ for the purposes of entitlement to Income Support (see DMG 20081 et seq).

Note: Where the European Economic Area national has a *Saint Prix* right during the period of entitlement for Income Support for reasons of pregnancy, but then does not meet the conditions of entitlement to Income Support for the remainder of the reasonable period, entitlement may exist to income-based Jobseeker’s Allowance or Employment and Support Allowance. This is because the claimant continues to retain her worker status throughout the reasonable period. Where there is an entitlement to income-based Jobseeker’s Allowance during the remainder of the reasonable period, the claimant would be subject to general genuine prospect of work provisions.

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

Example

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

The decision maker determines that Maria retains her worker status in line with *Saint Prix*, and awards Income Support for 26 weeks from 30.8.16 to 27.2.17. For entitlement to Income Support to continue during the remaining reasonable period, Maria is required to satisfy the domestic conditions of entitlement for Income Support¹. The decision maker determines that Maria does not fall within one of the prescribed categories of persons for the purposes of entitlement to Income Support during the remainder of the 52 week reasonable period (see DMG 20081 et seq), but advises the claimant that she may satisfy the conditions of entitlement to income-based Jobseeker’s Allowance. The claimant makes a claim to income-based Jobseeker’s Allowance from 28.2.17, and the decision maker determines that the claimant can retain her worker status for 6 months (DMG 073086), when the claimant will be subject to the general genuine prospect of work provisions.

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

Returning to work or jobseeking

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

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

Example 1

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

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

Example 2

Carla, a European Economic Area national, began work as a cleaner on a six month temporary employment contract on 30.3.15. In April she finds out that she is pregnant with an expected confinement date of 21.11.15. Towards the end of August, she is finding it difficult to carry cleaning equipment and to carry out her usual cleaning duties. On 4.9.15 she gives up her job and claims Income Support on 14.9.15. She is not entitled to Maternity Allowance as she has not worked for the required period of time before her baby is due. Her employer told her that she can return to her job

under a new contract when she is able to after the birth of her baby and she stated at the point of her claim to Income Support that it was her intention to return to work.

As she gives up work within 11 weeks of her expected date of confinement, the decision maker considers that Carla is a worker, and then retains her worker status in line with the *Saint Prix* judgment from the date that her contract of employment ceases. The decision maker awards Income Support from 14.9.15. Income Support entitlement continues for reasons of pregnancy for 26 weeks until 15 weeks after the date that the claimant's pregnancy ends. The decision maker then determines that the claimant falls within one of the prescribed categories of persons, as a lone parent, resulting in continued Income Support entitlement for a further 26 weeks.

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

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

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

1 Directive 2004/38/EC, art 16

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

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

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

073230 Decision makers should

1. continue to assess a *Saint Prix* right of residence prospectively at the point of the claim (DMG 073209 **2.**) **and**
2. assume that the claimant *will* return to work, where she says that she has an intention to do so (DMG 073211).

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

073231 Where the claimant's circumstances change and she

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

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

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

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

073233 From 10.9.15, decision makers may make an award of Income Support to a European Economic Area national worker who

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

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

Right to reside

[See DMG Memo Vol 2/74]

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

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

073235 The following persons have the right to reside in the United Kingdom and therefore in the common travel area

1. United Kingdom nationals (including persons from other countries who are granted British citizenship) **or**
2. all European Economic Area nationals and their family members with an initial right of residence **or**
3. “qualified persons” **or**
4. family members of “qualified persons” or European Economic Area nationals with a permanent right of residence **or**
5. extended family members of “qualified persons” or European Economic Area nationals with a permanent right of residence **or**
6. family members who retain the right of residence **or**
7. persons who have acquired the right of permanent residence **or**
8. the primary carer of the child of a migrant worker or a self-employed person who is in education in the United Kingdom (see DMG 073381).

Note: This list is not exhaustive.

Extended right of residence

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

073237

Qualified persons

073238 A “qualified person”¹ is a European Economic Area national who is in the United Kingdom and, by virtue of European Union legislation, is

1. a jobseeker (see DMG 073084)
2. a worker
3. a self-employed person
4. a self-sufficient person
5. a student.

1 Imm (EEA) Regs 2016, reg 6(1)

073239

Jobseekers

073240 Jobseekers who have registered with their Jobs and Benefits Office and have claimed Jobseeker’s Allowance will have a right to reside for an initial period of six months, and for longer if they can provide evidence that they are seeking employment, and have a genuine chance of being engaged¹. A person who is a jobseeker will not satisfy the right to reside element of the habitual residence test for Income Support, income-related Employment and Support Allowance and State Pension Credit², but will satisfy the test for income-based Jobseeker’s Allowance³. Family members of persons who have a right to reside as a jobseeker will not have a right to reside for Income Support, income-related Employment and Support Allowance or State Pension Credit purposes⁴.

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

1 Directive 2004/38/EC, art 14(4)(b); Case C-292/89, Antonissen; Imm (EEA) Regs 2016, reg 6(1) & reg 14; 2 IS (Gen) Regs (NI), reg 21AA(3); ESA Regs (NI), reg 70(3); SPC Regs (NI), reg 2(3); 3 JSA Regs (NI), reg 85A(3); 4 IS (Gen) Regs (NI), reg 21AA(3)(b)(ii); ESA Regs (NI), reg 70(3)(b)(ii); SPC Regs (NI), reg 2(3)(b)(ii)

073241

Workers and self-employed persons

073242 Workers and self-employed persons continue to have a right to reside¹ (see DMG 072821 & DMG 072861).

1 Directive 2004/38/EC, art 7; Imm (EEA) Regs 2016, reg 14(1)

073243

Self-sufficient persons with comprehensive sickness insurance

073244 **[See DMG Memo Vol 2/102] [See DMG Memo Vol 2/107]** European Economic Area nationals who

1. have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the United Kingdom **and**
2. have comprehensive sickness insurance cover in the United Kingdom for themselves and their family members

and their family members have a right to reside¹ but must **also** satisfy the second element of the habitual residence test - the factual assessment of habitual residence.

Note: Social assistance includes Housing Benefit, income-related Employment and Support Allowance, Income Support, income-based Jobseeker's Allowance, State Pension Credit and Universal Credit.

1 Directive 2004/38/EC, art 7(1)(b); Imm (EEA) Regs 2016, reg 4(1)(c)

073245 **[See DMG Memo Vol 2/107]** A European Economic Area national's resources (and where applicable the resources of their family members) are to be regarded as "sufficient" if¹

1. they are greater than the level of resources at or below which a British citizen (and where appropriate their family members) would be entitled to social assistance in the United Kingdom **or**

2. 1. above does not apply (i.e. resources are not above social assistance levels) but, taking into account the personal situation of the person concerned (and where applicable their family members), it appears to the decision maker that the resources of the person(s) concerned should be regarded as sufficient.

1 Imm (EEA) Regs 2016, reg 4(2) & 4(4)

073246 **[See DMG Memo Vol 2/102] [See DMG Memo Vol 2/107]** The requirement for comprehensive sickness insurance is not met by simple access to free treatment under the National Health Service. However, a claimant will have comprehensive sickness insurance where the United Kingdom is entitled to reimbursement of National Health Service healthcare costs from another Member State¹. This will usually be the case where the claimant is receiving a pension or invalidity benefit from another Member State, but it can arise in other circumstances. The European Health Insurance Card only offers comprehensive sickness insurance where the European Union citizen concerned has not moved residence to the United Kingdom and intends to return to his home state, such as a student on a course in the United Kingdom².

1 SG v Tameside MBC (HB) [2010] UKUT 243 (AAC); 2 European Commission COM 2009) 313 & SG v Tameside MBC (HB) [2010] UKUT 243 (AAC)

073247

Students

073248 A student¹ means a person who

1. is enrolled for the principal purpose of following a course of study (including vocational training) at a public or private establishment which is
 - 1.1 financed from public funds **or**
 - 1.2 otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located **and**
2. assures the Secretary of State that he has, and (where their right to reside is dependent on being a family member of the student) his family members have), sufficient resources to avoid him and his family members becoming a burden on the social assistance system of the United Kingdom **and**
3. is covered by sickness insurance in respect of all risks in the United Kingdom (see DMG 073246 above).

1 Directive 2004/38/EC, art 7(1)(c) and (d); Imm (EEA) Regs 2016, reg 4(1)(d)

Comprehensive sickness insurance for family members of students

073249 From 6.4.15, specified legislation¹ was amended which brings in the requirement for European Economic Area nationals who are exercising Treaty rights in the United Kingdom as a student, to hold comprehensive sickness insurance cover not only for themselves, but also for their family members. Prior to 6.4.15, European Economic Area nationals who were residing in the United Kingdom as students were required to hold comprehensive sickness insurance for themselves, but the regulations did not explicitly require such persons to also hold comprehensive sickness insurance for any family members who were residing in the United Kingdom with them. That was in contrast to the requirements for self-sufficient persons, who are explicitly required to hold comprehensive sickness insurance for themselves and their family members. The changes from 6.4.15 bring the requirements for family members of students in line with those for the family members of self-sufficient persons.

1 Imm (EEA) Regs 2016, reg 4(2), 4(3) & 4(4)

Family members

073250 The family members of a qualified person (see DMG 073238) residing in the United Kingdom or a European Economic Area national with a permanent right to reside have the same rights to reside as that qualifying person or European Economic Area national as long as¹

1. they remain a member of the family of that person **and**
2. that person continues to be a qualifying person or to have a permanent right to reside.

1 Imm (EEA) Regs 2016, reg 14(2)

073251

Meaning of “family member”

073252 For the purposes of the extended right to reside, a “family member” means¹

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

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

Note 1: See DMG 072901 for advice on dependency.

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

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

073253

Family members of British citizens [See DMG Memo Vol 2/82]

073254 **[See DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54]** If certain conditions are satisfied, family members (as defined in DMG 073252) of British citizens have the same European Union law rights to reside as they would if they were a family member of another European Economic Area state¹. Those conditions were amended with effect from 1.1.14 but there are some transitional provisions. The following guidance gives the conditions as they were before 1.1.14, then the new conditions and finally the details of the transitional provisions.

1 Imm (EEA) Regs 2016, reg 9

073255

The old rules

073256 Prior to the amendment described below, a person who was a family member of a British citizen enjoyed the same rights to reside as if they were a family member of a European Economic Area national but only if

1. the British citizen was either
 - 1.1 residing in a European Economic Area State as a worker or self-employed person **or**
 - 1.2 so residing before returning to the United Kingdom **and**
2. if the family member was the spouse or civil partner of the British citizen, they were living together in the European Economic Area state where the British citizen was residing as a worker or self-employed person as in **1.1 or**

3. had married or entered into a civil partnership before the British citizen returned to the United Kingdom after having resided in a European Economic Area state as a worker or a self-employed person as in **1.2**.

073257

The new rules

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

1. the British citizen
 - 1.1 was residing in a European Economic Area state (other than the United Kingdom) as a worker, self-employed person, self-sufficient person or student immediately before returning to the United Kingdom **and**
 - 1.2 had acquired a right of permanent residence in a European Economic Area state **and**
2. the family member and the British citizen resided together in the European Economic Area state **and**
3. the family member and the British citizen's residence in the European Economic Area state was genuine **and**
4. they have had the status of "family member" within the meaning of specified legislation² for all or part of their joint residence in a non-United Kingdom European Economic Area member state where the British citizen was exercising Treaty rights³ **and**
5. genuine family life was created or strengthened during their joint residence in the European Economic Area state⁴.

Note: For the purposes of **1.2** the British citizen is only to be treated as having acquired the right of permanent residence in the European Economic Area state⁵, if such residence would have led to the acquisition of the right of permanent residence⁶, had it taken place in the United Kingdom.

¹ *Imm (EEA) Regs 2016, reg 9(2); O&B (C-456/12); 2 Directive 2004/38, art 2(2);*

³ *Imm (EEA) Regs 2016, reg 9(2)(d); 4 reg 9(2)(e); 5 reg 9(6); 6 reg 15*

073259 [See **DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/93 & 7/54**] From 25.11.16, factors that are relevant to whether residence

in a European Economic Area state (other than the United Kingdom) is or was genuine, include¹

1. whether the centre of the British citizen's life transferred to the European Economic Area state **and**
2. the length of the family member and British citizen's joint residence in the European Economic Area state **and**
3. the nature and quality of the family member and the British citizen's accommodation in the European Economic Area state and whether it is or was the British citizen's principal residence **and**
4. the degree of the family member and the British citizen's integration in the European Economic Area state **and**
5. whether the family member's first lawful residence in the European Union with the British citizen was in a European Economic Area state.

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

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

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

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

073261 **[See DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54]** Where it is necessary to treat a British citizen as though the British citizen were a European Economic Area national¹, for the purposes of determining whether the British citizen would be a qualified person² (see DMG 073238)

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

3. in assessing whether the British citizen can be treated as a jobseeker², the British citizen is not required to satisfy condition A⁴ and where relevant, condition C⁵.

1 Imm (EEA) Regs 2016, reg 9(7); 2 reg 6(1); 3 reg 6(2)(b) or (c); 4 reg 6(5); 5 reg 6(9)

Definition of European Economic Area national **[See DMG Memo Vol 2//80]**

073262 The definition of a European Economic Area national means¹ a national of a European Economic Area state who

1. is not also a British citizen **or**
2. is also a British citizen and who prior to acquiring British citizenship, exercised a right to reside as such a national during their extended right of residence² or right of permanent residence³. The exception to the above definition, is that a person does not fall within sub-paragraph 2. if the person's European Economic Area state of nationality became a member state after that person acquired British citizenship.

1 Imm (EEA) Regs 2016, reg 2(1); 2 reg 14; 3 reg 15

Transitional provisions

073263 In determining whether a person satisfies the requirements of being a dual national who may continue to be treated as a European Economic Area national, transitional provisions provide that the definition of European Economic Area national (DMG 073262) is to be read as if that definition was in force at all relevant times¹.

1 Imm (EEA) (Amdt) Regs 2018, reg 3(a)

Dual national - European Economic Area national who acquires British citizenship

073264 Specified legislation¹ provides the circumstances where a national of a European Economic Area state, who is also a British citizen (a dual national), may continue to be treated as a European Economic Area national.

1 Imm (EEA) Regs 2016, reg 9A; Lounes (C-165/160)

Meaning of dual national

073265 A dual national means¹ a person falling within DMG 073262 2..

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

Dual national who may continue to be treated as a European Economic Area national

073266 A dual national must not have, at any point since having acquired British citizenship, lost their right of permanent residence or their status as a qualified person.

073267 A dual national (DMG 073265) must provide evidence that they

1. had acquired a right of permanent residence prior to becoming a British citizen and have not at any time, subsequent to acquiring their British citizenship, lost their right of permanent residence¹ **or**
2. were a qualified person at the time of acquiring their British citizenship² and have not at any time subsequent to acquiring British citizenship, lost their status as a qualified person³.

1 Imm (EEA) Regs 2016, reg 9A(3); 2 reg 9A(3) & (4); 3 reg 9A(2)(b)

Transitional provisions

073268 Transitional provisions specify that the legislation providing the requirements for a dual national who may continue to be treated as a European Economic Area national (DMG 073266 - 073267) is to be treated if that legislation was in force at all relevant times.

1 Imm (EEA) (Amdt) Regs 2018, reg 3(b); 2 Imm (EEA) Regs 2016, reg 9A

Example

Mrs B, an Estonian national, arrived in the United Kingdom in March 2010 using her Estonian passport. She began full-time employment immediately. In March 2015, Mrs B acquired a right of permanent residence (Home Office issuing a document certifying this). In April 2016, she acquired her British citizenship, but retained her Estonian citizenship.

On 6.1.18, Mrs B's father (Mr G) arrived in the United Kingdom, claiming State Pension Credit on 14.4.18 as the dependent family member of Mrs B. Mr G provided evidence of Mrs B's permanent residence document dated March 2015, her valid United Kingdom passport and valid Estonian passport, along with a variety of her wage slips in order to show that, since acquiring her right of permanent residence, this has not been lost through an absence from the United Kingdom in excess of 2 years.

The decision maker determines that Mrs B falls within the definition of being a European Economic Area national, as she has exercised free movement rights as a European Economic Area national prior to acquiring her British citizenship. The decision maker also determines that Mrs B may continue to be treated as a European

Economic Area national as she had acquired a right of permanent residence prior to becoming a British citizen, and had not lost that right of permanent residence since acquiring her British citizenship.

073269 – 073290

Family members of students

073291 In the case of a European Economic Area student, other than a student who is a “qualified person” under other provisions, after the period of three months beginning on the date on which the student is admitted to the United Kingdom only the following shall be treated as his family members¹

1. his spouse or civil partner
2. the dependent children of the student, his spouse or civil partner.

1 Imm (EEA) Regs 2016, reg 7(2)

073292

“Extended family members”

073293 **[See DMG Memo Vol 2/84, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54]**
An “extended family member” is a person (who is not a family member of a European Economic Area national within the meaning given in DMG 073252 **1.** to **3.**) who is a relative (plus, in one case, a partner) of a European Economic Area national who is treated as a family member for the purposes of the right to reside aspect of the habitual residence test only. They may or may not be European Economic Area nationals¹.

1 Directive 2004/38/EC, art 3(2); Imm (EEA) Regs 2016, reg 8

073294 An extended family member should have a European Economic Area family permit, a registration certificate or a residence card. They will continue to be treated as a family member as long as they hold such documents¹ **and**

1. reside in any state other than the United Kingdom and are dependent on the European Economic Area national or is a member of the European Economic Area national's household² **or**
2. satisfied the conditions in **1.**, and are accompanying the European Economic Area national to the United Kingdom or wish to join the European Economic Area national in the United Kingdom³ **or**

3. satisfied the conditions in 1., and have joined the European Economic Area national in the United Kingdom and continue to be dependent (see DMG 072901) on the European Economic Area national or a member of his household⁴ **or**
4. on serious health grounds strictly require the personal care of the European Economic Area national, his spouse or civil partner⁵ **or**
5. would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the European Economic Area national were the European Economic Area national a person settled and present in the United Kingdom⁶ (where this applies decision makers should submit such cases to Decision Making Services for advice as evidence from the Home Office will be needed and their guidance will be required on the application of the Immigration Rules) **or**
6. are the partner of a European Economic Area national (other than a civil partner) and can prove that they are in a durable relationship with the European Economic Area national⁷.

Extended family members of European Economic Area nationals who are students are issued with family permits, registration certificates or residence cards under specific provisions. Decision makers should submit such cases to Decision Making Services for advice as evidence from the Home Office will be required about the provisions under which those documents have been issued.

*1 Imm (EEA) Regs 2016, reg 7(3); 2 reg 8(2)(a) & 8(7); 3 reg 8(2)(b) & 8(7); 4 reg 8(2)(c) & 8(7);
5 reg 8(3) & 8(7); 6 reg 8(4); 7 reg 8(5)*

073295 – 073299

“Family member who retains the right of residence”

073300 **[See DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/93 & 7/54]**

Under certain circumstances a family member of a European Economic Area national may retain the right to reside on the death or departure from the United Kingdom of the European Economic Area national¹. To retain the right of residence the person

1. must
 - 1.1 have been the family member of a qualified person or a European Economic Area national with a permanent right to reside when that person died **and**

1.2 have resided in the United Kingdom in accordance with the Regulations for at least the year before the death of the qualified person or the European Economic Area national with a permanent right to reside **and**

1.3 satisfy the condition that either

1.3.a although not a European Economic Area national, he would, if he were one, be a worker, self-employed person or self-sufficient person for the “qualified person” provisions **or**

1.3.b he is the family member of a person who falls within **1.3.a**².

In other situations where the claim is based on a family member’s retained right of residence cases should be submitted to Decision Making Services for guidance. This applies in particular to cases where the right relates to the attendance by the person or their children on an educational course³ or where it relates to termination of the marriage or civil partnership of the family member to the qualified person⁴.

¹ Directive 2004/38/EC, art 12; Imm (EEA) Regs 2016, reg 10; ² reg 10(2); ³ reg 10(3) & (4);

⁴ Directive 2004/38/EC, art 13; Imm (EEA) Regs 2016, reg 10(5)

073301 – 073349

Permanent right of residence - 5 years residence

073350 **[See DMG Memo Vol 2/58]** The European Union Citizenship Directive¹ introduced for the first time a permanent right to reside for European Union citizens and members of their family who have resided legally in a host Member State of the European Union for a continuous period of five years. The Directive was brought into force in the United Kingdom by regulations² which took effect from 30.4.06.

¹ Directive 2004/38/EC; ² Imm (EEA) Regs 2006

073351 Under the Immigration (European Economic Area) Regulations 2016 the following persons acquire the right to reside in the United Kingdom permanently

- 1.** a European Economic Area national who has resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016 for a **continuous** period of five years¹
- 2.** family members of European Economic Area nationals (who are not themselves European Economic Area nationals) who have resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016 for a **continuous** period of five years².

Note: Subject to DMG 073360, a break in continuity during which residence is not in accordance with the Immigration (European Economic Area) Regulations will mean that the five year qualifying period has to be served afresh.

1 Imm (EEA) Regs 2016, reg 15(1)(a); 2 reg 15(1)(b)

073352 The five year qualifying period therefore includes periods during which the European Economic Area national

1. was a jobseeker (see DMG 073240)
2. was a worker or self-employed person in the United Kingdom **or**
3. retained worker status in the United Kingdom whilst temporarily incapable of work because of illness or accident or whilst involuntarily unemployed and seeking work **or**
4. was both self-sufficient and had comprehensive sickness insurance for themselves and their family members **or**
5. was a student who was both self-sufficient and had comprehensive sickness insurance **or**
6. was a family member accompanying or joining a person who satisfied the above conditions.

Note: This list is not exhaustive

073353 Periods of workseeking mixed with periods of work will normally count for the purposes of considering a permanent right of residence¹.

1 Directive 2004/38/EC art 7; 2 art 14(4)(b)

073354 Periods of residence completed in accordance with a derivative right to reside (see DMG 073387 et seq) **do not count** towards the acquisition of a permanent right to reside¹.

1 Imm (EEA) Regs 2016, reg 15(2); Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department. Case C529/11

073355 – 073359

Temporary absences that do not break continuity

073360 Certain temporary absences from the host Member State will not break the continuity of residence¹

1. absences not exceeding six months in a year
2. absences of more than six months for compulsory military service

3. one absence of a maximum of 12 consecutive months for important reasons such as

- 3.1 pregnancy
- 3.2 childbirth
- 3.3 serious illness
- 3.4 study or vocational training
- 3.5 a posting abroad.

Note: Although these absences do not break the continuity of residence requirement, they do not count towards the accrual of the 5 years continuous residence².

1 Directive 2004/38/EC, art 16(3); 2 CIS/2258/08

073361 **[See DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/93 & 7/54]**

From 1.2.17, additional criteria are added to the circumstances where continuity of residence is broken¹. This is when the European Economic Area national

1. serves a sentence of imprisonment² **or**
2. has a deportation or exclusion order made in relation to that person **or**
3. is removed from the United Kingdom under the Immigration (European Economic Area) Regulations 2016.

1 Imm (EEA) Regs 2016, reg 3(3); 2 Onuekwere (C-378/12); MG (C-400/12)

Qualifying period - effect of periods of residence before 30.4.06 - European Economic Area nationals

073362 Subject to DMG 073366 below, any period during which a European Economic Area national carried out activities or was resident in the United Kingdom in accordance with specific regulations¹ (i.e. the United Kingdom regulations and Directives concerning the right to reside in European Union law that were in force before 30.4.06) is to be treated as a period in which that activity or residence was in accordance with the Immigration (European Economic Area) Regulations 2016². Accordingly this will count towards the qualifying period for the acquisition of a permanent right to reside.

But note that the permanent right to reside can only take effect from 30.4.06.

1 Imm (EEA) Regs 00; Imm (EEA) Order 94; Directive 64/221/EEC; Directive 68/360/EEC; Directive 72/194/EEC; Directive 73/148/EEC; Directive 75/34/EEC; Directive 75/35/EEC; Directive 90/364/EEC; Directive 90/365/EEC; Directive 93/96/EEC;

2 Imm (EEA) Regs 2016, Sch 6, para 8(2)

073363

Qualifying period - periods before accession

073364 Subject to paragraph DMG 073366 below, any period during which a national of a non-European Economic Area state which subsequently became a European Economic Area state carried out an activity or was resident in the United Kingdom throughout which they

1. had leave to enter or remain in the United Kingdom **and**
 2. would have been carrying out that activity or residing in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016
 - 2.1 had the Immigration (European Economic Area) Regulations 2016 been in force **and**
 - 2.2 the person's state of nationality had been a European Economic Area state
- at that time

is to be treated¹ as a period of activity or residence in the United Kingdom completed in accordance with the Immigration (European Economic Area) Regulations 2016. Such periods will therefore count towards the acquisition of a permanent right to reside.

1 Imm (EEA) Regs 2016, Sch 6, para 8(3)

073365

Periods where residence was not in accordance with the regulations

073366 A period during which the conditions in DMG 073362 or 073364 above were satisfied will not be regarded¹ as a period of activity or residence completed in accordance with the Immigration (European Economic Area) Regulations 2016 where it was followed by a period of more than two consecutive years throughout which

1. the person was absent from the United Kingdom **or**
2. the person's residence in the United Kingdom was not in accordance with DMG 073362 or 073364 **or**
3. was not otherwise in accordance with the Immigration (European Economic Area) Regulations 2016.

1 Imm (EEA) Regs 2016, Sch 6, para 8(4)

073367

Effect of absence after right to permanent residence acquired

073368 Once acquired on or after 30.4.06, the right of permanent residence is only lost by absence from the host Member State for a period exceeding two consecutive years¹.

1 Directive 2004/38/EC, art 16(4); Imm (EEA) Regs 2016, reg 15(3)

073369 – 073380

Primary carers

Introduction

073381 Certain children and their primary carers have a right to reside in the United Kingdom. This is known as a derivative right to reside. The guidance below describes the conditions for this right to reside. A primary carer satisfying those conditions satisfies the requirement that they have a right to reside in the common travel area. However they have to be actually habitually resident in the common travel area.

Note: Periods of residence in the United Kingdom as a result of a derivative right to reside do not count towards the five year qualifying period needed to acquire a permanent right to reside.

073382

Meaning of “exempt person”

073383 In DMG 073385 & 073387 below “exempt person” means¹ a person

1. who has a right to reside in the United Kingdom as a result of any provision in the Immigration (European Economic Area) Regulations other than a derivative right to reside² **or**
2. who has a right of abode in the United Kingdom by virtue of specific legislation³ (which includes British citizens) **or**
3. to whom specific legislation⁴ exempting certain persons from the requirement to have leave to enter or remain applies (for example certain aircrew & seamen who are under an engagement requiring them to leave within 7 days and certain diplomats) **or**
4. who has indefinite leave to enter or remain in the United Kingdom.

1 Imm (EEA) Regs 2016, reg 16(7)(c); 2 reg 16; 3 Immigration Act 1971, s 2; 4 s 8

073384

Meaning of “primary carer”

073385 A person is to be regarded¹ as the primary carer of another person (“the child”) if they are a direct relative or legal guardian of the child **and**

1. they have primary responsibility for the child’s care **or**
2. they share equally the responsibility for the child’s care with one other person (“the joint primary carer”) provided that the joint primary carer is not an exempt person

Note 1: The term “direct relative” is not defined in the Immigration (European Economic Area) Regulations but should be taken as including direct relatives in the ascending line (i.e. parents, grandparents, great grandparents) of the child, but not uncles, aunts, cousins etc.

Note 2: A person is not be regarded as having responsibility for a person’s care on the sole basis of a financial contribution towards that person’s care².

Note 3: Where there is another person who is able and willing to assume to continue primary day to day care of the child, this is a relevant factor, but is not in itself sufficient ground for concluding whether or not a European Union citizen would be compelled to leave their own country or the territory of the European Union as a whole³.

1 Imm (EEA) Regs 2016, reg 16(8); 2 reg 16(11); 3 Chavez-Vilchez (C133/15)

Sharing equal responsibility

073386 Two people should be considered to share equally the responsibility for a child when they both have responsibility for the care and welfare of the child, both long-term and on a day to day basis. This may include

1. deciding where the child lives
2. choosing what school the child attends
3. providing for the child’s education
4. deciding how and where the child spends time outside of school
5. looking after the child’s property
6. disciplining the child
7. authorising medical treatment
8. authorising school trips.

This is not an exhaustive list.

Note: Two people who spend different amounts of time with a child may still have equal responsibility for that child. Equal responsibility does not mean there has to be evidence of an equal sharing of responsibilities (as this is not always practical). Each case should be considered on its individual merits.

Example 1

Child resides with mother during the week, and resides with father at weekends. Unless there is evidence to indicate that the father is unable to care for the child at all, it can be accepted that both parents share equal responsibility¹.

1 Imm (EEA) Regs 2016, reg 16(8)(b)(ii)

Example 2

Child resides with the mother full-time, but father has regular contact. Whilst the father may not provide the majority of care for the child, the father is actively involved in the child's life and continues to have parental responsibility for the child. Unless there is evidence to indicate that the father is unable to care for the child at all, it can be accepted that both parents share equal responsibility¹.

1 Imm (EEA) Regs 2016, reg 16(8)(b)(ii)

Derivative rights to reside

073387 A person who is not an exempt person has a derivative right to reside¹

Primary Carer of a Self-sufficient child

1. **where** that person² is the primary carer of a European Economic Area national **and** that European Economic Area national
 - 1.1 is under the age of 18 **and**
 - 1.2 is residing in the United Kingdom as a self-sufficient person **and**
 - 1.3 would be unable to remain in the United Kingdom if the primary carer left the United Kingdom for an indefinite period.

Note: The child must be self-sufficient (see DMG 073248). The primary carer is treated as a family member of the child³ so the child and the primary carer must have sufficient combined resources to ensure that the primary carer does not become a burden on the social assistance system of the United Kingdom during their period of residence. Equally both must have comprehensive health insurance cover. **A primary carer with the type of derivative right to reside described in subparagraph 1 will not normally be entitled to Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and State Pension Credit.**

Child in general education who is the child of a worker**2. where⁴**

- 2.1** any of the child's parents is a European Economic Area national who resides or has resided in the United Kingdom **and**
- 2.2** both the child and the European Economic Area national parent reside or have resided in the United Kingdom at the same time and during such a period of residence, the European Economic Area national parent has been a worker (see DMG 073407 below) **and**
- 2.3** the child is in general education (see DMG 073405 below) in the United Kingdom

Note 1: The European Economic Area national who has worked or been a worker must be the parent of the child(ren) (see **2.2** above). A derivative right of residence does not arise where the worker is a grandparent.

Note 2: From 1.2.17 where a child of a European Economic Area national has a derivative right to reside because they are in education in the United Kingdom, the European Economic Area national parent does not have to have been resident when the child first entered education (see **2.3** above).

Child in general education who is the child of a self-employed person**3. from 1.1.21 where⁵**

- 3.1** any of the child's parents is a European Economic Area national who resides or has resided in the United Kingdom **and**
- 3.2** both the child and European Economic Area national parent reside or have resided in the United Kingdom at the same time and during such a period of residence, the European Economic Area national parent has been a self-employed person in the United Kingdom (see DMG 073411 below) **and**
- 3.3** the child is in general education (see DMG 073405 below) in the United Kingdom.

Note 1: Under the Withdrawal Agreement self-employed persons were granted the same rights of workers, including the right to reside of children in general education of self-employed persons. As the Withdrawal Agreement only came into force on 1.1.21, persons who want to derive their right to reside as the primary carer of children of self-employed persons who in general education will only be able to do so from 1.1.21. However, periods of residence before 1.1.21 where the child and European Economic Area national parent resided in the United Kingdom and the European

Economic Area national parent was in self-employment are accepted for the purpose of meeting condition **3.2** above.

Note 2: The European Economic Area national who was or has been self-employed must be the parent of the child(ren) (see **3.2** above). A derivative right of residence does not arise where the self-employed person is a grandparent.

Note 3: Where a child of a European Economic Area national has a derivative right to reside because they are in education in the United Kingdom, the European Economic Area national parent does not have to have been resident when the child first entered education (see **3.3** above).

Primary carer of a person in general education

4. where⁶

- 4.1 that person is the primary carer (see DMG 073385) of a person in general education in the United Kingdom who satisfies the conditions in sub-paragraphs **2.** or **3.** above **and**
- 4.2 that person in education would be unable to continue to be educated in the United Kingdom if the primary carer left the United Kingdom for an indefinite period (but see DMG 073403 for how this rule applies where there are joint primary carers).

Dependant children of a primary carer

5. where⁷

- 5.1 that person ("the child") is under the age of 18 **and**
- 5.2 the child does not have leave to enter, or remain in the United Kingdom **and**
- 5.3 the child's primary carer is entitled to a derivative right to reside in the United Kingdom as the primary carer of a person in education in accordance with sub-paragraph **4.** above **and**
- 5.4 the child's primary carer would be prevented from residing in the United Kingdom if the child left the United Kingdom for an indefinite period.

1 Imm (EEA) Regs 2016, reg 16(1); 2 reg 16(2), Case C-200/02 Zhu and Chen v Secretary of State for the Home Department; 3 Imm (EEA) Regs 2016, reg 4(5); 4 reg 16(3), NA (Pakistan) (C-115/15), Reg (EEC) 1612/68, art 12; 5 Withdrawal Agreement, art 25(2); 6 Imm (EEA) Regs 2016, reg 16(4), Case C 310/08 Ibrahim v London Borough of Harrow and Secretary of State for the Home Department; Case C-480/08 Teixeira v London Borough of Lambeth and Secretary of State for the Home Department;

7 Imm (EEA) Regs 2016, reg 16(6)

Example

Lucia is a Spanish national. She entered the United Kingdom in July 2012 with her husband Hugo, also a Spanish national. Hugo worked in the United Kingdom but Lucia did not. The couple have a child, Alba born on 25.8.2003 who started primary school in the United Kingdom in September 2012. Alba is a Spanish national. In March 2013 the couple separated and Hugo returned to Spain. Lucia claimed income-related Employment and Support Allowance in April 2013. The decision maker decided that Lucia had a right to reside in the United Kingdom as Alba's primary carer in accordance with **4.** above. It was evident that Alba would not be able to continue his general education in the United Kingdom if his mother and sole carer had to leave the country.

- 073388 Once a child of a migrant worker has gained a derivative right to reside, that right and the consequent right to reside of the primary carer will continue whilst ever the child remains in general education in the United Kingdom (see DMG 073405) and the ability of the child to remain in general education continues to require the presence of the parent/primary carer. It will not matter that the migrant worker or self-employed person might subsequently leave the United Kingdom.

Best interest of the child

- 073389 A decision maker should consider all of the information and evidence provided, concerning the best interests of the child¹ in the United Kingdom, when assessing whether a relevant child would be unable to remain or be educated in the United Kingdom if the primary carer left the United Kingdom for an indefinite period. The assessment must take account of all their specific circumstances including

1. the age of the child **and**
2. the child's physical and emotional development **and**
3. the extent of the child's emotional ties to both the primary carer and the European Economic Area national parent **and**
4. the risks, which separation from the primary carer might entail for the child's equilibrium.

This is not an exhaustive list.

1 Chavez-Vilchez and Others (C-135/15)

073390 – 073399

Effect of absences

073400 If the child leaves the United Kingdom for anything other than temporary periods, the rights described in DMG 073387 will end. Absences of less than 6 months could be considered as temporary if that was the intention at the outset and remained so throughout. Longer absences could still be temporary depending on the reason for the absence.

073401 The derived rights to reside of a child in education described in DMG 073387 **2. & 4.** have their origins in a specific European Union provision intended to facilitate the free movement of workers. The derived rights to reside of a child in education described in DMG 073387 **3.** were created by the Withdrawal Agreement on 1.1.21. They are triggered where a European Economic Area national parent of the child is employed or self-employed in the host Member State. Where a European Economic Area national parent has worked or been self-employed in the United Kingdom and this is followed by a period when the parent and child are absent from the United Kingdom where (on return) the parent is not employed or self-employed here, the decision maker will need to make a judgement as to whether the right has been lost during the absence in the light of the circumstances of the case. While a substantial period of habitual residence in another European Economic Area state will mean that the right is lost, an absence that can properly be regarded as temporary will not have that effect. Decision makers should consider the following factors in relation to the period of absence

1. the reasons why the parent ceased to be resident in the United Kingdom
2. the activities of the parent in the country to which they went, including economic activity
3. the roots the parent put down in the country to which they went
4. the contact which the parent maintained with the United Kingdom whilst absent and the quality of that contact
5. the length of the absence (the longer the absence the more difficult it will be to maintain that the right can be reasserted).

073402

Application to joint primary carers

073403 Where there are joint primary carers, the condition described in DMG 073387 **4.2** is that the child would be unable to continue to be educated in the United Kingdom if **both** joint primary carers were required to leave the United Kingdom. However this

condition does not apply if² one of the joint primary carers had acquired a derivative right to reside as a sole primary carer before sharing responsibility for care with a joint primary carer.

1 Imm (EEA) Regs 2016, reg 16(9); 2 reg 16(10)

073404

Meaning of “general education”

073405 General education can include up to and including university or similar courses and vocational courses, but the primary carer’s right to reside set out in DMG 073387 4. generally ends when the child reaches the age of majority. This is 18 in the United Kingdom¹. However it can continue beyond that age if the child continues to need the presence and care of that parent in order to be able to complete their education². Whether there is a continuing need for the presence and care of the parent is a matter for determination by the decision maker. Factors to take into account include: the age of the child, whether the child is residing in the family home or whether the child needs financial or emotional support from the parent in order to be able to continue and to complete his education³. General education excludes nursery education, but does not exclude education received before compulsory school age where that education is equivalent to the education received at or after compulsory school age⁴. It usually starts around age 5. A primary carer of the child of a European Economic Area national who has been employed or self-employed⁵ in the host Member State is entitled to a derivative right to reside once that child has entered into reception class education⁶.

1 Family Law Reform Act 1969, s 1 Age of Majority (Scotland) Act 1969; 2 Teixeira v London Borough of Lambeth CJEU Case C-480/08 (para 87); 3 Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department, Case C-529/11; 4 Imm (EEA) Regs 2016, reg 16(7)(a); 5 Withdrawal Agreement, art 25(2); 6 Shabani [2013] UKUT 315 (IAC)

073406

Meaning of “worker”

073407 In DMG 073387 2.2 above a “worker” does not include¹ a jobseeker or a person who, on stopping work retains worker status in the circumstances described in DMG 072821. Before 1.1.21 it also did not include a self-employed person². For periods after 1.1.21, see DMG 073411.

Note: See DMG 072810 to 072817 for guidance on when a person is a worker.

1 Imm (EEA) Regs 2016, reg 16(7)(b); 2 Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11); RM v Secretary of State for Work and Pensions (IS) [2014] UKUT 401 (AAC) [2015] AACR 11

073408 Work carried out by a national of another Member State before that Member State joined the European Union cannot trigger a right under DMG 073387. Where an A8 or A2 national has been employed in the United Kingdom on or after the date of accession, they may be a “worker” for the purposes of a derivative right to reside¹ if it is for an authorised employer, or the migrant worker is otherwise exempt from the requirement to register or seek authorisation. The A2/A8 national does not have to complete 12 months registered or authorised work in order to be regarded as a worker for the purposes of the derivative right to reside².

1 Reg (EEC) 1612/68, art 12; 2 S of S for W & P v JS (IS) [2010] UKUT 347 (AAC)

073409 An A8 national is working for an authorised employer in the first month of any employment in the United Kingdom starting on or after 1.5.04¹, even if it is not subsequently registered: but an A2 national must seek authorisation before starting employed work in the United Kingdom². From 1.5.11 A8 nationals have full European Union rights and do not need to register any work with the Home Office scheme.

1 Accession Regs 2004, reg 7(3); 2 Accession Regs 2006, reg 9

073410

Self-employed parent

073411 Before 1.1.21 a derivative right to reside under DMG 073387 **2.**, **4.** and **5.** could only apply where the European Economic Area national parent who resided in the United Kingdom as a “worker”¹. From 1.1.21, self-employed persons were granted the same rights of under the Withdrawal Agreement, including the right to reside of children in general education of self-employed persons². This derivative right to reside (see DMG 073387 **3.**) can only apply where there is a European Economic Area national parent who resided in the United Kingdom as a self-employed person, i.e. those who are in genuine and effective self-employment and are not in a relationship of subordination with the person who receives the services³.

Note: See DMG 072841 to 072846 for guidance on when a person is a self-employed person.

1 Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11) at para 33; RM v Secretary of State for Work and Pensions (IS) [2014] UKUT 401 (AAC) [2015] AACR 11; 2 Withdrawal Agreement, art 25(2); 3 Case C-256/01, Allonby v Accrington and Rossendale College

073412 Although the derivative right to reside as the primary carer of a child in general education of a self-employed person will only be available from 1.1.21 when the Withdrawal Agreement came into force, however, periods of residence before 1.1.21 where the child and European Economic Area national parent resided in the United Kingdom and the European Economic Area national parent was in self-employment are accepted.

Derivative residence card

073413 A derivative residence card is a card issued to a person as proof of the holder's derivative right to reside as at the date of issue¹. The card can also take the form of a stamp in the person's passport. The card or stamp will be valid for five years or until a specified date and can be renewed upon application. However the card itself does not confer a derivative right to reside which can only arise from satisfaction of the conditions in DMG 073387. Decision makers should not therefore rely on the existence of a derivative residence card as conclusive proof of a derivative right to reside.

1 Imm (EEA) Regs 2016, reg 20

European Economic Area right to reside - permanent residence

Introduction

073414 Guidance at DMG 073415 to 073443 is to enhance existing DMG guidance regarding permanent residence for European Economic Area nationals and their families.

073415 **[See DMG Memo Vol 2/58]** Since 30.4.06, European Economic Area nationals and their family members, who have resided legally in the United Kingdom for a continuous period of 5 years in accordance with laws relating to European Union free movement rights that were in force during the 5 year period, will acquire a right of permanent residence¹ (see DMG 073350 - 073352). This means they must have resided in the United Kingdom as a worker/self-employed person (or someone who retained that status), or as a student or self-sufficient person (and had comprehensive sickness insurance - see DMG 073246 and 073248 - 073249).

1 Directive 2004/38/EC, art 16; Imm (EE) Regs, reg 15

073416 A European Economic Area national who has acquired the right of permanent residence on or after 30.4.06 will only lose that right if they are absent from the United Kingdom for more than 2 consecutive years¹ (see DMG 073368).

1 Directive 2004/38/EC, art 16(4); Imm (EEA) Regs, reg 15(2)

Continuity of residence - Breaks during 5 year qualifying period

073417 Detailed guidance in relation to temporary absences from the United Kingdom that do not break continuity of residence during the 5 year qualifying period can be found at DMG 073360. In general, temporary absences from the United Kingdom will not break the continuity of residence¹ if they

1. are no more than a total of 6 months a year **or**
2. comprise of one absence of up to a maximum of 12 consecutive months for important reasons, such as pregnancy and childbirth, serious illness, study or vocational training, or a posting to another country abroad **or**
3. are for compulsory military service.

Although these absences do not break the continuity of the residence requirement, they do not count towards the accrual of the 5 years continuous residence². This is because these absences will generally be periods when the claimant is not exercising a right to reside as defined within the European Economic Area regulations.

1 Directive 2004/38/EC, art 16(3); 2 CIS/2258/08

Permanent residence with less than 5 years residence

073418 **[See DMG Memo Vol 2/58]** The general rule on the right of permanent residence requires that European Economic Area nationals and their family members have resided legally in the United Kingdom for a continuous period of 5 years (see DMG 073350 et seq). Workers or self-employed persons and their family members, who have ceased activity, can acquire a right to reside in the United Kingdom permanently without that 5 year requirement¹ (see DMG 073174, 073528 and 073613).

Note: With regard to a family member, who retains the right of residence², see DMG 073300.

1 Imm (EEA) Regs, reg 15(1)(c) & (d); 2 reg 15(1)(f) & reg 10

073419 A worker or self-employed person who has ceased activity is a person who satisfies the conditions in DMG 073420, 073421, 073422 or 073423, and can acquire the right to reside in the United Kingdom permanently with less than 5 years residence.

073420 A worker or self-employed person who

1. ceases activity as a worker or self-employed person **and**
2. has reached the age at which they are entitled to a state pension on the date their work ceases or in the case of a worker, ceases working to take early retirement **and**
3. was working in the United kingdom, as a worker or self-employed person, for at least 12 months prior to ceasing work **and**
4. resided in the United Kingdom continuously for more than 3 years prior to ceasing work¹.

1 Imm (EEA) Regs 2016, reg 5(2)

073421 A worker or self-employed person who

1. ceases activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work **and**
2. either
 - 2.1 that person resided in the United Kingdom continuously for more than 2 years prior to ceasing work **or**
 - 2.2 the incapacity is the result of an accident at work or an occupational disease that entitles that person to a pension payable in full or in part by an institution in the United Kingdom¹.

1 Imm (EEA) Regs 2016, reg 5(3)

073422 A worker or self-employed person who

1. is active in a European Economic Area state, but retains their place of residence in the United Kingdom, to which they return (as a rule) at least once a week and
2. prior to becoming active in the European Economic Area state, had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least 3 years¹.

1 Imm (EEA) Regs 2016, reg 5(4)

073423 A person who satisfies the condition in DMG 073422 1. but not DMG 073422 2. shall, for the purposes of DMG 073420 and 073421, be treated as being active and resident in the United Kingdom during any period that they were working or self-employed in the European Economic Area state¹.

1 Imm (EEA) Regs 2016, reg 5(5)

073424 The family member of a worker or self-employed person where

1. the worker or self-employed person has died and
2. the family member resided with the worker or self-employed person immediately before their death and
3. the worker or self-employed person has resided continuously in the United Kingdom for at least 2 years immediately before their death, or the death was a result of an accident at work or occupational disease¹.

Note 1: For guidance in relation to family members of British citizens - see DMG 073254.

Note 2: For guidance in relation to extended family members - see DMG 073293 - 073294.

1 Imm (EEA) Regs 2016, reg 15(1)(e)

Periods of residence prior to 30.4.06

073425 In accordance with the Court of Justice of the European Union judgments in *Lassal and Dias*, periods of residence prior to 30.4.06 (the date of transportation of Directive 2004/38) which were in accordance with earlier European Union instruments relating to residence must be taken into account for the purposes of acquisition of permanent residence under Directive 2004/38 (see DMG 073362). However, where a period of residence in accordance with the earlier European Union instruments is followed by a period of more than 2 years during which the person's residence is not in accordance with earlier European Union instruments, then the earlier period of residence will not count (see DMG 073366).

Note: Subject to DMG 073360, a break in continuity during which residence is not in accordance with the Immigration (European Economic Area) Regulations will remain that the 5 year period has to be served afresh.

Derivative right of residence

073426 Residence in the United Kingdom, which is a result of a derivative right of residence does not count towards the period for calculation of the 5 year period for permanent residence¹ (see DMG 073354).

1 Imm (EEA) Regs 2016, reg 15(2); Alarape and Tijani (C-529/11)

Long-term jobseeker

073427 Guidance at DMG 073240 and 073080 advises that European Economic Area jobseekers who have registered with their Jobs and Benefits Office will have a right to reside for an initial period of 6 months¹. If the claimant is able to provide compelling evidence that they are continuing to seek employment and have a genuine chance of being engaged, a short extension period of income-based Jobseeker's Allowance may be allowed (DMG 073099 - 073100 and 073138 - 073139).

1 Directive 2004/38/EC, art 14(4)(b); Antonissen (C-292/89); Imm (EEA) Regs 2016, regs 6(1) & 14

073428 **[See DMG Memo Vol 2/86 & DMG Memo Vol 2/89]** Where a claimant is relying entirely on a right to reside as a jobseeker for the entire 5 year period for calculating permanent residence, it should be accepted that the immigration regulations¹ would be satisfied in those circumstances. This is because a European Economic Area national acquires the right to reside in the United Kingdom permanently, where they

have resided in the United Kingdom, in accordance with the immigration regulations for a continuous period of 5 years. Where a claimant has been awarded income-based Jobseeker's Allowance on the basis of having a right to reside as a jobseeker, it should therefore be accepted that their continuous period of 5 years of pure jobseeking, would be sufficient for the acquisition of permanent residence.

Note 1: An accession state national, whose Jobseeker's Allowance claim commenced within the accession period, must have satisfied the accession regulations, in order to have had jobseeker status.

Note 2: With effect from 1.1.14, a European Economic Area national cannot have a right to reside as a jobseeker or retained worker for longer than their relevant period, unless they provide compelling evidence that they are continuing to seek employment and have a genuine prospect of work² (see DMG 073092). As such, unless they can demonstrate an alternative right to reside, their right to reside as a jobseeker or retained worker would cease at the end of their relevant period and they would no longer be residing legally in the United Kingdom.

1 Imm (EEA) Regs 2016, reg 15(1)(a); 2 reg 6(7)

Evidence to demonstrate permanent residence

073429 The following documents may be evidence that can be used when determining whether a person has gained a permanent right to reside

1. valid passport or ID card
2. marriage or civil partnership certificates
3. P60s, contracts or letters of employment for workers
4. business accounts and tax returns for self-employed persons
5. leases for premises used to conduct business
6. utility bills
7. document certifying permanent residence (issued by the Home Office) where the person is a European Economic Area national - this document does not carry a date of expiry
8. permanent residence card (issued by the Home Office) where the person is a non-European Economic Area national - this document is valid for 10 years from the date of issue and must be renewed upon application

9. comprehensive sickness insurance (see DMG 073246 or 073248) where the European Economic Area national claims to have resided in the United Kingdom as a self-sufficient person or student
10. bank statements showing self-sufficiency
11. evidence of study
12. where the family member of a European Economic Area national applies on the basis that the European Economic Area national is a worker or self-employed person who has ceased activity, they must supply
 - 12.1 evidence confirming the relationship **and**
 - 12.2 documentation confirming their European Economic Area family member was employed or self-employed prior to retirement or becoming permanently incapacitated **and**
 - 12.3 documentation confirming permanent incapacity (where appropriate)
13. where the family member of a European Economic Area national applies on the basis that the European Economic Area national has died, they must supply
 - 13.1 the death certificate of the European Economic Area national **and**
 - 13.2 evidence confirming the relationship **and**
 - 13.3 evidence that the European Economic Area national had resided continuously in the United Kingdom for at least 2 years prior to death, or evidence that the death was as a result of an accident at work or occupational disease **and**
 - 13.4 evidence that they were residing in the United Kingdom with the European Economic Area national immediately prior to the European Economic Area national's death
14. worker registration or worker authorisation documents in cases where the claimant is an accession state national who worked during the relevant accession period.

Note 1: For the purposes of 7. and 8., documents cease to be valid if the holder ceases to have a right of permanent residence. This can happen when the right to reside is lost through absence from the United Kingdom for a period exceeding 2 consecutive years.

Note 2: For the purposes of 12. and 13., the claimant could be a European Economic Area national or non-European Economic Area national.

This is not an exhaustive list.

Claimant unable to provide original documentary evidence

- 073430 The claimant has primary responsibility to provide original documentary evidence of their nationality, continuous residence and their qualifying status, throughout the 5 year period within which they wish to confirm that they have met the conditions for permanent residency. If the claimant has not provided sufficient evidence to the decision maker to confirm their status, the conditions for permanent residency will not be met.
- 073431 Decision makers should also utilise additional records available to them, to confirm whether or not the conditions for permanent residency have been met. For example, national insurance contribution records.
- 073432 Where the claimant declares that they may have acquired a right to permanent residency, but they are awaiting documentation to confirm this, the decision maker should allow the claimant a reasonable timescale to provide supporting evidence before making a decision.

Moving between alternate rights to reside

- 073433 Where a qualified person switches their status to that of another qualified person, the decision maker has the discretion to allow a period of up to 30 days, so that the gap between the claimant's statuses does not break a permanent right of residence.
- 073434 A cumulative break of up to 30 days in any 12 month period is allowable when switching between rights to reside, for example student to worker, worker to self-employed person, self-employed person to jobseeker, or between the end of one job and the start of the next. In such circumstances, the claimant will be required to provide evidence of
1. acquiring another right to reside as a jobseeker, worker, self-employed person, student or self-sufficient person (or as a dependent) within 30 days of their previous right to reside ending **and**
 2. acquiring a right to reside as a jobseeker, worker, self-employed person, student or self-sufficient person (or as a dependent) for the remainder of the 5 year period of continuous residence.

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

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

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

Example 1

Person A is an Italian national. He arrived in the United Kingdom as a single person on 1.6.10. He claimed Jobseeker's Allowance as a jobseeker on 3.6.10 and signed off to start full-time work as a retail assistant on 3.7.10. On 28.2.12 his employer closed down the shop and terminated Person A's contract. Person A claimed Jobseeker's Allowance on 25.3.12 but was unsuccessful in finding work and signed off on 10.8.12. He started a full-time course as a student on 3.9.12 and took out a comprehensive sickness insurance policy. The course ended on 6.8.15 and Person A made a claim to Jobseeker's Allowance the next day. The decision maker decided that Person A had acquired a permanent right to reside as he had demonstrated 5 years continuous residence as a qualified person, and the break between his right to reside as a retained worker and a student maintained continuity as the break was within 30 days.

Example 2

Person B is a Dutch national. She arrived in the United Kingdom as a single person and started full-time work as a barista on 30.6.10. She continued to work full-time until 2.2.14 and then decided to leave. The next day she claimed Jobseeker's Allowance. The decision maker decided she was a jobseeker and informed her that she would be subject to a genuine prospect of work interview if she was still claiming Jobseeker's Allowance in 6 months time. Person B began receiving contribution-based Jobseeker's Allowance until it exhausted on 6.8.14. She found a full-time job as a receptionist which was due to start on 1.11.14. She presented this evidence at her genuine prospect of work interview and was awarded an extension of income-based Jobseeker's Allowance until 31.10.14. Person B left her job on 31.7.15 and claimed Jobseeker's Allowance. The decision maker decided that Person B had acquired a permanent right to reside as she had demonstrated 5 years continuous residence as a qualified person. Person B was treated as a jobseeker for the period 3.2.14 - 31.10.14 as she had demonstrated she was actively seeking employment and had a genuine chance of engagement throughout that period.

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

Imprisonment

- 073436 Periods of imprisonment by a European Economic Area national (or their family member) interrupt continuity of residence¹ for the purposes of satisfying the Residence Directive².

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

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

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

073439 – 073441

Sanctions and disallowances of Jobseeker's Allowance

- 073442 In the case of a sanction, payment of Jobseeker's Allowance is removed for a time, but entitlement may continue. So where the European Economic Area national has not yet reached their genuine prospect of work assessment interview, they would still get their 6 months as a retained worker or 91 days as a jobseeker. The period of the sanction would not break continuity for the calculation towards the 5 year period for permanent residence.

- 073443 In the case of a disallowance, the Jobseeker's Allowance award ends. If the disallowance is for a fixed period, the claimant will have to reclaim Jobseeker's Allowance once the disallowance has ended. Once the claimant has made a repeat claim as a jobseeker (who has received such a disallowance), they will get the balance (if any) of their relevant period. A period of disallowance would therefore break the continuity for the calculation towards the 5 year period for permanent residence.

Separation from European Economic Area partner

073444 Family members have an automatic right of residence in the United Kingdom for as long as they remain the family member of a European Economic Area national¹ who

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

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

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

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

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

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

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

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

073446 Where there has been a breakdown in the relationship and the claimant wishes to demonstrate permanent residence, the onus is on the claimant to provide documentary evidence of their European Economic Area national sponsor. Where the claimant has been the victim of domestic violence (DMG 21369) and so cannot provide anything other than oral evidence to demonstrate their residency status, the decision maker should adopt a pragmatic approach. It must be remembered that a claimant's oral statement is evidence (DMG 1400). Where oral evidence is the only evidence available, the decision maker must decide on the balance of probability (DMG 1343) whether the claimant has discharged the burden of proof (DMG 1405 et seq).

Note: This guidance does not cover a couple who are living together as husband and wife or living together as civil partners.

Deportation orders

073447 A European Economic Area national (or family member of a European Economic Area national) may be deported from the United Kingdom, where it is decided that the person's removal is justified on the grounds of public policy, public security or public health¹.

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

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

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

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

073449

Rights to reside which are excluded

[See DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/93 & 7/54]

Introduction

073450 As stated in DMG 072771, a person cannot be treated as habitually resident in the common travel area unless they have a right to reside. However certain European Union rights to reside are specifically excluded by the regulations. Thus if a person **only** has an excluded right to reside, they cannot be treated as habitually resident in the common travel area and so they are a person from abroad/person not in Northern Ireland and therefore not entitled to Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance or State Pension Credit. The following paragraphs give details of the excluded rights to reside.

073451 – 073459

Initial right of residence

073460 All European Economic Area nationals and their family members have the right to reside in any other Member State for a period of three months. This includes economically inactive people who are not required to be self-sufficient during this period¹.

1 Directive 2004/38/EC, art 6; Imm (EEA) Regs 2016, reg 13

073461 This right to reside is specifically excluded by regulations, so, persons who have a right to reside **solely** on the basis of the initial three month residence right referred to above will not be treated as habitually resident in the common travel area and will therefore be persons from abroad/person not in Northern Ireland.

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

073462 – 073465

Primary carers of British citizen children

073466 [See DMG Memo Vol 2/84, DMG Memo Vol 2/92 & DMG Memo Vol 2/93 & 7/54] A person who is not an “exempt person” (see DMG 073383 for the meaning of this term) has a derivative right to reside in the United Kingdom if¹

1. they are the primary carer of a British citizen **and**

- 2. that British citizen is residing in the United Kingdom **and**
- 3. that British citizen would be unable to reside in
 - 3.1 the United Kingdom **or**
 - 3.2 another European Economic Area state or Switzerland

if the person (i.e. the primary carer) left the United Kingdom for an indefinite period.

*1 Imm (EEA) Regs 2016, reg 16(1) & (5),
1 Ruiz Zambrano v Office national de l'emploi (ONEm) Case C-34/09*

073467 A right to reside on the basis of DMG 073466 above is an **excluded** right to reside¹. A person who only has a right to reside in accordance with DMG 073466 will therefore not satisfy the right to reside element of the habitual residence test and will therefore be a person from abroad/person not in Northern Ireland and thus not entitled to Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and State Pension Credit.

Note: The regulations described in DMG 073466 and this paragraph were introduced with effect from 8.11.12 because of a decision of the Court of Justice of the European Union dated 8.3.11 ("the *Zambrano* decision"). Decision makers still dealing with claims or appeals which involve the application of the *Zambrano* decision to periods **before** 8.11.12 should contact Decision Making Services for advice.

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

073468 – 073480

European Union citizenship rights

073481 European Union case law has established the principle that in certain circumstances a third country national may have a right to reside where to deny that right would mean that a European Union citizen would be deprived of their rights as a European Union citizen under the Treaty¹ to move and reside freely within the territory of the European Union. In the *Zambrano* case² the basis of the Court of Justice of the European Union's judgment was that, if Mr Zambrano (a third country national) was not granted a right to reside and a work permit in Belgium, the result would be that his dependent children, who were Belgian (and thus European Union) citizens, would be deprived of the genuine enjoyment of the substance of their rights as European Union citizens under article 20 of the Treaty¹.

1 TFEU, art 20; 2 Ruiz Zambrano v Office national de l'emploi (ONEm) Case C-34/09

073482 A right to reside which exists in accordance with the Treaty¹ where that right to reside arises because a British citizen would otherwise be deprived of the genuine

enjoyment of the substance of their rights as a European citizen is an excluded right to reside².

1 TFEU, art 20; 2 IS (Gen) Regs (NI), reg 21AA(3)(e); JSA Regs (NI), reg 85A(3)(c); ESA Regs (NI), reg 70(3)(e); SPC Regs (NI), reg 2(3)(e)

073483 So, a person whose sole right to reside is the right described in DMG 073481 above will not satisfy the right to reside condition of the habitual residence test. Such a person will therefore be a person from abroad/not in Northern Ireland and thus will not be entitled to Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and State Pension Credit.

073484 – 073485

Transitional protection

073486 Transitional provisions¹ provide that the right to reside aspect of the habitual residence test will not apply to claimants who are entitled to an income related benefit on 30.4.04. A claimant will continue to be entitled to Income Support, income-related Employment and Support Allowance, income-based Jobseeker's Allowance, State Pension Credit and Housing Benefit until that claim ends if

1. he was entitled to that benefit on 30.4.04 and the claim has not terminated **or**
2. he makes a claim after 30.4.04 and it is determined that entitlement commenced on or before 30.4.04 **or**
3. he makes a claim for one of the income related benefits after 30.4.04 and entitlement is continuous with entitlement to that or another income related benefit for a period which includes 30.4.04 **or**
4. DMG 073486 3. has applied and he subsequently makes a claim for, and it is determined that he is entitled to, income-related Employment and Support Allowance and the period of limited capability for work links with a previous period of limited capability for work because the separation was not more than 12 weeks **or**
5. he claims income-based Jobseeker's Allowance after 30.4.04 and the claim links with another claim which includes 30.4.04.

1 SS (Hab Res Amdt) Regs (NI), reg 6

073487 – 073489

European Union Settlement Scheme

[See DMG Memo Vol 2/84, DMG Memo Vol 2/86, DMG Memo Vol 2/89 & DMG Memo Vol 2/93 & 7/54]

073490 [See DMG Memo Vol 2/104] A new right to reside has been created for European Economic Area nationals in Appendix EU to the Immigration Rules made under The Immigration Act 1971. Applicants to the European Union Settlement Scheme can be granted either

1. Indefinite Leave to Enter / Indefinite Leave to Remain (“settled status”) **or**
2. Limited Leave to Enter / Limited Leave to Remain (“pre-settled status”) by the Home Office.

Settled Status – Indefinite Leave to Remain

073491 Where a claimant has been granted Indefinite Leave to Remain i.e. settled status under the European Union Settlement Scheme, they will satisfy the right to reside element of the Habitual Residence Test for the purposes of claiming Income Support, Jobseeker’s Allowance, Employment and Support Allowance or State Pension Credit.

Note: It is not necessary for decision makers to apply The Immigration (European Economic Area) Regulations 2016 where the claimant has been granted Indefinite Leave to Remain, as the claimant does not need a qualifying right to reside.

Pre-settled Status – Limited Leave to Remain

073492 [See DMG Memo Vol 2/94] [See DMG Memo Vol 2/109] Where a claimant has been granted Limited Leave to Remain i.e. pre-settled status under the European Union Settlement Scheme, they will not automatically have a right to reside which is relevant for the purposes of claiming Income Support, Jobseeker’s Allowance, Employment and Support Allowance or State Pension Credit. The claimant is still required to demonstrate that they are exercising a qualifying right to reside under The Immigration (European Economic Area) Regulations 2016, such as worker status, self-employed status or permanent residence.

Note: Habitual Residence Test decision makers must continue to apply The Immigration (European Economic Area) Regulations 2016 for claims from European Economic Area nationals and their family members who have been granted Limited Leave to Remain or have yet to apply for settled status.

073493 Specified legislation¹ provides that a person is a person from abroad (or a person not in Northern Ireland for the purposes of State Pension Credit Regulations¹), if that person is not habitually resident in the Common Travel Area (United Kingdom, Channel Islands, Isle of Man or Republic of Ireland). No person shall be treated as habitually resident without having a relevant right to reside in the place where that person is living². Those rights to reside do not include (amongst others³) a right which exists by having been granted limited leave to enter or remain in the United Kingdom by virtue of

1. Appendix EU to the Immigration Rules⁴ or
2. being a person with a Zambrano right to reside as defined in Annex 1 of Appendix EU to the Immigration Rules⁵.

Note: Although the claimant has been granted Limited Leave to Remain (which is not a right to reside that allows access to income related benefits) they may still be able to exercise a qualifying right to reside under The Immigration (European Economic Area) Regulations 2016.

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

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

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

⁴ IS (Gen) Regs (NI), reg 21AA(3A)(a); JSA Regs (NI), reg 85A(3A)(a); ESA Regs (NI), reg 70(3A)(a);

SPC Regs (NI), reg 2(3A)(a); ⁵ IS (Gen) Regs (NI), reg 21AA(3A)(b); JSA Regs (NI), reg 85A(3A)(b);

ESA Regs (NI), reg 70(3A)(b); SPC Regs (NI), reg 2(3A)(b)

European Union Settlement Scheme Couple Claims

073494 Each member of the European Union Settlement Scheme couple has to satisfy the habitual residence test in their own right. A family member of a European Economic Area national will not be able to derive rights from that person's status under the European Union Settlement Scheme. This is because settled status is granted under the United Kingdom Immigration Rules which do not provide for derived or derivative rights. The family member may be eligible for settled status or pre-settled status under the European Union Settlement Scheme in their own right.

073495 The European Economic Area national will need to exercise a qualifying right to reside under The Immigration (European Economic Area) Regulations 2016 for a family member to derive rights. While the United Kingdom remains in the European Union (and until The Immigration (European Economic Area) Regulations 2016 are revoked), decision makers should still apply The Immigration (European Economic Area) Regulations 2016 to someone who has been granted Indefinite Leave to Remain & Limited Leave to Remain in order to check whether a family member can derive a right to reside from them under The Immigration (European Economic Area) Regulations 2016. Where a European Economic Area national has been granted

Indefinite Leave to Remain or Limited Leave to Remain, that does not mean that they cannot still rely on The Immigration (European Economic Area) Regulations 2016¹ (see DMG 070838).

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

AT destitution test

073496 **[See DMG Memo Vol 2/110]** Prior to the AT judgment¹, if an individual had no qualifying right to reside, or did not fall within a relevant exemption, they were deemed to be not entitled to State Pension Credit. Specifically, European Union nationals and their family members whose only right to reside in the United Kingdom was having pre-settled status under the European Union Settlement Scheme. The conclusion in AT was that European Union Charter of Fundamental Rights² applied through the Withdrawal Agreement. This means that before a refusal of State Pension Credit an assessment of a person's individual circumstances should be assessed to determine whether a refusal to State Pension Credit will infringe on a person's Charter rights.

1 [SSWP v AT \(Aire Centre and IMA intervening\) UC \[2022\] 300 \(AAC\) \(link is external\)](#);

2 [EU Charter of Fundamental Rights \(link is external\)](#)

073497 The judgment does not extend to

1. claims from non-European Union nationals, who are not family members of European Union nationals treated as in scope of the Withdrawal Agreement. This includes persons from Norway, Iceland, Liechtenstein and Switzerland
2. claims from those with settled status, a certificate of application or any other form of leave
3. a decision considering entitlement before the 12 December 2022
4. family members of British citizens (Surinder Singh cases)¹ and Zambrano carers² as they are not in scope of the Withdrawal Agreement.

*1 Immigration (EEA) Regs 2016, reg 9(1); 2 reg 16(5);
Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving,
Transitional and Transitory Provisions) (EU Exit) Regulations 2020*

Assessment

073498 For claimants who do not have a qualifying right to reside, decision makers must consider whether they come in scope of the AT judgment. Claimants covered by the AT judgment are European Union nationals and their family members with pre-settled status who are treated as in scope of the Withdrawal Agreement. Those in scope of the judgment include European Union nationals who were not exercising a treaty right at the end of the transition period and their family members.

073499 AT threshold test means the inability to 'meet their most basic needs' at present or in the near future and should be considered in all cases. The threshold is high and the claimant's position must amount to extreme material poverty incompatible with human dignity. Areas to be considered for basic needs are

1. Food
2. Personal hygiene
3. Clothing
4. Housing **and**
5. Adequate heating.

When looking at a claimant's inability to meet their most basic needs, decision makers should consider what alternative financial resources claimants are in receipt of and whether those are sufficient to meet their most basic needs at present or in the near future.

Example 1

Louisa is a Romanian national and has been residing in Northern Ireland since 8.11.18. She was granted pre-settled status on 2.2.21. On 22.12.22 Louisa applied for State Pension Credit with the support of her local women's domestic violence refuge. With the assistance of her support worker, she detailed the following information to State Pension Credit: Louisa was in genuine and effective work up until the birth of her grandson in September 2021 and worked part-time until September 2022. After this she was job seeking. Whilst looking for work she was financially supported by her partner. Soon after Louisa found herself applying for guardianship of her grandson and struggled to find work whilst balancing childcare. As the time passed and the bills started to increase her partner started to become violent towards her. On the 20.11.22 the police were called and Louisa and her grandson had to move to a safer accommodation. The accommodation, provided by a shelter, is not suitable to be lived in for a prolonged period of time, and local authority made it clear that presently they are unable to provide a more suitable accommodation for a parent with a young child. Louisa has health conditions and her grandson (after having been assessed by the local authority) is showing signs of delayed development. Louisa is isolated and the sole carer of her young grandson. She has only received the occasional food voucher and had no further support from family or friends, and despite receiving some support from the local authority, it is not sufficient to cover the food cost for Louisa and her baby grandson in the immediate term. Louisa is happy to provide evidence if supported. She was not receiving any other benefits for herself or her grandchild.

On initial consideration of the habitual residence test it is apparent that Louisa has no qualifying right to reside for State Pension Credit purposes. However, given the details provided regarding her current circumstances, the decision maker considers that Louisa is currently unable to meet her and her grandchild's most basic needs. The decision maker accepts that Louisa was covered by the Withdrawal Agreement at the relevant time, and decides that she meets the AT threshold. Louisa's claim is allowed.

Example 2

Antonio is an Italian national who came to Northern Ireland in 1999 as an adult dependent aged 59. Antonio believes he should be considered as having settled status under European Union Settlement Scheme - previously he was granted pre-settled status in 2019 and has appealed the Home Office decision. He applied to State Pension Credit on the 13.12.22. Antonio has disabilities and lives with his son and daughter-in-law in a local authority property and is named on the tenancy agreement. Both his son and daughter-in-law have settled status, are now inactive and in receipt of State Pension Credit. His son also receives Carer's Allowance for Antonio. During the habitual residence test interview, the decision maker determines Antonio to have been covered by the Withdrawal Agreement at the relevant time but decides that he is no qualifying right to reside for the purposes of his claim to State Pension Credit. Antonio also explains that he is unable to survive without State Pension Credit.

The decision maker considers the AT threshold to assess if Antonio can meet his most basic needs. Following the conversation with him, alongside the information from departmental systems, the decision maker decides that there are no concerns of Antonio's basic needs not being met due to other benefits received by the household. The decision maker makes a decision to disallow Antonio's claim because he does not have a qualifying right to reside and does not meet the AT threshold.

Right to reside - A8 country nationals

Introduction

073500 [See DMG Memo Vol 2/58 and DMG Memo Vol 2/73] Transitional provisions in the Treaty of Accession allow derogation from the principle of freedom of movement within the European Economic Area¹ for a limited period after 1.5.04². Regulations on immigration³ restrict the right to reside in the United Kingdom of certain nationals of the countries known as the A8 countries until 30.4.11⁴. **From 1.5.11 all A8 nationals have full European Union rights in accordance with Directive 2004/38/EC.** DMG 073555 gives guidance on some savings provisions that apply at the end of this period.

Note: DMG 073502 to 073515 explain how an A8 national's right to reside was determined during the period 1.5.04 to 30.4.11.

1 Treaty establishing the European Community; Regulation (EEC) 1612/68. AI-6;

2 Treaty of Accession, Annexes V, VI, VIII, IX, X, XII, XDIII and XIV; 3 Accession Regs 2004, reg 4;

4 reg 1(2)(c)

The A8 countries

073501 The nationals of the following countries are affected by the derogation

1. Czech Republic
2. Estonia
3. Hungary
4. Latvia
5. Lithuania
6. Poland
7. Slovakia
8. Slovenia.

Workers

073502 Unless otherwise exempt (see DMG 073511). A8 nationals who worked were subject to the Worker Registration Scheme from its introduction on 1.5.04 until 30.4.11. To have the right to reside as a worker, an A8 national who is subject to the Worker Registration Scheme must be working for an authorised employer¹. When he ceases

working for an authorised employer for any reason, including illness or involuntary unemployment, he ceases to have the right to reside in the United Kingdom² as a worker. However, if he starts working for an authorised employer after 1.5.04 and stops working within one month of having started work, due to temporary incapacity as a result of illness or accident, or because he is involuntarily unemployed, he does not cease to be treated as a worker during the remainder of the one month period commencing on the day he started work³.

1 Accession Regs 2004, reg 5(2); 2 reg 5(3); 3 reg 5(4)

Work seekers

073503 A national of an A8 country who is a work seeker who would be subject to the Worker Registration Scheme including those who have ceased to work for an authorised employer, does not have the right to reside as a work seeker as applied to other European Economic Area nationals. Their right to reside depends on their being self-sufficient¹. See DMG 073511 for A8 workers exempt from the Worker Registration Scheme.

1 Accession Regs 2004, reg 4(3); Directive 2004/38/EC

Inactive persons

073504 Inactive persons who are A8 nationals will be treated in the same manner as other European Economic Area nationals in that situation and their right to reside will be dependent on their not being a burden on public funds.

Authorised employer

073505 An employer is an unauthorised employer

1. where the worker was legally working for that employer on 30.4.04 for so long as that employer continues¹ **or**
2. for the first month of a worker's employment with that employer which started on or after 1.5.04² **or**
3. where the worker has applied for a registration certificate within the first month of starting work for that employer and has not received a certificate or refusal to issue a certificate. The employer remains authorised under this paragraph until a certificate or refusal is received, or until he ceases working for that employer, whichever is earlier³ **or**
4. from receipt by the worker of a valid registration certificate relating to that employer which has not expired⁴ **or**

5. where the worker was issued with leave to enter the United Kingdom before 1.5.04 as a seasonal worker at an agricultural camp, and begins working on or after 1.5.04 for an employer as a seasonal worker at such a camp until that work ends or 31.12.04, whichever is the earlier⁵.

1 Accession Regs 2004, reg 7(2)(a); 2 reg 7(3); 3 reg 7(2)(b); 4 reg 7(2)(c); 5 reg 7(4)

073506 Where the worker does not apply for a registration certificate within one month of starting work for an employer, that employer will only be an authorised employer for the first month and then subsequently from the date of receipt of a valid registration certificate. It will not be an authorised employer for the period in between.

073507 A registration certificate expires when the worker ceases working for that employer¹. A registration certificate is invalid if the worker has ceased working for the specified employer on the date the certificate is issued.

1 Accession Regs 2004, reg 7(5)

Worker registration scheme

073508 To have the right of residence in the United Kingdom a national of an A8 country who is a worker and is not in an exempt category is required to register with the Home Office Worker Registration Scheme and is an 'accession State worker required to register' (other than during the first month of any employment - see DMG 073505 2.)

073509 Registration is required within one month after starting employment but cannot be made before the employment starts. Registration ends when that employment terminates and the worker must re-register with each new employer.

073510 Workers who register will be issued with a Worker Registration Scheme card when they first register and a Worker Registration Certificate for subsequent registrations.

Exempt workers

073511 Workers from A8 countries are exempt from the requirement to register if, amongst other exemption categories, they

1. had on 30.4.04 leave to enter or remain in the United Kingdom and their immigration status had no restrictions on work¹ **or**
2. were legally working in the United Kingdom on 30.4.04 and had been so for a continuous period of 12 months prior to that date² **or**
3. have legally worked in the United Kingdom for an uninterrupted period of 12 months either partly or wholly after 30.4.04, at the end of that 12 month period³.

1 Accession Regs 2004, reg 2(2); 2 reg 2(3); 3 reg 2(4)

Uninterrupted work

- 073512 A person is to be treated as having worked for an uninterrupted period of 12 months if he is not legally working for less than 30 days in total, provided that he was legally working at the beginning and end of that period¹.

1 Accession Regs 2004, reg 2(8)

Self-employed persons

- 073513 Transitional provisions in the Treaty of Accession do not allow derogation from the principle of freedom of movement within the European Economic Area for self-employed persons¹. An A8 national who works in the United Kingdom as a self-employed person is not subject to the Worker Registration Scheme and is a qualified person with normal European Economic Area rights whilst pursuing an activity as a self-employed person.

1 TFEU, art 49

- 073514 An A8 national who is a self-employed person in the United Kingdom will retain that status if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident¹ (see DMG 072861). He will be a qualified person² (see DMG 073238).

1 Imm (EEA) Regs 2016, reg 6(4); 2 reg 6(1)

- 073515 However, where an A8 national, who has been working as a self-employed person, becomes unemployed, he does not retain the status of a self-employed person. If he seeks work, he will be treated the same as other A8 nationals who are seeking work (see DMG 073503). This means that he will only have a right to reside by virtue of his status as a work seeker if he is in an exempt category¹ (see DMG 073511).

1 Accession Regs 2004, reg 4(2) & (3)

073516 – 073519

A8 nationals - ending of restrictions on right to reside

073520 Subject to the savings provisions described below, the additional restrictions on the rights of A8 nationals to reside in the United Kingdom ceased to have effect on 1.5.11. From that date A8 nationals became subject to the same European Union rules about right to reside.

073521

Effect on income-based Jobseeker's Allowance

073522 With effect from 1.5.11, A8 nationals can be jobseekers. This means that, for the purposes of income-based Jobseeker's Allowance they have a right to reside if they are seeking work¹.

1 JSA Regs (NI), reg 85A(2) & (3); Imm (EEA) Regs 2016, reg 6(1)

073523

Saving provisions

“Accession worker”

073524 In the guidance in DMG 073525 to 073529 the phrase “accession worker” means an A8 national who was required to register as a worker as at 30.4.11.

Right to reside

073525 With effect from 1.5.11 accession workers (as defined in DMG 073524 above) will retain worker status when¹

1. they become unable to work, become unemployed or ceased to work in the circumstances described in DMG 072821 on or after 1.5.11 **or**
2. they had ceased working in the circumstances described at DMG 072821 for an authorised employer
 - 2.1 within the first month of employment **and**
 - 2.2 they were still within that one month period.

1 Imm (EEA) Regs 2006, reg 7A(4)

073526 It follows that an A8 national required to register as at 30.4.11, who, ceased work in the circumstances described in DMG 072821 **before 1.5.11** will not retain worker status on account of the ending of the A8 restrictions. The only exception is where the A8 national had started work for an authorised employer after 1.4.11. Provided such a person satisfies the conditions in DMG 072821 they will retain worker status on ceasing work and on past 1.5.11.

Acquiring a permanent right to reside

073527 A European Economic Area national who has resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016 continuously for five years¹ acquires a permanent right to reside. An accession worker (within the definition in DMG 073524 above) is treated² as having resided in accordance with the regulations

1. during any period before 1.5.11 in which they were working in the United Kingdom for an authorised employer³ **and**
2. in the case of an accession worker who started work for an authorised employer after 1.4.11 and ceased that work before 1.5.11 on the grounds set out in DMG 072821, for the remainder of April 2011 after work ceased.

1 Imm (EEA) Regs 2016, reg 15; 2 Imm (EEA) Regs 2006, reg 7A(5); 3 Accession Regs 2004, reg 2(7)

Workers who have ceased activity

073528 Certain persons who permanently cease activity as workers or self-employed persons can acquire a permanent right to reside in the United Kingdom¹ (see DMG 073174). The conditions for acquiring this right include the need to have completed certain periods of activity as a worker and the regulations² treat certain periods of unemployment, sickness etc as periods of such activity.

1 Imm (EEA) Regs 2016, reg 15(1)(c); 2 reg 5(7)

073529 In the case of accession workers, periods of involuntary unemployment duly recorded by the relevant employment office will only be treated as periods of activity as a worker where¹

1. the accession worker ceased working during the first month of registered employment, for the remainder of that month **or**
2. the accession worker became unemployed or ceased work on or after 1.5.11.

1 Imm (EEA) Regs 2006, reg 7A(3)

Savings and modifications of Immigration (European Economic Area) Regulations 2006

073530 Arrangements within the immigration (European Economic Area) Regulations 2006 for accession members states¹ continue to have effect in relation to any European Economic Area national to whom the provisions applied immediately before 1.2.17².

1 Imm (EEA) Regs 2006, reg 7A & 7B; 2 Imm (EEA) Regs 2016, Sch 4, para 2

073531 – 073550

Right to reside - A2 country nationals

Nationals of Bulgaria and Romania

073551 Romania and the Republic of Bulgaria joined the European Union on 1.1.07. Transitional provisions in the Treaty of Accession allow derogation from the principle of freedom of movement within the European Economic Area¹ for a limited period, initially five years after 1.1.07. Regulations on immigration² restrict the right to reside in the United Kingdom of nationals of Bulgaria and Romania (known as A2 nationals). The transitional provisions also gave Member States the option of extending the initial period for a further two years. The United Kingdom government has decided to exercise this option and the restrictions will continue until 31.12.13³.

Note: 1 From 1.1.14 all A2 nationals have full European Union rights in accordance with Directive 2004/38/EC⁴. The guidance at DMG 073555 to 073585 below is retained for cases where the period at issue is between 1.1.07 and 31.12.13. DMG 073605 et seq gives guidance on some savings provisions that apply at the end of this period.

Note 2: Savings and modifications provisions continue to have effect on any European Economic Area national to whom the provisions applied immediately before 1.2.17⁵ (see DMG 073530).

*1 Treaty establishing the European Community; Regulation (EEC) 1612/68, A 1-6;
2 Accession Regs 2006, reg 6; 3 reg 1(2)(c), definition of "accession period";
4 Imm (EEA) (Amdt) (No. 2) Regs 2013; 5 Imm (EEA) Regs 2016, Sch 4, para 2*

073552 – 073554

Derogation for A2 nationals

073555 A2 nationals wishing to work in the United Kingdom must, except where they are exempt from the requirement, obtain a worker authorization document before they commence employment in the United Kingdom¹. (See DMG 073565 onwards for those A2 nationals who are not subject to worker authorization.)

1 Accession Regs 2006, reg 9(1)

073556 To have a right to reside as a worker, an A2 national who is subject to worker authorization, must have a worker authorization document and be working in accordance with the conditions set out in that authorization document¹.

1 Accession Regs 2006, reg 6(2)

073557 If A2 nationals subject to worker authorization cease working for any reason, including illness or involuntary unemployment, they cease to have a right to reside in the United Kingdom as a worker¹.

1 Accession Regs 2006, reg 6(3)

073558 An A2 national who is subject to worker authorization and who is a work seeker, does not have a right to reside as a work seeker¹, although he may have a right to reside if he is self-sufficient. He is not treated as a jobseeker for the purposes of the definition of “qualified person”².

1 Accession Regs 2006, reg 6(2); 2 Imm (EEA) Regs 2016, reg 6

073559

A2 nationals exempt from the habitual residence test

073560 Amendments to Income Support, Jobseeker’s Allowance, and State Pension Credit legislation, and subsequent Employment and Support Allowance legislation, introduced a new category of persons who are exempt from the habitual residence test¹.

1 IS (Gen) Regs (NI), reg 21AA(4)(f)(ii); JSA Regs (NI), reg 85A(4)(f)(ii); ESA Regs (NI), reg 70(4)(f)(ii); SPC Regs (NI), reg 2(4)(f)(ii)

073561 An A2 national is exempt from the habitual residence test if he

1. is subject to worker authorization **and**
2. has a worker authorization document **and**
3. is working in accordance with the conditions in that document¹.

He will not be treated as a person from abroad for Employment and Support Allowance, Income Support or Jobseeker’s Allowance, or not treated as not in Northern Ireland for State Pension Credit.

1 Accession Regs 2006, reg 6(2)

073562 – 073564

Exempt from worker authorization

073565 However certain categories of nationals of Bulgaria and Romania are not subject to worker authorization. An A2 national is not an Accession State national subject to worker authorization where he or she

1. has leave to enter or remain in the United Kingdom under the Immigration Act 1971 and their immigration status has no condition restricting employment¹ **or**

2. was legally working² in the United Kingdom on 31.12.06 and had been so working in the United Kingdom without interruption for a continuous period of 12 months ending on that date³ **or**
3. legally works in the United Kingdom without interruption for a period of 12 months falling partly or wholly after 31.12.06, at the end of that 12 month period⁴ **or**
4. has dual nationality and is also a national of the United Kingdom or some other European Economic Area State (other than Bulgaria or Romania)⁵, or during any period where they are the spouse or civil partner of a United Kingdom national⁶ **or**
5. is the spouse, civil partner or child under 18 of a person who has leave to enter or remain in the United Kingdom⁷, where that leave allows the person to work in the United Kingdom⁸
6. has a permanent right of residence⁹ under regulation 15 of the Immigration (European Economic Area) Regulations 2006 **or**
7. is a family member of a European Economic Area national¹⁰ who has a right to reside in the United Kingdom under certain legislation¹¹ other than a family member in an excluded category¹² **or**
8. is¹³ the spouse, civil partner or descendant of an accession State national subject to worker authorisation who has a right to reside as a worker¹⁴. However the descendant must be either
 - 8.1 under 21 **or**
 - 8.2 dependent on the accession state worker subject to worker authorisation
9. is highly skilled and holds a registration certificate from the Home Office that includes a statement that they have unconditional access to the United Kingdom labour market¹⁵ **or**
10. is in the United Kingdom as a student and does not work for more than 20 hours per week and holds a registration certificate that includes a statement that they are a student who has access to the United Kingdom labour market for 20 hours a week¹⁶ **or**

11. is a posted worker¹⁷ as defined in European Union legislation¹⁸, being an A2 national working for an employer of another member state but posted to work in the United Kingdom, during the period of the posting.

1 Accession Regs 2006, reg 2(2); 2 reg 2(12); 3 reg 2(3); 4 reg 2(4); 5 reg 2(5); 6 reg 2(6); 7 Imm Act 71; 8 Accession Regs 2006, reg 2(5A); 9 reg 2(7); 10 reg 2(8); 11 Imm (EEA) Regs 2016; 12 Accession Regs 2006, reg 3(8)(a) & (b); 13 reg 2(8A); 14 Imm (EEA) Regs 2016, reg 14(1) & 6(1)(b); 15 Accession Regs 2006, reg 2(9); 16 reg 2(10); 17 reg 2(11); 18 Directive 96/71/EC, art 1(3)

073566 A2 nationals who fall into the above groups can obtain a registration certificate from the Home Office to confirm their status, or will have a valid passport marked with

1. a United Kingdom residence permit granting leave to remain with permission to work that has not expired **or**
2. indefinite leave to remain **or**
3. a “no time limit” stamp.

073567 Those A2 workers who are exempt from the worker authorization scheme (see DMG 073565) can retain worker status in the same way as other European Economic Area nationals when, for example, temporarily unable to work due to illness or accident¹.

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

073568 – 073580

Uninterrupted work

073581 A person is treated as having worked in the United Kingdom without interruption for a period of twelve months if he was legally working in the United Kingdom at the beginning and end of that period and any intervening periods in which he was not legally working in the United Kingdom do not, in total, exceed 30 days¹.

1 Accession Regs 2006, reg 2(12)(c)

073582

Self-employed

073583 Transitional provisions in the Treaty of Accession do not allow derogation from the principle of freedom of movement for self-employed persons within the European Economic Area¹. Bulgarian and Romanian nationals who are working in the United Kingdom in a self-employed capacity are not subject to worker authorization while they are working, and are qualified persons with normal European Economic Area rights whilst pursuing activities as self-employed persons.

1 TFEU, art 49

073584 An A2 national who is a self-employed person in the United Kingdom will retain that status if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident¹. He will still be a qualified person² (see DMG 072861).

1 Imm (EEA) Regs 2016, reg 6(4); 2 reg 6(1)(c)

073585 However, where an A2 national, who has been working as a self-employed person, becomes unemployed, he does not retain the status of a self-employed person. If he seeks work, he will be treated the same as other A2 nationals who are seeking work. This means he will only have a right to reside as a "jobseeker"¹ for the purpose of the definition of "qualified person" if he is in an exempt category (see DMG 073565).

1 Accession Regs 2006, reg 6(2)

073586 – 073599

Bulgarians and Romanians - ending of restrictions

Effect on income-based Jobseeker's Allowance

073600 With effect from 1.1.14, A2 nationals can be jobseekers (see DMG 073240). This means that, for the purpose of income-based Jobseeker's Allowance they have a right to reside if they are seeking work¹. Decision makers are reminded however that income-based Jobseeker's Allowance claimants with a right to reside as jobseekers must be actually habitually resident in the United Kingdom (see DMG 073707 et seq).

1 JSA Regs (NI), reg 85A(2) & (3); Imm (EEA) Regs 2016, reg 6(1)

073601 – 073604

Transitional rules

A2 national who was subject to worker authorisation

073605 Where an A2 national was subject to worker authorisation (see DMG 073555 et seq) before 1.1.14 then certain particular rules, as described in DMG 073607 to 073614 below apply to them.

073606

Retaining worker status

073607 An A2 national who is subject to worker authorisation on 31.12.13 can **only** retain worker status as a person

1. who, having worked in the United Kingdom, is in duly recorded involuntary unemployment, is registered with the relevant employment office and has genuine prospects of engagement **or**
2. where that person became unemployed or ceased to work because of illness on or after 1.1.14¹.

1 Imm (EEA) Regs 2006, reg 7B(5)

073608

Permanent right to reside

073609 A European Economic Area national who has resided in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations continuously for five years¹ acquires a permanent right to reside. An A2 national who was subject to worker authorisation before 1.1.14 shall be treated as having resided as a worker in accordance with the Immigration (European Economic Area) Regulations only for those periods when they were “legally working” in the United Kingdom² (see DMG 073611 below).

Note: A2 nationals may also have resided in accordance with the Immigration (European Economic Area) Regulations in other ways which may count for the purposes of the acquisition of a permanent right to reside; for example as a self-employed person or as a student.

1 Imm (EEA) Regs 2016, reg 15; 2 Imm (EEA) Regs 2006, reg 7B(6)

073610

Meaning of “legally working”

073611 For the purpose of DMG 073609, a person was “legally working” with respect to periods of work by an A2 national in the United Kingdom on or after 1.1.07 either

1. when they were exempt from worker authorisation when working **or**
2. when they held an accession worker authorisation document and were working in accordance with the conditions set out in that document **or**
3. with regard to any period when they were working lawfully under United Kingdom domestic law.

073612

Workers who have ceased activity

073613 Certain European Economic Area nationals who permanently cease activity as workers or self-employed persons can acquire a permanent right to reside in the United Kingdom¹ (see DMG 073174). The conditions for acquiring this right include the need to have completed certain periods of activity as a worker and the Immigration (European Economic Area) Regulations² treat certain periods of unemployment, sickness etc as periods of such activity.

1 Imm (EEA) Regs 2016, reg 15(1)(c); 2 reg 5(7)

073614 In the case of A2 nationals who are/were subject to worker authorisation as at 31.12.13, periods of involuntary unemployment duly recorded by the relevant employment office will **only** be treated as periods of activity as a worker if the unemployment began on or after 1.1.14¹.

1 Imm (EEA) Regs 2006, reg 7B(4)

073615 – 073649

Right to reside - Croatian nationals

Introduction

073650 The Republic of Croatia became a member state of the European Union on 1.7.13¹. The following DMG paragraphs provide guidance for decision makers on the European Union law rights to reside of Croatian nationals and their family members. Compared to full European Union law rights to reside, these are restricted, initially until 30.6.18.

1 Treaty concerning the accession of the Republic of Croatia, art 3.2

073651 Employment restrictions that have applied to Croatian nationals since 1.7.13 ceased to have effect on 1.7.18¹. From that date all Croatian nationals have full European Union rights in accordance with Directive 2004/38/EC.

1 Croatian (I & WA) Regs 2013, reg 1(2)

073652 – 073659

Transitional provisions of the Treaty

073660 Transitional provisions in the Croatia Treaty¹ allow European Union Member States to impose certain restrictions on the rights to freedom of movement within the European Economic Area², and allow European Union Member States to apply national measures restricting the access of Croatian nationals to the United Kingdom's labour market for a limited period, initially for five years from 1.7.13³. The rights of European Economic Area nationals (and in some circumstances their family members) to reside in the United Kingdom are set out in the Immigration (European Economic Area) Regulations. The Accession of Croatia (Immigration & Worker Authorisation) Regulations 2013 limit those rights to reside and set out the measures restricting access to the United Kingdom's labour market in the case of Croatian nationals.

1 Act concerning the accession of the Republic of Croatia, art 18 & Annex V;

2 TFEU art 45 & Reg (EU) 492/11, arts 1 to 6;

3 Act concerning the accession of the Republic of Croatia, art 18 & Annex V, section 2, para 2

073661 – 073664

The two groups

073665 For the purposes of entitlement to Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and State Pension Credit Croatian nationals will fall into two main groups

1. persons who are subject to worker authorisation **and**
2. those who are exempt from the requirement for worker authorisation.

073666 – 073669

Croatian nationals subject to worker authorisation

073670 Unless they come within the exempt group described in DMG 073689 below, all Croatian nationals are “accession state nationals subject to worker authorisation”¹ from 1.7.13 until 30.6.18. This means that, in order to be able to work as employed persons in the United Kingdom, Croatian nationals subject to worker authorisation have to apply to the Home Office for a worker authorisation document giving details of the employer they wish to work for. A worker authorisation document will only be issued where the Croatian national meets the relevant requirements¹. Those requirements are set out in the “Statement of relevant requirements”, dated May 2013 and published by the Secretary of State for the Home Department.

1 Croatia (I & WA) Regs 2013, reg 2(1)

073671 – 073675

Worker authorisation document

073676 The worker authorisation document will be either¹

1. a passport or other travel document endorsed before 1.7.13 to show that the holder has leave to enter or remain in the United Kingdom under the Immigration Act 1971, subject to a condition restricting his employment in the United Kingdom to a particular employer or category of employment **or**
2. a worker authorisation registration certificate issued in accordance with the Accession of Croatia (Immigration & Worker Authorisation) Regulations 2013 and endorsed with a condition restricting the holder’s employment to a particular employer and authorised category of employment.

1 Croatia (I & WA) Regs 2013, reg 8(2)

073677

Exemption from the habitual residence test

073678 With effect from 1.7.13 until 30.6.18, a Croatian national subject to worker authorisation will not have to satisfy the habitual residence test for Income Support, income-based Jobseeker’s Allowance, income-related Employment and Support Allowance or State Pension Credit during any period when they¹

1. hold an accession worker authorisation document **and** are working in accordance with the conditions set out in that document **or**
2. are a self-employed person in the United Kingdom² (see DMG 073683 and DMG 073700 - 073701 for more advice on the self-employed).

They will therefore not be treated as a person from abroad for the purposes of Income Support, income-based Jobseeker's Allowance or income-related Employment and Support Allowance, nor will they be treated as not in Northern Ireland for the purposes of State Pension Credit.

Note: Nonetheless they will have to satisfy the other conditions of entitlement for these benefits which, as they are working, will not normally be the case.

1 IS (Gen) Regs (NI), reg 21AA(4)(f)(ii); JSA Regs (NI), reg 85A(4)(f)(ii); ESA Regs (NI), reg 70(4)(f)(ii); SPC Regs (NI), reg 2(4)(f)(ii); 2 IS (Gen) Regs (NI), reg 21AA(4)(b); JSA Regs (NI), reg 85A(4)(b); ESA Regs (NI), reg 70(4)(b); SPC Regs (NI), reg 2(4)(b)

073679

Right to reside

073680 With effect from 1.7.18, Croatian nationals have a right to reside¹ as a

1. jobseeker (see DMG 073084 and 073141) **or**
2. person retaining worker status (see DMG 072821) **or**
3. person retaining the status of a self-employed person (see DMG 072862).

1 JSA Regs (NI), reg 85A(2) & (3); Imm (EEA) Regs, reg 6(1)

073681 From 1.7.13 to 30.6.18, a Croatian national subject to worker authorisation **did not** have a right to reside

1. as a jobseeker¹ **or**
2. as a person retaining worker status² (see DMG 072821).

1 Croatia (I & WA) Regs 2013, reg 5(1); 2 reg 5(2)

073682 Croatian nationals subject to worker authorisation nonetheless **did** have rights to reside if they are self-employed persons¹ (see DMG 073683 and DMG 073700 - 073701 below for more on self-employment).

1 Imm (EEA) Regs 2016, reg 14 & 6(1)

Self-employment stops

073683 A Croatian national subject to worker authorisation retained the status of being a self-employed person if they were temporarily unable to pursue activity as a self-employed

person as a result of illness or accident¹. However if self-employment ceased altogether (on which see DMG 072842) a Croatian national subject to worker authorisation did not have a right to reside as a jobseeker².

1 Imm (EEA) Regs 2016, reg 14 & 6; 2 Croatia (I & WA) Regs 2013, reg 5(1)

073684

Self-sufficient persons and students

073685 Croatian nationals subject to worker authorisation did have a right to reside¹ as

1. self-sufficient persons (see DMG 073244 - 073246) **or**
2. students (see DMG 073248).

However these groups need to have sufficient resources not to become a burden on United Kingdom social assistance (which includes Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance and State Pension Credit) throughout their period of stay and they must have comprehensive sickness insurance.

1 Imm (EEA) Regs 2016, reg 6(1)

073686

Summary

073687 In practice the result of these rules is that a Croatian national subject to worker authorisation will not normally be entitled to Income Support, income-based Jobseeker's Allowance, income-related Employment and Support Allowance or State Pension Credit. They will usually either be persons from abroad/treated as not in Northern Ireland for the lack of a right to reside or they will fail to satisfy the other conditions of entitlement.

073688

Croatian nationals who were not subject to worker authorisation

073689 A Croatian national was not subject to worker authorisation if

1. on 30.6.13, they had leave to enter or remain in the United Kingdom under the Immigration Act 1971 and their immigration status has no condition restricting employment¹, or they are given leave of this type (including that their immigration status has no condition restricting employment) **or**

2. they were legally working (see DMG 073691 - 073692) in the United Kingdom on 30.6.13 and had been legally working in the United Kingdom without interruption (see note) throughout the period of 12 months ending on that date²
or

3. they legally worked (see DMG 073691 - 073692) in the United Kingdom without interruption (see note) for a period of 12 months falling partly or wholly after 30.6.13, at the end of that 12 month period³ **or**

Note: For sub-paragraphs 2. & 3: a person shall be treated⁴ as having worked without interruption for a period of 12 months provided they were legally working in the United Kingdom at the beginning and end of the 12 month period and, if their work was interrupted, any intervening period(s) **do not exceed 30 days in total**

4. they had dual nationality and were also a national of the United Kingdom or a European Economic Area State (other than Croatia)⁵, except that, where the person was also a Bulgarian or Romanian national subject to worker authorisation in accordance with the Accession Regulations 2006 (see DMG 073551 et seq), they would only be exempt from worker authorisation as a Croat during any period when they were working in accordance with the Accession Regulations 2006 **or**

5. during any period in which they were⁶

5.1 the spouse, civil partner, unmarried or same sex partner (see DMG 073696) of **or**

5.2 a child under 18 of

a person who has been given leave to enter or remain in the United Kingdom under the Immigration Act 1971 where that leave allows that person to work **or**

6. during any period when they were⁷ the spouse, civil partner, unmarried or same sex partner (see DMG 073696) of a national of the United Kingdom or a person settled (as defined in specific legislation⁸) in the United Kingdom **or**

7. during any period when they were⁹ a member of a diplomatic mission, or a family member of a member of a diplomatic mission, as defined in specific legislation¹⁰ and other persons who are not British citizens specified in an order of the Secretary of State for the Home Department¹¹ exempting them from any or all of the provisions of the Immigration Act 1971 **or**

8. they had a permanent right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations¹² **or**
9. except where sub-paragraph 10 applies, during any period when they were a family member of a European Economic Area national who has a right to reside in the United Kingdom¹³ **or**
10. where the European Economic Area national with a right to reside in the United Kingdom referred to in subparagraph 9. is a Croatian national subject to worker authorisation or a Bulgarian or Romanian national subject to worker authorisation (referred to below as “Y”) then only the following family members were not subject to worker authorisation¹⁴
 - 10.1 Y’s spouse or civil partner **or**
 - 10.2 an unmarried or same sex partner of Y (see DMG 073696) **or**
 - 10.3 a direct descendent of Y, Y’s spouse or civil partner who is
 - 10.3.a under 21 **or**
 - 10.3.b dependent on Y, Y’s spouse or Y’s civil partner
11. they were highly skilled as defined¹⁵ and held a registration certificate from the Home Office that included a statement that they have unconditional access to the United Kingdom labour market **or**
12. during any period when they were a student in the United Kingdom and either
 - 12.1 they held a registration certificate which stated that they were a student who may work on the United Kingdom for not more than 20 hours per week (except where they are working, as part of a course of vocational training or during vacations) and provided they comply with those work conditions¹⁶ **or**
 - 12.2 they had leave to enter or remain under the Immigration Act 1971 as a student provided they were working in accordance with any conditions attached to that leave¹⁷ **or**
13. during the 4 months starting from the end of the course where they are a former student who holds a registration certificate (issued before they completed their course) saying that they may work during that period¹⁸ **or**
14. they were a posted worker¹⁹ as defined in specific European Union legislation²⁰, being a person posted to the United Kingdom by an employer

based in another European Economic Area state in pursuance of a contract to provide services in the United Kingdom.

1 Croatia (I & WA) Regs 2013, reg 2(2); 2 reg 2(3); 3 reg 2(4); 4 reg 2(5)(c); 5 reg 2(6) & (7); 6 reg 2(8); 7 reg 2(9); 8 Immigration Act 1971, s 33(2A); 9 Croatia (I & WA) Regs 2013, reg 2(10) & (11); 10 Immigration Act 71, s 8(3); 11 s 8(2); 12 Croatia (I & WA) Regs 2013, reg 2(12); 13 reg 2(13); 14 reg 2(14); 15 reg 2(15); 16 reg 2(16)(a) & (17); 17 reg 2(16)(b); 18 reg 2(18); 19 reg 2(19); 20 reg 2(20) & Directive 96/71/EC, art 1(3)

073690

Meaning of legally working

Periods before 1.7.13

073691 For the purposes of DMG 073689 **2. & 3.**

1. a Croatian national working in the United Kingdom during a period falling before 1.7.13, was working legally in the United Kingdom during that period if¹
 - 1.1 they had leave to enter or remain in the United Kingdom under the Immigration Act 1971 for that period **and**
 - 1.2 that leave allowed them to work in the United Kingdom **and**
 - 1.3 they were working in accordance with any condition on that leave restricting their employment **or**
2. they were exempt from the provisions of the Immigration Act 1971 in accordance with specific legislation **or**
3. they were entitled to reside in the United Kingdom under the Immigration (European Economic Area) Regulations.

1 Croatia (I & WA) Regs 2013, reg 2(5)(a)

Periods on or after 1.7.13 until 30.6.18

073692 For the purposes of DMG 073689**3.**, a Croatian national is legally working in the United Kingdom on or after 1.7.13 during any period in which they¹

1. are exempt from worker authorisation because they fall within one of subparagraphs **4. to 13.** of DMG 073689 above **or**
2. hold an accession worker authorisation document (see DMG 073678 above) and are working in accordance with the conditions set out in that document.

1 Croatia (I & WA) Regs 2013, reg 2(5)(b)

073693

Meaning of “family member”

073694 For the purposes of DMG 073689 above, a Croatian national’s family members are¹ (subject to the special rules about the family members of students described in DMG 073291)

1. their spouse or civil partner **and**
2. their direct descendants or the direct descendants of their spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 their dependants or dependants of their spouse or civil partner **and**
3. their direct ascendant relatives or the direct ascendant relatives of their spouse or civil partner **and**
4. extended family members as described in DMG 073293.

Note: See DMG 073703 for more on family members

1 Croatia (I & WA) Regs 2013, reg 1(2)(a) & Imm (EEA) Regs 2016, reg 7

073695

Meaning of “unmarried or same sex partner”

073696 An “unmarried or same sex partner” means¹ a person who is in a durable relationship with another person. If a decision maker has doubts about whether this is the case, a view should be sought from the Home Office in the first instance.

1 Croatia (I & WA) Regs 2013, reg 1(2)

073697

Right to reside

073698 For as long as they continue to satisfy one of the conditions for exemption in DMG 073689 above, Croatian nationals **who are not subject to worker authorisation** have the same rights to reside as are enjoyed by a non-accession European Economic Area national such as a French or German national.

073699

Self-employment

073700 Transitional provisions in the Treaty of Accession do not allow limitation of the principle of freedom of movement for self-employed persons within the European Economic Area. This means that, from 1.7.13, all Croatian nationals (regardless of whether or not they are subject to worker authorisation) have a right to reside as a “qualified person” when they are working as a self-employed person in the United Kingdom¹.

Note: Decision makers are reminded that work as a self-employed person must be genuine and effective (see DMG 072816). In addition decision makers may need to establish whether at any particular moment in time a claimant is a self-employed person (see DMG 072842).

1 Imm (EEA) Regs 2016, reg 14 & reg 6(1)

073701 Any Croatian national who is a self-employed person in the United Kingdom will retain that status and a right to reside only if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident¹ (see DMG 072861). Such a person is deemed not to be a person from abroad/person not in Northern Ireland for the purposes of Income Support², income-based Jobseeker’s Allowance³, income-related Employment and Support Allowance⁴ or State Pension Credit⁵ (see DMG 072800 2.).

1 Imm (EEA) Regs 2016, reg 6(4); 2 IS (Gen) Regs (NI), reg 21AA(4)(b); 3 JSA Regs (NI), reg 85A(4)(az); 4 ESA Regs (NI), reg 70(4)(b); 5 SPC Regs (NI), reg 2(4)(b)

073702

Family members

073703 In general the family members of a European Economic Area national with a right to reside in the United Kingdom, also have a right to reside derived from and linked to the European Economic Area national's right to reside¹. Where a Croatian national **not** subject to worker authorisation (“C”) has a right to reside in the United Kingdom then their family members (as defined in DMG 073694) are not subject to worker authorisation and have the same rights to reside as the family members of any other European Economic Area national.

1 Imm (EEA) Regs 2016, reg 14(2)

073704 However where a Croatian national is subject to worker authorisation then only

1. their spouse, civil partner, unmarried or same sex partner (hereafter “partner”)
and

2. their (or their partner's)

2.1 children **or**

2.2 grand children

who are aged under 21 or dependant

escape the requirement for worker authorisation (see DMG 073689.10.). A Croatian national's Croatian father, father in law, mother, mother in law, and grandparents will have a right to reside as family members of a European Economic Area national. However in their own right they will only have the limited rights to reside of any Croatian national subject to worker authorisation (see DMG 073670 to 073676) (i.e. as an authorised worker, a self-employed or self-sufficient person or a student). In other words they have a right to reside in the United Kingdom but their access to work and the labour market here is limited.

073705 – 073706

Actual habitual residence

Requirement to establish a residence that is habitual in nature

- 073707 [See DMG Memo Vol 2/91] [See DMG Memo Vol 2/96] [See DMG Memo Vol 2/98] [See DMG Memo Vol 2/99] [See DMG Memo Vol 2/101, 5/123, 9/58 & 14/79] [See DMG Memo Vol 2/106] To be habitually resident in a country a person must have actually taken up residence and lived there for a period. It is not sufficient that the person came to this country voluntarily and for settled purposes. He must be resident in fact for an appropriate period of time which demonstrates that his residence has become, and is likely to remain, habitual in nature¹.

1 House of Lords, Nessa v CAO (1999) IWL 1937 HL

073708 – 073710

Settled intention to remain

- 073711 The period of time cannot begin before the person is both living in the United Kingdom, and has a settled intention to remain in the United Kingdom for the time being. The person does not have to intend to remain permanently.

073712 – 073715

Relevant factors

- 073716 Whether and when a person's residence has become habitual in nature is a question of fact. The period is not fixed and depends on the facts of each case. Amongst the relevant factors to be taken into account are bringing possessions so far as is practicable, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, and having durable ties (this is sometimes called "centre of interest" (see DMG 073758)) with the country of residence or intended residence¹. The list is not exhaustive and any facts which may indicate whether or not the residence is habitual in nature should be taken into account.

1 House of Lords, Nessa v CAO (1999) IWL 1937 HL

- 073717 Only the appropriate weight should be given to factors wholly or partly outside the person's control. The person may have close relatives, even immediate family, outside the United Kingdom. There may be an intention that family members will join the person here when permission to do so can be obtained. The person may, quite reasonably, visit them regularly. That need not indicate that the person himself does

not have a settled intention to remain in the United Kingdom, or that he cannot be habitually resident here. Cultural differences in the nature of contact between family members should be respected.

073718 It is not necessary to have permanent or private accommodation to establish habitual residence. A person may be resident in a country whilst having a series of temporary abodes.

073719 A person's financial viability may be a relevant factor, but the test for habitual residence should not be applied so as to prevent access to public funds. It must be applied in a way that allows for the possibility of a claimant establishing both habitual residence and an entitlement to benefits¹.

1 House of Lords, Nessa v CAO (1999) 1WLR 1937 HL

073720 – 073722

Appropriate period of time

073723 The appropriate period of time need not be lengthy if the facts indicate that a person's residence has become habitual in nature at an early stage¹. In some circumstances the period can be as little as a month, but it must be a period which is more than momentary in a claimant's life history². A period of between one and three months is likely to be appropriate to demonstrate that a person's residence is habitual in nature. Cogent reasons should be given where a period longer than three months is considered necessary³.

1 House of Lords, Nessa v CAO (1999) 1WLR 1937 HL; 2 CIS/4389/99; 3 CIS/4474/03

073724 – 073725

Becoming habitually resident

073726 The nature of a person's residence should be considered throughout the period in question, to establish whether or when it became habitual. The fact that a person's residence has become habitual in nature after a period of time does not mean that the residence was habitual in nature from the outset. Residence only changes its quality at the point at which it becomes habitual.

073727 – 073728

Resuming a previous habitual residence

073729 There may be special cases where a person who has previously been habitually resident in the United Kingdom resumes that habitual residence immediately when

he returns to the United Kingdom following a period living abroad¹. The only element of habitual residence that is bypassed by a returning former resident is the need to be resident in the United Kingdom for an appreciable period. Factors to be considered in deciding whether the previous habitual residence has been immediately resumed include the settled intention to remain, whether the person is in a position to make an informed decision about residence in the United Kingdom, the ties and contacts with the United Kingdom retained or established by the person while abroad, the reasons why the claimant left the United Kingdom and became habitually resident elsewhere, the similarity between their residence in the United Kingdom now and when they were previously here, and the length of the period of absence². This is a different situation to that where a person is temporarily absent from the United Kingdom and does not lose their habitual residence during that period of absence.

Note: For claims made to Jobseeker's Allowance with effect from 1.1.14, please see guidance at DMG 072986 et seq with regard to the three month residence requirement.

1 House of Lords, Nessa v CAO (1999) 1WLR 1937 HL; 2 CIS/1304/1997 and CJSA/5394/1998

Example 1

On 4.2.18, Alex returned to the United Kingdom after undertaking a 12 week placement in Tanzania. This was a voluntary placement with the International Citizen Service, a scheme funded by the United Kingdom Government Department for International Development. Alex makes a claim to Jobseeker's Allowance from 5.2.18.

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

Example 2

Karen has British nationality. In December 2010 she left the United Kingdom to live and work in the United States. In January 2013, when her two year employment contract came to an end, Karen returned to the United Kingdom. She claimed Jobseeker's Allowance on 18.1.13. It emerged that, during her absence, Karen had retained a property here and had continued to pay the mortgage on it. She had put the bulk of her belongings in storage in the United Kingdom. She had also returned

to the United Kingdom twice a year. The decision maker decided that Karen was resuming her previous habitual residence here immediately on her return.

073730 – 073745

European Community law

073746 When deciding whether a person is habitually resident for European Community law decision makers should consider whether a person is resuming a previous habitual residence before taking into account other factors in DMG 073756. In such cases it is still necessary to determine whether the person has a right to reside in accordance with the guidance in DMG 072816 et seq.

073747

Resuming previous residence

073748 The guidance at DMG 073749 - 073751 is concerned with European Community law¹ which applies a broader meaning to the term 'habitual residence' than that found in the regulations. It does not apply to persons who have returned to the common travel area from a country which is not a European Community Member State².

1 Reg 1408/71/EEC, art 10A; 2 Court of Appeal; Gingi v Secretary of State for Work and Pensions [2001] 1 CMLR 20

073749 A person with habitual residence in the common travel area who exercised his right to freedom of movement under European law and then returns to resume his residence in the common travel area may be habitually resident immediately on his return¹.

1 Case C-90/97, Swaddling v CAO (1999) All ER (EC) 217

073750 An income-based Jobseeker's Allowance, Income Support, income-related Employment and Support Allowance or State Pension Credit claimant who

1. was previously habitually resident in the common travel area **and**
2. moved to live and work in another Member State **and**
3. returns to resume the previous habitual residence

is habitually resident immediately on arrival in the common travel area.

073751 In deciding whether the claimant is resuming previous residence the decision maker should take account of the length and continuity of previous residence in the common travel area, his employment history in the other Member State and whether the claimant has maintained sufficient links with the previous residence to be said to be resuming it rather than commencing a new period of residence.

Example 1

The claimant, a United Kingdom national, lived and worked in the United Kingdom before moving to Germany where he worked for several years. He was made redundant and having failed to find work in Germany for three months he returned to the United Kingdom where he had family and friends. On claiming income-based Jobseeker's Allowance he stated that his intention was to find work and remain permanently in the United Kingdom. Jobseeker's Allowance was awarded because he was resuming a previous habitual residence.

Example 2

Martina is an Italian national. Starting in 1990 she spent a year in the United Kingdom studying English followed by a period of 6 months working in a London hotel. Martina then returned to Italy where she worked for 20 years following which she spent 2 years looking after her aged father. She returned to the United Kingdom in January 2013 and claimed income-based Jobseeker's Allowance. It emerged that Martina's father had died. She had been unable to find work in Italy and (apart from sending Christmas cards to a friend she had made while studying English) she had not maintained any links with the United Kingdom. The decision maker decided that Martina would need to live here for an appropriate period before her residence became habitual.

073752 – 073755

Factors to take into account

073756 When deciding where a person is habitually resident for European Community law, the decision maker should take into account the

1. person's main centre of interest¹
2. length and continuity of residence in a particular country
3. length and purpose of the absence from that country
4. nature of the employment found in the other country to which the person moved for a time **and**
5. intention of the claimant.

Note: This is not an exhaustive or conclusive list. There may be other factors that are important in deciding whether a person is habitually resident in an individual case.

1 Case 76/76 Di Paolo; R(U) 7/85; R(U) 8/88

073757

Centre of interest

073758 People who maintain their centre of interest in the United Kingdom, for example a home, a job, friends, membership of clubs, are likely to be habitually resident in the United Kingdom. People who have retained their centre of interest in another country and have no particular ties here are unlikely to be habitually resident in the United Kingdom.

073759

Length and continuity of residence

073760 A person who has a home or close family in another country would normally retain habitual residence in that country. A person who has previously lived in several different countries but has now moved permanently to the United Kingdom may be habitually resident here.

073761

Length and purpose of absence

073762 Where a person spends time away from the United Kingdom, the decision maker should consider the frequency, length and purpose of the absences and decide whether habitual residence in the United Kingdom has been lost. If a person who is working abroad returns frequently, for example to visit family or because a home has been retained here, it is likely that habitual residence in the United Kingdom has not been lost. Infrequent visits or the purchase of a home abroad may point to the opposite.

073763

Employment

073764 The claimant's employment record and in particular the nature of any previous occupation and plans for the future are relevant. A person with the offer of genuine and effective work in the United Kingdom, whether full time or part time is likely to be habitually resident here.

073765

Intentions

073766 The fact that a person may intend to live in the United Kingdom for the foreseeable future does not, of itself, mean that habitual residence has been established. However, the claimant's intentions along with other factors, for example the purchase of a home in the United Kingdom and the disposal of property abroad may indicate that the claimant is habitually resident in the United Kingdom.

073767 A claimant who intends to reside in the United Kingdom for only a short period, for example on holiday, to visit friends or for medical treatment, is unlikely to be habitually resident in the United Kingdom.

073768 Jobseekers do not come within the scope of the Regulations and Directives¹ which define 'workers' for the purpose of deeming the satisfaction of the habitual residence test and European Economic Area nationals who are seeking work in the United Kingdom may be subject to the test if they have no established link with the United Kingdom employment market².

1 Regulation 1612/68; Directive 2004/38/EC;

2 Case C-138/02 Collins v Secretary of State for Work and Pensions

073769 However citizens of the European Union are entitled not to be discriminated against whether or not they come within the scope of the Regulations and Directives which apply to 'workers'¹. In a judgment of the European Court of Justice² it was held that although the habitual residence test discriminated against work seekers, because it could be satisfied more easily by United Kingdom nationals than by nationals of other Member States, that discrimination was not unlawful if it could be justified on the basis of objective criteria independent of nationality. The test had to be proportionate to the legitimate aim of ensuring that there is a genuine link between a claimant and the geographic employment market in question. When this case returned to the domestic courts the Court of Appeal concluded that the habitual residence test was not incompatible with European Community law³.

1 Treaty of Rome art 12 & 17; Case C-184/99 (Grzelczyk); 2 Case C-138/02 (Collins);

3 Collins v SSWP [2006] EWCA Civ 376

073770 The period required for the Secretary of State to be satisfied that there is a genuine link with the United Kingdom employment market is not defined and must be considered in the light of the circumstances. However it should be long enough to demonstrate the sustained nature and relevance of the search. The Commissioner has held¹ that the period was not sufficient in a case where the claimant

1. had not previously worked in any Member State other than temporary work in the United Kingdom 17 years previously

2. had not made any real enquiries about work before arriving in the country
3. had not made any arrangements for accommodation and was staying with a friend
4. was single with no dependents
5. had close family and a bank account in the United States of America
6. had a return ticket to the United States of America (although that was bought because it was cheaper than a single)
7. had been looking for work for no more than a month.

The Commissioner further expressed the opinion that, in the circumstances, a further month of residence and work search would not be enough even though at the end of that time the claimant found work that was full time but not in the sector in which he was particularly interested.

1 R(JSA) 3/06, para 50

073771 – 073779