

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

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Chapter 07 - Part 3 - Habitual residence and right to reside - IS/JSA/SPC/ESA

European legislation referred to in Chapter 07 - Part 3

Full title	Abbreviation
Council Regulation (EEC) No. 1612/68	Reg (EEC) 1612/68
Council Regulation (EEC) No. 1408/71	Reg (EEC) 1408/71
Council Directive No 2004/38/EC	Directive 2004/38/EC
Regulation (EC) No. 883/2004	Reg (EC) 883/04
Regulation (EC) No. 987/2009	Reg (EC) 987/09
Treaty on European Union	TEU
Treaty on the Functioning of the European Union	TFEU

Habitual residence

Introduction

072770 The habitual residence test applies to IS, JSA(IB), ESA(IR) and SPC. A claimant who is not habitually resident in the CTA

1. is a person from abroad and has an applicable amount of nil for IS, JSA(IB) and ESA(IR)¹ **and**
2. is treated as not in GB for SPC².

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

072771 Regulations¹ provide that a claimant cannot be habitually resident unless he has the right to reside in the CTA (see DMG 073230). However certain types of EU rights to reside do not count² (see DMG 073450 et seq).

*1 IS (Gen) Regs, reg 21AA; JSA Regs, reg 85A; ESA Regs, reg 70(2); SPC Regs, reg 2;
2 IS (Gen) Regs, reg 21AA (3); JSA Regs, reg 85A(3); ESA Regs, reg 70(3); SPC Regs, 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 EC law but in both instances the expression should be given its ordinary and natural meaning. DMs 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 UK, the Channel Islands, the Isle of Man or the Republic of Ireland. This is known as the Common Travel Area (CTA)¹.

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

072787 - 072790

When the test should be applied

072791 If other conditions of entitlement to benefit are satisfied the DM should consider whether the claimant is excluded from benefit by being a PSIC. If not the DM should consider

1. whether the claimant is excluded from treatment as a person from abroad in consequence of EC law or under other specific exclusions **if not**
2. whether the claimant has the right to reside in the CTA **and**
3. whether that right to reside is excluded.

If the claimant has the right to reside in the CTA which is not excluded the DM 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 CTA (for instance, where a PSIC is granted British citizenship).

072793 - 072799

Persons who are not a “person from abroad/person not in Great Britain”

072800 A claimant who

1. is an EEA national and a qualified person as a worker or a S/E person under EU law¹ (see DMG 072810 & 072481) **or**
2. is an EEA national who retains worker or S/E status under EU 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 073181) **or**
5. is a refugee⁵ (see DMG 073183) **or**
6. is a person who⁶
 - 6.1 has been granted discretionary leave to enter or remain in the UK outside the Immigration Rules (see DMG 073187) **or**
 - 6.2 has been granted leave to remain outside the Immigration Rules under the Domestic Violence concession (see DMG 073191) **or**
 - 6.3 is deemed to have been granted leave outside the Immigration Rules by virtue of specific legislation⁷ which, in accordance with an EU directive⁸ provides temporary protection to persons affected when the Council of the EU decides that there is (or will be) a mass influx of displaced persons who cannot return to their country of origin.

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

7 has humanitarian protection granted under the Immigration Rules⁹ (see DMG 073183) **or**

8. is a person who is not subject to immigration control and who is in the UK as a result of his deportation, expulsion or other removal by compulsion of law from another country to the UK¹⁰

is neither a person from abroad nor a person not in GB.

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, reg 21AA(4)(h); JSA Regs, reg 85A(4)(h); ESA Regs, reg 70(4)(h); SPC Regs, reg 2(4)(h); 7 Displaced Persons (Temporary Protection) Regs 2005, reg 3; 8 Directive 2001/55/EC; 9 IS (Gen) Regs, reg 21AA(4)(hh); JSA Regs, reg 85A(4)(hh); ESA Regs, reg 70(4)(i); SPC Regs, reg 2(4)(hh); 10 IS (Gen) Regs, reg 21AA(4)(i); JSA Regs, reg 85A(4)(i); ESA Regs, reg 70(4)(j); SPC Regs, 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 HRT of those Croatians covered by DMG 073678.

072802 - 072809

Workers

072810 A national of another EEA state who is in genuine and effective employment in the UK is a worker for EU purposes¹. 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 EU regulations² and is subject to the habitual residence test (but see DMG 073768).

*1 Imm (EEA) Regs, 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 EU 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 sufficient, DMs should consider the preliminary question of whether the claimant is genuinely exercising their EU rights as a “worker”. In deciding this question, DMs 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 DMs 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 EU rights as a worker.

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

Example

Thijs is a Dutch national. He first came to the UK in 1999 and has resided in the UK ever since. He claimed IS on 2.1.13. The DM established that the only work Thijs

had done in the UK 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 DM concluded that Thijs was not a worker and that accordingly he had not retained worker status.

072812 - 072815

Genuine and effective work

072816 The DM 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 EC law the DM should decide each case on its own merit. The DM should take account of all work done in the UK 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 also DMG 073049 et seq for further guidance in relation to genuine and effective work.

Example

An EEA national arrives in the UK 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 JSA immediately on arrival. The claimant is not a refugee and has not been given discretionary leave to remain in the UK.

The DM considers whether the work in the UK was genuine and effective. As she only worked for a few hours a week, in work that was irregular and low paid the DM 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 EC purposes and retain a right to residence in the UK as long as the work is genuine and effective.

Example

An EEA national who claims JSA shows that he has been working for three hours per day, five days per week for the last four months. The DM 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

072821 A worker retains worker status when he stops working if

1. he is temporarily unable to work due to illness or accident¹ **or**

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

2. he is in duly recorded involuntary unemployment after having been employed in the UK, as long as he has registered as a jobseeker with the relevant employment office **and**

2.1 he was employed for **a year or more** before becoming unemployed **or**

2.2 he has been unemployed for no more than six months **or**

2.3 he can provide evidence that he is seeking employment in the UK and has a genuine chance of being engaged³ **or**

3. he is involuntarily unemployed and has started vocational training⁴ **or**

4. he has voluntarily stopped working and has started vocational training which is related to his last employment⁵.

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

3 Imm (EEA) Regs, reg 6(2)(b); 4 reg 6(2)(c); 5 reg 6(2)(d)

072822 DMG 072821 **2.** sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee for one year or more and then becomes involuntarily unemployed. This paragraph sets out the conditions for a right to reside as a worker who retains worker status after having worked as an employee in the UK for **less than one year**. A person who¹

1. has registered as a jobseeker with the relevant employment office **and**
2. is in duly recorded involuntary unemployment after having been in genuine and effective employment for **less than one year**

will only retain worker status for a maximum of 6 months from the date on which the person first became involuntarily unemployed².

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

1 Imm (EEA) Regs, reg 6(2)(ba); 2 reg 6(2A)

072823 - 072825

Meaning of “registered as a jobseeker”

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

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

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

072827 Consequently, with effect from 18.12.09 onwards where a claimant

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

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

072828 - 072840

Self-employed persons

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

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

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

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

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

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

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

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

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

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

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

072844 - 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, reg 6(3); R (on the application of Marian Tilianu) v Social Fund Inspector and SSWP [2010] EWCA Civ 1397

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

072862 - 072899

Family members of workers and self-employed persons

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

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

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

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

Meaning of “dependent”

072901 A UT Judge has analysed the EU case law on the meaning of “dependent” in this context. He summarised that case law¹ as finding that²

1. a person is only dependent who actually receives support from another **and**
2. there need be no right to that support and it is irrelevant that there are alternative sources of support available **and**
3. that support must be material, 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

072902 - 072985

Three Month Residence Requirement

072986 With effect from 1.1.14 (in addition to the right to reside requirement) a JSA(IB) claimant (who is not in the exempt group) (see DMG 072800) cannot be treated as habitually resident in the UK, 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 JSA(IB). Where the three month rule condition is met and the claimant has a qualifying right to reside, the DM 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 UK.

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, reg 85A(2)(a)

Example 1

Milan is a Belgian citizen. He entered the UK for the first time on 6.1.14 to look for work. He was unable to find a job and claimed JSA(IB). 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 DM decided that Milan could not be treated as habitually resident in the UK until 6.4.14. He was therefore a person from abroad with an applicable amount of nil. The DM accordingly disallowed the claim.

Example 2

Andreea is a Romanian citizen. She arrived in the UK for the first time on 2.1.14 in order to look for work. The date of her claim for JSA(IB) was 7.4.14. There was no question of backdating. On 10.4.14, the DM decided the claim. The DM decided that the claimant had an EU law right to reside in the UK as a jobseeker. She determined that the claimant had completed a period of three months living in the UK on 1.4.14. Finally the DM also concluded that Andreea was (actually) habitually resident in the UK as at the date of claim. The DM therefore decided that Andreea was entitled to JSA(IB) and made an award accordingly.

072987 - 072989

Applying the Three Month Rule

072990 In deciding whether there is entitlement to JSA(IB) where the three month rule applies, DMs 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 02428). If the three months is completed during that period the DM will need to make a decision that the claimant

1. is not entitled to JSA from the date of claim up to and including the date before the three month rule is satisfied, **and**
2. is entitled to JSA(IB) from the first day on which the three month rule is satisfied.

Example

Hans is a German national. He entered the UK for the first time on 2.1.14, in order to look for work. He was unable to find a job and claimed JSA(IB) on 24.3.14. The DM decided the claim on 4.4.14. The DM determined that Hans had completed three months living in the UK on 1.4.14 and accordingly decided that Hans was not entitled to JSA(IB) 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 CTA, the DM will have to make a judgement as to whether the claimant ceased to be “living in” the CTA during that absence. It is not possible for this guidance to deal with all the circumstances in which a temporary absence from the CTA will mean that a person has or has not ceased to be living in the CTA. DMs 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 UK to look for work. Having been unable to find a job he claimed JSA(IB). 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 UK 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 DM decided that, as at 14.4.14, Louis had lived in the UK continuously for 3 months. The 2 week absence did not mean that Louis had ceased to live in the UK.

Example 2

Mia is a German national. She came to the UK 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 UK 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 no work in Germany during that time. When she came back (again alone) to the UK on 30.3.14, she took up a 6 month tenancy on a flat. On 7.4.14 Mia claimed JSA(IB). On 8.4.14, the DM decided that Mia had a right to reside as a jobseeker but that she was not to be treated as habitually resident in the UK because she had not lived here for the three months prior to her claim. The DM therefore decided that Mia was not entitled to JSA(IB).

072997

Saving Rule

072998 The three month rule does not apply to a claim for JSA(IB) 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 UK 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 JSA(IB) on 31.12.13. The DM decided that the three month rule did not apply to her. The DM proceeded to consider whether Tereza was actually habitually resident in the UK.

Example 2

Rasmus is an Estonian national. He entered the UK for the first time on 9.12.13. He was unable to find any work and he claimed JSA(IB) on 2.1.14. The DM 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 DM therefore concluded that the three month rule did not apply to Rasmus and proceeded to consider whether Rasmus was actually habitually resident in the UK.

JSA(Cont)

072999 The habitual residence test (including the new three month rule) does not apply to JSA(Cont).

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 UK, EEA and non EEA nationals who originally left the UK 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 Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2014, reg 1; 2 JSA Regs, reg 85A

073012

Person from abroad

073013 A person cannot be treated as habitually resident unless they have been living in the CTA for a qualifying period of three months and they have a right to reside in the CTA. A claimant who is not habitually resident in the CTA is a person from abroad, who has an applicable amount of Nil and is therefore not entitled to JSA(IB)¹.

1 JSA Regs, reg 85, 85A & Sch 5, para 14

073014 The introduction of the three month residence requirement (see DMG 072986 – 072999) limits access to benefits for all UK and EEA jobseekers until they have established residency in the UK and a link to the UK labour market. This has affected individuals who were previously habitually resident in the UK but left as a result of accepting a posting to work abroad for a period exceeding three months and subsequently returned to the UK 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 UK economy during this absence, for example by making Class 1 or Class 2 National Insurance Contributions (NICs) whilst working abroad. The exemption can apply to a returning UK, EEA and non-EEA posted worker with a right to reside in the CTA.

1 JSA Regs, reg 85A

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

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

1 JSA Regs, 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 NICs² 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 CTA, 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, reg 85A(2A); 2 Social Security (Contributions) Regulations 2001, reg114, 118, 146, 147 or SS A Act 92, s 179; 3 JSA Regs, 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 UK NICs, 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 S/E persons who have continued to pay Class 2 NICs whilst working abroad and those NICs 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 NICs have been paid via direct debit.

Example 1

Georg, an Austrian national, has been resident and working in genuine and effective employment in the UK 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 UK where he makes a claim to JSA. Georg provides a pay slip which shows that at some time during the three month period prior to making his claim to JSA, he has paid Class 1 UK NICs for the period whilst working in Spain. The DM therefore determines that Georg is an EEA posted worker and is therefore exempt from the three month residence requirement, so can immediately be treated as habitually resident. Georg is entitled to JSA as a jobseeker for a total period of 6 months before being subject to a GPoW assessment.

Example 2

Enora, a Belgian national, is resident and working in the UK 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 UK NICs. On completion of that 4 month period in Paris, Enora's contract ends and she is returned to the UK where she immediately makes a claim to JSA. The DM determines that as Enora has paid Class 1 UK NICs at some time during the three month period prior to making her claim to JSA, she is a posted worker who is exempt from the three month residence requirement and is entitled to JSA for a period of 6 months before being subject to a GPoW assessment.

Example 3

Alec, a UK national, was posted to his company's Madrid branch where he continued to pay Class 1 UK NICs. When the company downsized Alec lost his job so immediately returned to the UK and made a claim to JSA. As he had been paying UK NICs 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 DM determined that he was a UK national with a right of abode and could be treated as habitually resident immediately on his return to the UK.

Example 4

Keith, a UK national, took a job with a UK-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 UK NICs. Keith's contract ended at the end of the holiday season in September that year and immediately returned to the UK and made a claim to JSA. Keith was living outside the UK for the previous 5 months. As he had not lived in the UK for 3 months prior to his claim and had not paid UK NICs at any point during these 3 months, the DM determined that Keith could not be treated as habitually resident immediately on his return to the UK.

Note: DMs should be mindful of the potential for JSA(Cont) entitlement from exporting contributions that have been paid abroad (see DMG 075333).

073020

EEA jobseeker

073021 An EEA 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 JSA for a period of 3 months + 91 days before being subject to a GPoW assessment.

073022

Meaning of Crown Servant

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

1 JSA Regs, reg 1(3)

073024

Meaning of Her Majesty's Forces

073025 Her Majesty's forces¹ has the meaning given in specified legislation².

1 JSA Regs, reg 1(3); 2 Armed Forces Act 2006

073026

Savings provision

073027 The exceptions at DMG 073017 do not apply to a claim for JSA 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 Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2014, reg 4

073028 - 073030

Minimum Earnings Threshold

073031 Persons with certain rights to reside are deemed not to be persons from abroad¹ (see DMG 072810). Consequently for the purposes of JSA(IB), IS, ESA(IR) and SPC they do not have to satisfy the requirement that

1. they have lived in one of the territories of the CTA 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, reg 21AA(4); JSA Regs, reg 85A(4); ESA Regs, reg 70(4); SPC Regs, reg 2(4)

073032 Amongst this exempt group are EEA nationals who are

1. workers **or**
2. persons who retain their worker status because
 - 2.1 they are in duly recorded involuntary employment after having been employed in the UK, as long as they have registered as a jobseeker with the relevant employment office **or**

2.2 work as an employee in the UK has stopped because the person is temporarily unable to work due to illness or accident **or**

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

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

073033 - 073034

Meaning of “worker” – two tier approach

073035 It is well established in EU law that, in order to be a worker or self-employed, the person must be doing work which genuine and effective and is not on such a small scale as to be marginal and ancillary¹. In order to clarify the position for DMs 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 EEA national was in genuine and effective work assessed against a set of secondary criteria.

With respect to claims for and entitlement to JSA(IB), this two tier assessment process must be applied with effect from 1.3.14. With respect to claims for entitlement to IS and ESA(IR), the two tier assessment process should be applied from 6.10.14 and in respect of SPC, from 3.11.14.

1 Case C-53/81 D.M. Levin v Staatssecretaris van Justitie

073036 - 073037

Tier 1 – Minimum Earnings Threshold

073038 An EEA 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 EU law if

- 1.** their average gross earnings from employment or self-employment in the UK were more than £646 pcm (£149 a week) in 2013/14, and or £663 pcm (£153 a week) in 2014/15, **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, DMs should accept that the work activity was genuine and effective and that while the work was done, the EEA national had worker or self-employed status, as appropriate, in EU 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 HMRC Primary Earnings Threshold (PET), which is the point at which employees must pay Class 1 National Insurance Contributions. Self-employed have to pay Class 2 and Class 4 NICs around this point too. As the PET level is uprated every April, DMs should ensure that they use the PET level relevant to the 3 month period of earnings under consideration. Where this period spans the April PET uprating, DMs should use the pre-uprating PET rate for the entire 3 month period.

073039

Tier 2 – Minimum Earnings Threshold criteria not met

073040 In all cases where an EEA 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 DM will need to examine each case as a whole, taking account of all circumstances, to determine whether the EEA 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 or 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 EU and specified legislation¹ defines "worker" as meaning a worker within the meaning of Article 45 (see DMG 072810 – 072811).

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

073043 The following principles can be derived from EU case law

1. The term "worker" has an EU law meaning¹ and may not be interpreted restrictively²
2. The term "worker" applies to employees rather than the self-employed. In EU 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 UK, 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 DM will need to consider two questions

1. Is the person exercising their EU 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 EU 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, DMs may consider the preliminary question of whether the claimant is genuinely exercising their EU rights as a “worker”.

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

073047 In deciding this question, DMs 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 EU 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).

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

073048

Genuine and Effective Work

073049 Provided the DM is satisfied that the claimant is in fact exercising his rights as a worker in accordance with DMG 073046 - 073047 above, then the DM 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 DM 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 EC purposes and retain a right to residence in the UK 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.

Example 1

An EEA national arrives in the UK 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 JSA immediately on arrival on 10.3.14. The claimant has not been given discretionary leave to remain in the UK. As the earnings were clearly below the Minimum Earnings Threshold, the DM considered whether the work in the UK was genuine and effective. The DM 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 DM therefore decided that the claimant is not a “worker”. The DM 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 UK for the three months immediately before the date of claim (see DMG 072986 – 072999). The DM decided that the claimant had not satisfied this condition and that therefore she was a person from abroad and thus not entitled to JSA(IB).

Example 2

Wolfgang is a German national who came to the UK 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 JSA(IB). The DM considered that the claimant had not yet been in the UK 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 DM 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 UK to look for work. In October 2013 he claimed ESA. 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 DM 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 ESA(IR). In particular the claimant wasn't a person who retained worker status because he had never been a "worker" in the UK. 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 UK 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 SSP 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 ESA was made on 2.6.13. The DM 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 DM 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 DM 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 DM therefore decided that the claimant did not have a qualifying right to reside and for the purposes of ESA(IR) she was a person from abroad" with an applicable amount of nil.

Example 5

An EEA national who claims ESA(IR) shows that he has been working for three hours per day, five days a week for the last four months. The DM 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". The UT 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 073224 in relation to self-employment and the CJEU 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 NI) are more than £646 pcm (£149 pw) (see **Note 2** below) **and**
2. average profits have been at or above that level for a continuous period of 3 months

the DM should accept that the self-employment is genuine and effective and they can be considered as self-employed persons under EU law.

Note 1: If average profits are less than £646 pcm (£149 pw) (see **Note 2** below) and/or have not been at or above that level for a continuous period of 3 months, the DM 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 the HMRC Primary Earnings Threshold (PET), which is the point at which employees must pay Class 1 National Insurance Contributions. Self-employed have to pay Class 2 and Class 4 NICs around this point too. As the PET level is uprated every April, DMs should ensure that they use the PET level relevant to the 3 month period of earnings under consideration. Where this period spans the April PET uprating, DMs should use the pre-uprating PET rate for the entire 3 month period.

073058 DMs should exercise care in applying the guidance on EU 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 UK in 4.1.14. He claimed JSA on 11.2.14. 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 DM 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 DM 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 UK for the 3 months period immediately prior to the date of claim. The DM decided therefore that the claimant was a person from abroad and not entitled to JSA(IB).

Example 2

The claimant was a French national. She came to the UK on 6.10.14 and claimed SPC 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 DM 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 SPC accordingly.

073059 – 073079

Genuine Prospects of Work - (GPoW) - JSA(IB)

Introduction

073080 EEA nationals who have been unemployed and claiming JSA for 6 months will lose their EU right to reside in the UK, **unless** they provide **compelling evidence** that they are continuing to seek employment and that they have a genuine prospects of work. In which case, a short extra period of JSA(IB) will be allowed. In practice, even though these amendments to Immigration legislation take effect from 1.1.14, the first GPoW assessments take place in July.

Note: This paragraph will not apply to anyone with a right to reside other than as a jobseeker or person retaining worker status (see DMG 073230 et seq)

073081 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 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 UK in order to seek employment² or

- 1.2** is present in the UK 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 prospect of work⁴.

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

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

Retaining Worker Status

073085 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 UK for less than one year

073086 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 UK for **less than one year**

will only retain worker status for a maximum of 6 months from the date on which they first became involuntarily unemployed².

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

1 Imm (EEA) Regs, reg 6(2)(ba); 2 reg 6(2A)

073087 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 GPoW assessment at the end of 6 months and the reclaiming rules apply (see DMG 073111).

073088 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 JSA **and**
- 3.** receive JSA for 6 months before having a GPoW assessment.

073089

Employed in the UK for one year or more

073090 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 UK for a year or more **and**
3. can provide evidence that they are seeking employment and have a genuine prospect of work

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 prospect of work² (see DMG 073099). Transitional provisions³ provide that any period of duly recorded involuntary unemployment or any period during which a person is a jobseeker, prior to 1.1.14, should be disregarded.

1 Imm (EEA) Regs, reg 6(2)(b), (5) & (6); 2 reg 6(7); 3 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013, Sch 3, para 1(b)

073091

The Genuine Prospect of Work Test

073092 With effect from 1.1.14, an EEA 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 073085 to 073090

for longer than the relevant period unless they can provide **compelling evidence** that they are continuing to seek employment and have a **genuine prospect of work**¹.

1 Imm (EEA) regs, reg 6(7)

The Relevant Period

073093 The meaning of the relevant period

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 months¹ **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 UK of at least 12 months².

Note 1: In practice, prior to 10.11.14 when the relevant period for a jobseeker was 182 days (see **Note 2**), DMs should not apply the distinction between the relevant periods in **1.** and **2.** above. DMs 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, reg 6(8)(a), 2 reg 6(8)(b)

When does the relevant period start?

073094 The relevant period starts from the first day of any successful claim to JSA 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 The relevant period starts from the date of the successful claim to JSA, where the 3 month residence requirement has already been satisfied.

073096 - 073098

Compelling Evidence

073099 The DM can extend the claimant's JSA entitlement where the claimant has provided compelling evidence that a change of their circumstances as set out below has now given them a genuine prospect of work -

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) provided that job is due to start within 3 months starting from the relevant period plus 1 day point. In this case the relevant period can be 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 by up to 2 months. Any extension is backdated to the date of change. However, time within the current relevant period is disregarded and as such, any change that occurs more than 2 months before the last day of the relevant period will not, in practice, result in any extension beyond the six month point.

Note: Examples of a change in circumstances could include evidence of recent completion of a vocational training course, or a recent change of location to improve

labour market conditions, which may significantly improve the claimant's genuine prospect of employment. Using these examples, the date of change would be the date that any qualification was awarded from, or the date that the claimant moved into a different labour market area.

073100 The DM should accept there is compelling evidence if

1. the claimant has a definite job offer of genuine and effective work **or**
2. the evidence presented of their change in circumstances indicates that it is likely the claimant will receive a job offer imminently. The DM should note that it is irrelevant whether the evidence is compelling if the change in circumstances does not meet the "date of change" requirement stated at DMG 073099 **2.** above.

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

Example 1

Pavel, a Polish national attends his GPoW assessment interview on 1.8.14 and provides a letter from an employer. This shows that Pavel has been offered a job which is due to start on 11.8.14. The position is permanent and the pay will be £200 per week. As the work is genuine and effective the DM grants an extension until 10.8.14. A week later Pavel returns with another letter from the employer. Because of the nature of the work, employees cannot start without a security check and, unfortunately, these are taking longer than expected. Pavel will not be able to start work until 26.8.14. The DM determines that as the delay is outside Pavel's control but the work is still due to start within 3 months an extension is appropriate until 25.8.14.

Example 2

Solange, a Portuguese national, has been a jobseeker for the relevant period and attends her GPoW assessment interview on 23.7.14. She provides a letter saying that she is due to start genuine and effective work on 11.8.14. The original job advert shows that the work was due to start by 28.7.14. There is evidence that Solange has notified the Jobcentre that she will be going on holiday in England between 28.7.14 and 8.8.14. At that time she stated that she would be continuing to look for work and able to return if work was offered. When asked why she was not starting work earlier, Solange states that when she told the employer that she was going to be on holiday so would not be able to start when advertised, the employer said she could hold the job until her return. The DM determines that Solange has demonstrated that she has a genuine prospect of work. The DM therefore determines that Solange is entitled to an extension until 27.7.14. The extension does not cover the period of her holiday. As she did not return to take up work at the time the job was due to start, the Jobcentre should consider whether Labour Market action for an Availability doubt is appropriate.

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 UK.

The DM determines that, in the field in which Christophe is now looking, at this time of year and this area he has a genuine prospect of work. As Christophe has only recently relocated the DM determines that an extension is appropriate. The DM 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 DM 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 JSA for the relevant period and has been invited to attend a GPoW 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 DM 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 DM determines that Magda has not shown that she has a genuine prospect of work in the near future and an extension is not appropriate. The DM 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 GPoW assessment on 1.8.14 as he has now been in receipt of JSA 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 DM 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 DM therefore determines that Kurt has not provided compelling evidence to show a genuine prospect of work. Kurt no longer has a right to reside as either a retained worker or a jobseeker and consequently must be treated as a person from abroad. His applicable amount for JSA(IB) is nil from the GPoW assessment due date.

Other relevant considerations

073101 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, reg 6(8)

073102 Where a claimant who was previously claiming JSA and whose claim ended before the GPoW assessments makes a subsequent claim to JSA, then they always 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 UK 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 JSA, for 6 months. At the end of that 6 month period, the GPoW assessment is conducted as normal.

073103 – 073105

JSA(Cont)

073106 JSA(Cont) 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 JSA(Cont) only and then later become entitled to JSA(IB). Time spent on JSA(Cont) would only be relevant to the GPoW assessment, where a person, reaching their 6

month point for receiving JSA(Cont), seeks to transfer from JSA(Cont) to JSA(IB).

Note 1: Whilst JSA(Cont) is limited to 6 months, this is a separate period to the relevant GPoW period.

Note 2: In some circumstances JSA(IB) can be paid in addition to JSA(Cont) (see DMG Chapter 23 for guidance).

073107 Only periods of entitlement to JSA(Cont) or JSA(IB) 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 HRT. However, the period of a JSA(Cont) claim can be taken into account when calculating the balance of time to the GPoW end date.

Example 1

Salvatore, an Italian national, first came to the UK on 31.1.14 and immediately claimed JSA. Although he had jobseeker status he had not been in the UK 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 JSA(IB). He now satisfied the 3 month residency requirements and was subsequently able to satisfy the HRT and general JSA entitlement conditions. Accordingly, the DM decided he was entitled to JSA(IB) from 1.5.14. On 16.6.14 Salvatore ended his claim to JSA. Salvatore made a new claim to JSA on 18.8.14.

The DM considered that Salvatore satisfied the 3 month residence requirement (he had not left the UK or CTA between his two claims) and satisfied the HRT as an EEA jobseeker. The DM then had to consider Salvatore's previous claims when calculating date for the GPoW. When calculating part months an average month is 30 whole days (this is based on 365/12). The DM did not include the period 1.2.14 – 30.4.14 as this was prior to a successful claim to JSA, 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 DM determined that Salvatore's GPoW due date was 1.1.15.

Example 2

Maria, a Dutch national, has been living and working in the UK for 3 years when she is laid off due to a downturn in the business. She claims JSA(Cont). Although this is not subject to HRT she was given the GPoW fact sheet at her New Jobseeker Interview.

After 6 months her JSA(Cont) exhausts and she completes a claim for JSA(IB). The DM determines that she has already been claiming JSA for 6 months (during which time she had a right to reside as a person who retained worker status) her GPoW is due immediately and must be completed before a final decision can be given on her right to reside. If she cannot show a GPoW at this time, she will no longer have a right to reside as either a retained worker or a jobseeker and her entitlement to JSA will end.

073108 Certain interruptions will be disregarded in calculating when the relevant period ends. Where the claimant offers evidence at their GPoW 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 GPoW 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 **or**
2. temporary absence from GB (see DMG 075350 et seq) **or**
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 JSA made after GPoW assessment

073111 Where a claimant makes a further claim to JSA after having a GPoW assessment and they

1. obtained genuine and effective work and had worker status through that job **or**
2. had been outside the UK for
 - 2.1 a continuous period of 12 months or more **or**
 - 2.2 less than 12 months, and they satisfy the GPoW at the point of this further claim

they may be entitled to a new period on JSA¹. They must satisfy the HRT, and if they have had more than a short absence from the UK, 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 JSA before a GPoW assessment is due.

If **2.2** applies (i.e. they have been absent from UK for less than 12 months and at the point of this claim they have met the compelling evidence² requirements for the GPoW at DMG 073100), they are entitled to claim JSA up until the job start date (if they have one) or for the relevant period, followed by a GPoW assessment.

If neither **1.** or **2.1** or **2.2** are met, the claimant is not entitled to JSA.

1 Imm (EEA) Regs, reg 6(9); 2 reg 6(11)

Genuine and effective work

073112 DMs 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 If, following the examination of the case

1. the DM 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 DM 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 Where a claimant is undertaking work activity at the date of claim which (although part-time) is determined by the DM 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 GPoW while they have this status. The right to reside status should be reviewed if the work activity ends.

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

073121 Where a claimant is undertaking work activity at the date of claim which is not determined by the DM 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 GPoW assessment as usual.

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

What happens if claimant fails GPoW test?

Joint Claims

073122 Where a claimant (claimant 1) loses their right to reside following a GPoW assessment in which they fail to demonstrate a genuine prospect of work, claimant 1 will no longer be entitled to JSA. In circumstances where the claimant's partner (claimant 2) then makes a claim to JSA, 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 JSA 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 GPoW assessment, neither claimant 1 or claimant 2 will be eligible for further JSA unless they can demonstrate a new right to reside in such circumstances as are described in this guidance.

Family Members

073123 DMs will need to be aware that if a JSA claimant has lost their EU rights to reside it may be that there are family members whose EU right to reside derives from the claimant's who will, as a consequence, also lose their EU 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 EEA national, his spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 dependants of his, his spouse or civil partner **or**
3. direct ascendant relatives of the EEA national, his spouse or civil partner, who are dependants.

Where this applies the DM should decide that the claimant is not entitled to JSA(IB). If a family member makes a claim for JSA(IB) the DM should also decide that they are also not entitled to JSA(IB).

Note 1: "Spouse" within this paragraph includes two people of a same sex couple.

Note 2: This may also be the case with regard to extended family members (see DMG 073231 **5.** and 073236).

Note 3: This paragraph also applies to family members who make a claim for IS, ESA(IR) or SPC, whose only EU right to reside is derived from the claimant.

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

073124 - 073140

Right to Reside as a jobseeker - JSA

Introduction

073141 From 1.1.14 Immigration Regulations were amended to restrict the right to reside for EEA jobseekers to six months, unless they provide compelling evidence that they have a genuine prospect of work. Further amendments were introduced from 10.11.14¹ which mean that an EEA national who comes to the UK to look for work will still have a total of six months residence as an EEA jobseeker in the UK, but that this will be made up of the initial three month right of residence², followed by a right to claim JSA(IB) as a jobseeker for the latter 91 days. This also applies where the claimant has resided in the UK for more than 3 months prior to the date of claim. In such cases, the claimant will still only receive JSA for 91 days.

Note 1: For GPoW guidance from 1.1.14, please see DMG 073092 – 073123.

Note 2: An EEA 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 JSA(IB) for 3 months + 91 days (see DMG 072800 and 073011 - 073027).

1 Immigration (European Economic Area) (Amendment) (No.3) Regulations 2014 (2014 No. 2761), reg 1;

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

Relevant period

073142 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 UK as a jobseeker (see DMG 073093 2.) was amended from 182 days to 91 days from 10.11.14¹.

1 Imm (EEA) Regs, regs 6(8)(b) & 6(9)(b)

On entry jobseeker

073143 On or after 10.11.14 an EEA national, who for the first time relies on their right to reside as a jobseeker

1. arrives in the UK **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 JSA made on or after 10.11.14.

Note: Where an EEA national has been resident in the UK for longer than the required three month residence period prior to making a successful claim to JSA, that person would still enjoy 91 days of residence as a jobseeker before undergoing a GPoW assessment.

1 Imm (EEA) Regs, reg 13; 2 reg 6(7) & 6(8)(b)

Example 1

Piotr, a Polish national, came into the UK to seek work in June 2014. He made a claim to JSA on 16.11.14. The DM determined that Piotr had satisfied the three month residence requirement and found him to be factually habitually resident. The DM determined that Piotr's award of JSA(IB) would end after 91 days on 14.2.15, unless Piotr could show genuine prospects of work. Although there was evidence that Piotr had already been in the UK for five months when he made his claim to JSA on 16.11.14, he will be entitled to 91 days, from the start of his successful claim to JSA, before his GPoW 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 UK 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 UK where he makes a claim to JSA. Georg provides a pay slip which shows that at some time during the 3 month period prior to making his claim to JSA, he has paid UK Class 1 NICs for the period whilst working in Spain. The DM therefore determines that Georg is an EEA posted worker and is exempt from the three month residence requirement, so can immediately be treated as habitually resident. Georg is entitled to JSA as a jobseeker for a total period of 3 months + 91 days before being subject to a GPoW assessment.

073144

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

073145 On or after 10.11.14, an EEA national who prior to their claim to JSA

1. exercised a right to reside in the UK 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 JSA, 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 JSA with a different right to reside (see 1.) must not be deducted from the 91 days.

1 Imm (EEA) Regs, reg 6(5)(b); 2 reg 6(9)(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 JSA immediately and was determined to have retained his worker status. He was entitled to six months before his GPoW assessment.

In April 2015, Anton returned to Hungary for 2 weeks to visit his family and his entitlement to JSA ended, having been in receipt of it for approximately 4½ months. On his return to the UK, Anton made a new claim to JSA from 1.5.15. The DM 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 UK during that absence. The DM 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 GPoW, so his relevant period ends on 30.7.15. His GPoW will be booked to take place on or soon after 31.7.15.

073146

Retained worker

073147 An EEA 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, regs 6(7) & 6(8)(a)

Example

Andrzej, an Estonian national, provided evidence at his GPoW 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 JSA from 1.5.15. As he retained his worker status, Andrzej had a new six month period before his GPoW was due.

073148

Absence from the UK of 12 months or more

073149 Before being required to provide compelling evidence that they have a genuine chance of being engaged in employment¹, an EEA jobseeker who is returning to jobseeking following an absence from the UK 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 relevant period as a jobseeker.

1 Imm (EEA) Regs, reg 6(7) & 6(9)(b)

Example

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

Ernst made a new claim to JSA from 4.4.16. As he had previously reached GPoW stage and had then left the UK 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 UK of less than 12 months

073151 Where, since last claiming JSA, the claimant has been out of the UK 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 JSA, 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 GPoW New Claim Assessment” to provide them with the opportunity to demonstrate this.

Note: For guidance relating to the “Post GPoW New Claim Assessment”, please refer to operational guidance.

1 Imm (EEA) Regs, reg 6(9) – 6(11)

Example 1

Nils, a Swedish national, has previously been in receipt of JSA(IB) 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 GPoW stage pending the outcome of some interviews he had attended. However, the expected work did not materialise and when JSA ended Nils returned to Sweden for a month to visit family.

On his return Nils made a new claim to JSA from 3.3.15. His only potential right to reside would be as a jobseeker. As he has only been out of the UK temporarily to visit family, the DM 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 UK during that absence, and could be treated as habitually resident. However as Nils has already had a GPoW decision and has left the UK for less than 12 months, the DM determines that Nils must go through the “Post-GPoW New Claim Assessment” before a final decision can be made on the right to reside. The DM telephones Nils and completes the assessment form over the phone.

Taking into account the information provided by Nils, the DM 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 JSA(IB).

Example 2

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

On 16.3.15 Sergej returned to the UK. 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 JSA from 16.6.15.

Although Sergej had not previously had a GPoW interview, records show that he had exhausted his allowed period before a GPoW was due. As this is the case the DM follows the post GPoW 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 DM determines that Sergej is entitled to a new period of 91 days before GPoW.

073152

Breaks in claim

073153 An EEA jobseeker who breaks their claim before reaching their GPoW 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 JSA (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 GPoW due date (see DMG 073102).

Note 2: Where a claim to JSA 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 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014, reg 4

073154 In the case of an EEA jobseeker who made a claim to JSA on or after 1.1.14, so began their claim with a six month GPoW due date, but who, before reaching their six month GPoW assessment

1. breaks their claim to JSA before 10.11.14 but makes a new claim to JSA on or after 10.11.14 **or**
2. breaks their claim to JSA on or after 10.11.14 then makes a new claim to JSA will only be given the remaining balance (if any) of a 91 day period.

Note 1: An immediate GPoW assessment may be required in some cases.

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

073155

JSA(Cont)

073156 JSA(Cont) is not subject to the Habitual Residence Test. An EEA national who meets the conditions of entitlement to JSA(Cont) will continue to receive JSA(Cont) for a period of six months.

073157 Where a claim is made to JSA, an EEA national who satisfies the conditions for entitlement to both JSA(Cont) and JSA(IB), who does not retain their worker status, would receive JSA(IB) as a jobseeker for 91 days before being required to undergo a GPoW assessment. If at that GPoW 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 JSA(IB) would end. However as their entitlement to JSA(Cont) is for a period of six months, if at the time entitlement to JSA(IB) ends, their entitlement to JSA(Cont) has not yet exhausted, JSA(Cont) would remain in payment after the JSA(IB) ends. For further guidance relating to JSA(Cont), please see DMG 073106 – 073107.

Note: System case controls will be set to notify DMs of entitlement to JSA(C).

Example

Gustav, a Norwegian national, lives with his civil partner who is unable to work due to health problems. He made a claim to JSA from 1.2.15. He satisfied the conditions to receive JSA(Cont), having paid enough NICs during the relevant tax years. However, as he had left his job voluntarily he did not retain worker status. A DM 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 JSA(IB) as he was also claiming for an inactive partner.

Gustav was unable to demonstrate a GPoW when required and could no longer exercise a right to reside as a jobseeker and his entitlement to JSA(IB) ended.

As he was entitled to JSA(Cont) for 182 days this element of the claim remained in payment after the JSA(IB) ended.

Note: JSA(Cont) and JSA(IB) may not always start on the same date (see DMG 073158).

073158 Where an EEA jobseeker makes a claim to JSA and is entitled to JSA(Cont), but as a result of a change of circumstances later becomes entitled to JSA(IB), the calculation of the relevant 91 day period, starts from the point that their JSA(Cont) claim started. An immediate GPoW assessment may be required in some cases.

073159

Joint Claims

073160 DMG 073122 provides guidance on joint claims where claimant 1 loses their right to reside and is no longer entitled to JSA following their failure at a GPoW assessment to demonstrate a genuine prospect of work, and claimant 2 then makes a claim to JSA, 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 GPoW 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 JSA online from 1.1.15 and is awarded JSA(IB). The DM determined that he retained worker status and had six months before GPoW, 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 an HRT interview. On 1.7.15 Louis attended a GPoW interview but could not provide compelling evidence that he had a GPoW. He no longer had a right to reside and his JSA(IB) claim closes. Anne no longer derives rights from him as he has no right to reside.

Following the GPoW decision on Louis' claim, the couple decide that Anne should become the principal claimant. Anne therefore makes a claim to JSA with herself as the principal claimant. An HRT decision is made on Anne. The DM 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 GPoW is due. During this time Louis is able to derive a right to reside from Anne.

073161

Transitional provisions

073162 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 GPoW assessment.

*1 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014, reg 4(1);
2 Imm (EEA) Regs, reg 6(9)*

073163 Where the relevant period in 073162 1. would result in a negative balance, the relevant period is to be treated as though it were zero days¹.

1 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014, reg 4(2)

Example

Antonia, an Italian national, previously made a claim to JSA in May 2014 when it was determined that she had jobseeker status and was awarded JSA(IB) 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 JSA from 24.11.14. The DM 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 GPoW assessment. The DM makes the right to reside decision specifying that Antonia has jobseeker status and that her GPoW is due immediately. An award of benefit must not be made until the GPoW decision is made.

Jobcentre staff call Antonia in for an immediate GPoW 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 DM determines that Antonia has shown a GPoW and is entitled to an extension of her jobseeker status until 14.12.14.

073164 - 073180

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

073181 The general rule on the right of permanent residence requires that EEA nationals and their family members have resided legally in the UK for five years¹ (see DMG 073350 et seq). Workers or S/E persons and their family members, who have ceased activity, acquire the right to reside in the UK permanently without that requirement². To be a “worker or S/E person who has ceased activity” a person must be an EEA 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 UK for at least twelve months before stopping **and**
3. resided in the UK continuously for more than three years before stopping³ **or**
4. stops working in the UK because of a permanent incapacity to work **and**
 - 4.1 has resided in the UK 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 UK⁴ **or**
5. a person who was the family member of a worker or S/E person where
 - 5.1 the worker or S/E person has died **and**
 - 5.2 the family member resided with him immediately before his death **and**
 - 5.3 the worker or S/E person had resided continuously in the UK 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 S/E person is a UK national the conditions on length of residence or time working will not apply⁶.

1 Imm (EEA) Regs, 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)

073182

Refugees/Persons granted humanitarian protection

073183 Refugees¹ are people who are outside their country of origin and are unwilling to return there for fear of persecution because of their

- race
- religion

- nationality
- political opinion
- membership of a social group.

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

073184 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 UK 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 GB for SPC purposes).

073185 The HO 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 EC law common criteria for the identification of persons genuinely in need of international protection are applied across EU 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

073186

Discretionary leave

073187 The HO may alternatively grant discretionary leave outside the immigration rules.

073188 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.

073189 The HO 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 GB for SPC purposes) for as long as the leave lasts, including periods when he/she has applied in time for an extension of leave.

073190

Destitution domestic violence concession

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

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

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

073192 The Home Office consider whether:

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

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

1 Immigration Rules, rule 289B

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

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

resident in the CTA¹ and therefore (provided they satisfy the other conditions of entitlement) will be eligible for IS, ESA(IR), JSA(IB) or SPC, as the case may be).

1 IS (Gen) Regs, reg 2IAA(4)(h); ESA Reg, reg 70(4)(h); JSA Regs, reg 85A(4)(h); SPC Regs, reg 2(4)(h)

073195 - 073199

Asylum seekers

073200 A person who is awaiting a decision on an application for asylum is given temporary admission and is lawfully present in GB¹. However, unless and until granted asylum, an asylum seeker is a person subject to immigration control (PSIC).

1 R(IS) 2/06

073201 A PSIC is not normally entitled to any benefits¹ (see DMG 070831 et seq) but there are some exceptions (see DMG 070835). For means-tested benefits these exceptions include any nationals of countries which have ratified either ECSMA or CESC who are lawfully present in GB².

1 I & A Act 99, s 115; 2 SS (Immigration & Asylum) Consequential Regs 2000, reg 2(1) & Para 4 of Sch Part 1

073202 Therefore an asylum seeker from Croatia, 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

073203 – 073209

CJEU Judgment Saint Prix v. SSWP

Introduction

073210 In its judgment¹, delivered on 19.6.14, the CJEU considered a case involving an EEA national who was exercising a right to reside as a worker in the UK and who ceased work due to pregnancy 11 weeks before her expected date of confinement.

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

073211 The impact of the judgment applies to new IS 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: There may be other benefit claims that may be relevant to this guidance. More complex cases may need referral to DMA Leeds (DMG 073221).

Facts of the case

073212 The claimant – Ms Saint Prix - is a French national who entered the UK 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 IS, 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.

CJEU ruling

073213 In their judgment, the CJEU 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

073214 The CJEU 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 CJEU 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 CJEU 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).

073215 Under domestic legislation, pregnant women in employment are entitled to 26 weeks maternity leave. Where they are not entitled to SMP or MA, they may be able to claim IS¹, 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 an EEA national in Ms Saint Prix's circumstances returned to work within a "reasonable period".

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

DM Action

073216 In line with the Saint Prix judgment, DMs may make an award of IS to an EEA national worker who

1. gives up, or stops seeking, work in the late stages of pregnancy **and**
2. at the outset of their IS 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 IS 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).

073217 To enable DMs 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. does the claimant intend to go back to work?
3. does the claimant have a job to return to?
4. what is the timescale for their return to work?

073218 Where a claimant indicates that they have an intention to return to their previous job or that they will find another job, the DM can award IS 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 IS paid will not be required.

073219 Where the claimant indicates at the outset of the IS 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 IS cannot be awarded.

073220 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 073224).

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 claims 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 expected 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 IS on 12 August (she was not entitled to MA as she had not worked 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 DM considered that Magda had retained worker status (in line with the judgement in Saint Prix). The DM therefore awarded IS 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 JSA as an EEA jobseeker and received this benefit from 5 June 2013. In 2014 while receiving JSA she became pregnant with an expected confinement date of 30 November. Eleven weeks before this date, she claimed IS. The DM considered that Dominique's situation was not covered by the Saint Prix judgment as when she claimed IS (in the late stages of pregnancy) she was a jobseeker. Her claim for IS was therefore disallowed.

Complex cases

- 073221 If DMs are dealing with claims that cannot be resolved using this guidance, please contact DMA Leeds for further assistance.

Entitlement to SMP or MA

- 073222 Pregnant women may be entitled to claim SMP (from their employer) or MA (from the Department) if they had been working. Both are payable for a maximum period of 39 weeks. SMP or the standard rate of MA is generally paid at a higher rate than the standard rate of IS, and entitlement to SMP or MA is not subject to the right to reside test. DMs should therefore ensure that any pregnant EEA national claiming

IS is made aware of a possible entitlement to SMP or MA, as this would likely be more advantageous to claim than IS.

073223

Self-employment

073224 Self-employed persons do not fall within the scope of the Saint Prix judgment. The CJEU only considered the retention of “worker” status under Article 45 TFEU.

073225 - 073229

Right to reside

073230 Regulations¹ provide that a person cannot be habitually resident where he does not have a qualifying right to reside in the CTA 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 UK is determined by domestic nationality and immigration law for non-EEA nationals and by EU law and domestic immigration law for EEA nationals arriving in the UK and claiming free movement rights³.

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

073231 The following persons have the right to reside in the UK and therefore in the CTA

1. UK nationals (including persons from other countries who are granted British citizenship) **or**
2. all EEA nationals and their family members with an initial right of residence **or**
3. “qualified persons” **or**
4. family members of “qualified persons” or EEA nationals with a permanent right of residence **or**
5. extended family members of “qualified persons” or EEA 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 parent and primary carer of the child of a migrant worker who is in education in the UK.

Note: this list is not exhaustive.

073232 - 073235

Extended right of residence

073236 Qualified persons have the right to reside in the UK for as long as they remain qualified persons. Family members of qualified persons and of EEA nationals with a permanent right of residence are entitled to reside in the UK 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” is an EEA national who is in the UK and, by virtue of EU legislation, is

1. a jobseeker¹(see DMG 073084) **or**
2. a worker² **or**
3. a S/E person³ **or**
4. a self-sufficient person⁴ **or**
5. a student⁵.

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

073239

Jobseekers

073240 Jobseekers who have registered with Jobcentre Plus and have claimed JSA 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 IS, ESA(IR) and SPC², but will satisfy the test for JSA(IB)³. Family members of persons who have a right to reside as a jobseeker will not have a right to reside for IS, ESA(IR) or SPC 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 JSA having not previously secured work.

1 Directive 2004/38/EC, Art 14(4)(b); Case C-292/89, Antonissen; Imm (EEA) Regs, reg 6(1)(a), reg 6(4) & reg 14;

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

4 IS (Gen) Regs, reg 21AA(3)(b)(ii); ESA Regs, reg 70(3)(b)(ii); SPC Regs, reg 2(3)(b)(ii)

073241

Workers and self-employed persons

073242 Workers and S/E persons continue to have a right to reside¹ (see DMG 072821 & DMG 072861).

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

073243

Self-sufficient persons with comprehensive sickness insurance

073244 EEA nationals who

1. have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the UK **and**

2. have comprehensive sickness insurance cover in the UK 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 HB, ESA(IR), IS, JSA(IB), SPC and UC.

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

073245 An EEA 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 UK **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 DM that the resources of the person(s) concerned should be regarded as sufficient.

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

073246 The requirement for comprehensive sickness insurance is not met by simple access to free treatment under the NHS. However, a claimant will have comprehensive sickness insurance where the UK is entitled to reimbursement of NHS 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 (EHIC) only offers comprehensive sickness insurance where the EU citizen concerned has not moved residence to the UK and intends to return to his home state, such as a student on a course in the UK².

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 UK 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 UK **and**
3. is covered by sickness insurance in respect of all risks in the UK (see 073246 above) .

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

073249

Family Members

073250 The family members of a qualified person (see DMG 073238) residing in the UK or an EEA national with a permanent right to reside have the same rights to reside as that qualifying person or EEA 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, reg 14(2)

073251

Meaning of “family member”

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

1. spouse or civil partner **or**
2. direct descendants of the EEA national, his spouse or civil partner who are
 - 2.1 under the age of 21 **or**
 - 2.2 dependants of his, his spouse or civil partner **or**
3. direct ascendant relatives of the EEA national, his spouse or civil partner, who are dependants **or**
4. extended family members (see DMG 073293)

Note: See DMG 072901 for advice on dependency

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

073253

Family Members of British Citizens

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

the conditions as they were before 1.1.14, then the new conditions and finally the details of the transitional provisions.

1 Imm (EEA) Regs, reg 9

073255

The old rules

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

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

073257

The new rules

073258 Subject to the transitional provisions described in DMG 073261-073262, with effect from 1.1.14, a person who is a family member of a British citizen (BC) has the same rights to reside in the UK as if they were the family member of a national of any other EEA state (except Croatia – on which see DMG 073650 et seq), provided that the following conditions are satisfied¹

1. the BC was residing in an EEA state (other than the UK) as a worker or S/E person before returning to the UK **and**
2. the centre of the BC’s life and transferred to the EEA state where the BC was residing as a worker or S/E person **and**
3. if the family member is the BC’s spouse or civil partner, the parties to the marriage or civil partnership
 - 3.1 had married or become civil partners in an EEA state (other than the UK) **and**
 - 3.2 were living together in that EEA state before returning to the UK

1 Imm (EEA) Regs, reg 9(2)

073259 Factors that are relevant to whether the centre of the BC’s life had transferred to another EEA state (other than the UK) include, but are not limited to¹

1. the period of residence in the EEA state as a worker or S/E person **and**
2. the location of the BC's principal residence **and**
3. the degree of the BC's integration in the EEA state.

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

073260

Transitional provisions

073261 The amended rules will not apply¹ to the family member (F) of a British citizen (BC) where one of the conditions set out below applied as at 1.1.14. (This transitional protection will continue to apply until the date determined in accordance with DMG 073262).

1. F was a person with a permanent right to reside² under the Imm (EEA) Regs (see DMG 073350 et seq) **or**
2. F was a person with a right to reside under the Imm (EEA) Regs who³
 - 2.1 held a valid registration certificate, residence card or EEA family permit issued under the Imm (EEA) Regs **or**
 - 2.2 had made an application under the Imm (EEA) Regs for a registration certificate, residence card or EEA family permit which (as at 1.1.14) had not yet been determined **or**
 - 2.3 had made an application under the Imm (EEA) Regs for a registration certificate or residence card which had been refused **and either**
 - 2.3.a the time limit for an appeal against that refusal had not yet expired (excluding the possibility of an out of time appeal) **or**
 - 2.3.b an appeal against a refusal is pending.

*1 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013, Sch 3, para 2(1), para 2(2)
2 para 2(2); 3 para 2(3)*

073262 The old rules continue to apply until the occurrence of the earliest of one of the following events

1. where DMG 073261 **2.1** or **2.2** apply and where F has (or has applied for) an EEA family permit, the date 6 months after an EEA family permit has been issued, if, within that 6 month period F has not been admitted to the UK¹ **or**
2. where DMG 073261 **2.3.a** applies, the date the time limit for an appeal expires² **or**
3. where DMG 073261 **2.3.b** applies, the date the appeal is finally determined, withdrawn or abandoned³ (except, of course, where the outcome of the appeal is favourable to F with the result that a registration certificate or residence card must be issued) **or**
4. the date on which F ceases to be⁴

4.1 the family member of an EEA national **or**

4.2 a family member who has retained the right to reside (as described in DMG 073300) **or**

5. in a case where F has a permanent right to reside, the date on which that right is lost because of an absence from the UK for a period of more than 2 consecutive years⁵.

1 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013, Sch 3, para 2(4)(a); 2 para 2(4)(b); 3 para 2(4)(c); 4 para 2(4)(d); 5 para 2(4)(e)

073263 - 073290

Family members of students

073291 In the case of an EEA 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 UK only the following shall be treated as his family members¹

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

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

073292

“Extended family members”

073293 An “extended family member” is a person (who is not a family member of an EEA national within the meaning given in DMG 073252 **1 to 3.**) who is a relative (plus, in one case, a partner) of

- 1.** an EEA national, **or**
- 2.** the EEA national’s spouse or civil partner

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 EEA nationals¹.

1 Directive 2004/38/EC, Art 3(2);

073294 An extended family member should have an EEA 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 UK and are dependent on the EEA national or is a member of the EEA national’s household² **or**
- 2.** satisfied the conditions in **1.**, and are accompanying the EEA national to the UK or wish to join the EEA national in the UK³ **or**

3. satisfied the conditions in 1., and have joined the EEA national in the UK and continue to be dependent on the EEA national or a member of his household⁴
or
4. on serious health grounds strictly require the personal care of the EEA 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 UK as a dependent relative of the EEA national were the EEA national a person settled and present in the UK⁶ (where this applies DMs should submit such cases to DMA Leeds for advice as evidence from the HO will be needed and their guidance will be required on the application of the Immigration Rules) **or**
6. are the partner of an EEA national (other than a civil partner) and can prove that they are in a durable relationship with the EEA national⁷.

Extended family members of EEA nationals who are students are issued with family permits, registration certificates or residence cards under specific provisions⁸. DMs should submit such cases to DMA Leeds for advice as evidence from the HO will be required about the provisions under which those documents have been issued.

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

073295 - 073299

“Family member who retains the right of residence”

073300 Under certain circumstances a family member of an EEA national may retain the right to reside on the death or departure from the UK of the EEA national¹. To retain the right of residence the person

1. must
 - 1.1 have been the family member of a qualified person or an EEA national with a permanent right to reside when that person died **and**
 - 1.2 have resided in the UK in accordance with the Regulations for at least the year before the death of the qualified person or the EEA national with a permanent right to reside **and**
 - 1.3 satisfy the condition that either
 - 1.3.a although not an EEA 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.a².

In other situations where the claim is based on a family member’s retained right of residence cases should be submitted to DMA Leeds 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, reg 10; 2 reg 10(2); 3 reg 10(3) & (4);
4 Directive 2004/38/EC, Art 13; Imm (EEA) Regs, reg 10(5)*

073301 - 073349

Permanent right of residence - 5 Years Residence

073350 The EU Citizenship Directive¹ introduced for the first time a permanent right to reside for EU citizens and members of their family who have resided legally in a host Member State of the EU for a continuous period of five years. The Directive was brought into force in the UK by regs² which took effect from 30.3.06.

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

073351 Under the Imm (EEA) regs the following persons acquire the right to reside in the UK permanently

1. an EEA national who has resided in the UK in accordance with the Imm (EEA) Regs for a **continuous** period of five years¹ **or**
2. family members of EEA nationals (who are not themselves EEA nationals) who have resided in the UK in accordance with the Imm (EEA) Regs 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 Imm (EEA) Regs will mean that the five year qualifying period has to be served afresh.

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

073352 The five year qualifying period therefore includes periods during which the EEA national

1. was a jobseeker (see DMG 073240) **or**
2. was a worker or self employed person in the UK **or**
3. retained worker status in the UK 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

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, reg 15(1A); 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 **or**
2. absences of more than six months for compulsory military service **or**
3. one absence of a maximum of 12 consecutive months for important reasons such as
 - 3.1 pregnancy **or**
 - 3.2 childbirth **or**
 - 3.3 serious illness **or**
 - 3.4 study or vocational training **or**
 - 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

Qualifying period - effect of periods of residence before 30.4.06 – EEA nationals

073362 Subject to DMG 073366 below, any period during which an EEA national carried out activities or was resident in the UK in accordance with specific regulations¹ (i.e. the UK regulations and Directives concerning the right to reside in EU 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 Imm (EEA) Regs². 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 Immigration (European Economic Area) Regs 2000; Immigration (European Economic Area) Order 94; Dir 64/221 /EEC; Dir 68/360/EEC; Dir 72/194/EEC; Dir 73/148/EEC; Dir 75/34/EEC; Dir 75/35/EEC; Dir 90/364/EEC; Dir 90/365/EEC; Dir 93/96/EEC; 2 Imm (EEA) Regs, Sch 4, para 6(2);

073363

Qualifying period - periods before accession

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

1. had leave to enter or remain in the UK **and**
2. would have been carrying out that activity or residing in the UK in accordance with the Imm (EEA) Regs
 - 2.1 had the Imm (EEA) Regs been in force **and**
 - 2.2 the person's state of nationality had been an EEA stateat that time.

is to be treated¹ as a period of activity or residence in the UK completed in accordance with the Imm (EEA) Regs. Such periods will therefore count towards the acquisition of a permanent right to reside.

1 Imm (EEA) Regs, Sch 4, para 6(3)

073365

Periods where residence was not in accordance with the regs

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 Imm (EEA) Regs where it was followed by a period of more than two consecutive years throughout which

1. the person was absent from the UK **or**
2. the person's residence in the UK was not in accordance with paragraphs DMG 073362 or DMG 073364 **or**
3. was not otherwise in accordance with the Imm (EEA) Regs.

1 Imm (EEA) Regs, Sch 4, para 6(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, reg15(2)

073369 - 073380

Primary Carers

Introduction

073381 Certain children and their primary carers have a right to reside in the UK. 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 CTA. However they have to be actually habitually resident in the CTA.

Note: periods of residence in the UK 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 UK as a result of any provision in the Imm (EEA) regs other than a derivative right to reside² **or**
2. who has a right of abode in the UK 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 UK.

1 Imm (EEA) Regs, reg 15A(6)(c); 2 reg 15A; 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 Imm (EEA) Regs but should be taken as including direct relatives in the ascending line (i.e. parents, grand parents, great grandparents) of the child, but not uncles, aunts, cousins etc.

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

1 Imm (EEA) Regs, reg 15A (7); 2 reg 15A(8)

073386

Derivative Rights to Reside

073387 A person who is not an exempt person has a derivative right to reside where¹

Primary Carer of a Self-sufficient child

1. that person² is the primary carer of an EEA national **and** that EEA national
 - 1.1 is under the age of 18 **and**
 - 1.2 is residing in the UK as a self-sufficient person **and**
 - 1.3 would be unable to remain in the UK if the primary carer was required to leave the UK

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 UK 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 sub-paragraph 1 will not normally be entitled to IS, JSA(IB), ESA(IR) and SPC.**

Person in general education

2. that person⁴
 - 2.1 is the child of an EEA national ("the EEA national parent") **and**
 - 2.2 resided in the UK at a time when the EEA national parent was residing in the UK as a worker (see DMG 073407 below) **and**
 - 2.3 is in general education (see DMG 073405 below) in the UK **and** was in education there at a time when the EEA national parent was in the UK

Primary carer of a person in general education

3. that person is⁵
 - 3.1 the primary carer (see DMG 073385) of a person in general education in the UK who satisfies the conditions in sub-paragraph 2. above **and**
 - 3.2 that person in education would be unable to continue to be educated in the UK if the primary carer were required to leave (but see DMG 073403 for how this rule applies where there are joint primary carers).

Dependant children of a primary carer

4. that person ("the child") is⁶

- 4.1 under the age of 18 **and**
- 4.2 the child's primary carer is entitled to a derivative right to reside as the primary carer of a person in education in accordance with subparagraph 3 above **and**
- 4.3 the child does not have leave to enter, or remain in the UK **and**
- 4.4 requiring the child to leave the UK would prevent the child's primary carer from residing in the UK.

1 Imm (EEA) Regs, reg 15A(1); 2 reg 15A (2), Case C-200/02 Zhu and Chen v Secretary of State for the Home Department; 3 reg 4(5); 4 reg 15A (3), Reg (EEC) 1612/68, art 12; 5 reg 15A(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; 6 reg 15A (5)

Example

Lucia is a Spanish national. She entered the UK in July 2012 with her husband Hugo, also a Spanish national. Hugo worked in the UK but Lucia did not. The couple have a child, Alba born on 25.8.2003 who started primary school in the UK in September 2012. Alba is a Spanish national. In March 2013 the couple separated and Hugo returned to Spain. Lucia claimed ESA(IR) in April 2013. The DM decided that Lucia had a right to reside in the UK as Alba's primary carer in accordance with 3. above. It was evident that Alba would not be able to continue his general education in the UK 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 UK (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 might subsequently leave the UK.

073389 - 073399

Effect of Absences

073400 If the child leaves the UK for anything other than temporary periods, the rights under Article 12 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. & 3. have their origins in a specific EU provision intended to facilitate the free movement of workers. They are triggered where an EEA national parent of the child is employed in the host Member State. Where an EEA national parent has worked in the UK and this is followed by a period when the parent and child are absent from the UK where (on return) the parent is not employed here, the DM 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 EEA state will mean that the right is lost, an absence that can properly be regarded as temporary will not have that effect. DMs should consider the following factors in relation to the period of absence

1. the reasons why the parent ceased to be resident in the UK **and**
2. the activities of the parent in the country to which they went, including economic activity **and**
3. the roots the parent put down in the country to which they went **and**
4. the contact which the parent maintained with the UK whilst absent and the quality of that contact **and**
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 **3.2** is that the child would be unable to continue to be educated in the UK if **both** joint primary carers were required to leave the UK¹. 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, reg 15A(7A); 2 reg 15A(7B)

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 **3**. generally ends when the child reaches the age of majority. This is 18 in the UK¹. 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 DM. 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 does not include nursery education⁴. It usually starts around age 5.

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, reg 15A(6)(a)

073406

Meaning of “worker”

073407 In 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. It also does not include a self employed person².

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

1 Imm (EEA) Regs, reg 15A(6)(b);

2 Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11)

073408 Work carried out by a national of another Member State before that Member State joined the EU cannot trigger a right under DMG 073387. Where an A8 or A2 national has been employed in the UK 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 UK 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 UK². From 1.5.11 A8 nationals, and A2 nationals from 1.1.14, have full EU 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 A derivative right to reside under DMG 073387 **2. to 4.** can only apply where there is an EEA national parent who resided in the UK as a “worker” i.e. those who are in genuine and effective work that is more than marginal and ancillary and are under the direction of another (see DMG 072816 to 072817). It does not therefore apply to those who are genuinely self-employed i.e. employed on their own account¹.

*1 Secretary of State for Work and Pensions v Lucja Czop (C-147/11) and Margita Punakova (C-148/11).
at para 33*

073412

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. DMs 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, reg 18A

073414 - 073449

Rights to reside which are excluded

Introduction

073450 As stated in DMG 072771, a person cannot be treated as habitually resident in the CTA unless they have a right to reside. However certain EU 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 CTA and so they are a person from abroad/person not in GB and therefore not entitled to IS, JSA(IB), ESA(IR) or SPC. The following paragraphs give details of the excluded rights to reside.

073451 - 073459

Initial right of residence

073460 All EEA 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), reg 13

073461 This right to reside is specifically excluded by regs¹, 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 CTA and will therefore be persons from abroad/person not in GB.

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

073462 - 073465

Primary carers of British citizen children

073466 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 UK if¹

1. they are the primary carer of a British citizen **and**
2. that British citizen is residing in the UK **and**
3. that British citizen would be unable to reside in
 - 3.1 the UK **or**
 - 3.2 another EEA state or Switzerland

if the person (i.e. the primary carer) was required to leave the UK.

1 Imm (EEA) Regs, reg 15A (1) & (4A), 1 Ruiz Zambrano v Office national de l'emploi (ONEm) Case C-34/09

073467 A right to reside on the basis of paragraph 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 GB and thus not entitled to IS, JSA(IB), ESA(IR) and SPC.

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 (CJEU) dated 8.3.11 (“the *Zambrano* decision”). DMs still dealing with claims or appeals, which involve the application of the *Zambrano* decision to periods **before** 8.11.12 should contact DMA (Leeds) for advice.

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

073468 - 073480

EU Citizenship rights

073481 EU 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 an EU citizen would be deprived of their rights as an EU citizen under the Treaty¹ to move and reside freely within the territory of the EU. In the *Zambrano* case² the basis of the CJEU’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 EU) citizens, would be deprived of the genuine enjoyment of the substance of their rights as EU citizens under article 20 of the Treaty¹.

1 TFEU, art 20; 2 Ruiz Zambrano v Office national de l’emploi (ONEm) Case C-34/0

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, reg 21AA(3)(e); JSA Regs, reg 85A(3)(c); ESA Regs, reg 70(3)(e); SPC Regs, 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 GB and thus will not be entitled to IS, JSA(IB), ESA(IR) and SPC.

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 IS, ESA(IR), JSA(IB), SPC, HB and CTB 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. 073486 **3.** has applied and he subsequently makes a claim for, and it is determined that he is entitled to, ESA(IR) and the PLCW links with a previous PLCW because the separation was not more than 12 weeks **or**
5. he claims JSA(IB) after 30.4.04 and the claim links with another claim which includes 30.4.04.

1 SS Hab Res Regs, reg 6

073487 - 073499

Right to reside - A8 country nationals

Introduction

073500 Transitional provisions in the Treaty of Accession allow derogation from the principle of freedom of movement within the EEA¹ for a limited period after 1.5.04². Regulations on immigration³ restrict the right to reside in the UK of certain nationals of the countries known as the A8 countries until 30.4.11⁴. **From 1.5.11 all A8 nationals have full EU rights in accordance with Directive 2004/38/EC.** DMG 073555 gives guidance on some savings provisions that applied at the end of this period.

1 Treaty establishing the European Community; Regulation (EEC) 1612/68. A1-6;

2 Treaty of Accession, Annexes V, VI, VIII, IX, X, XII, XIII and XIV; 3 Accession Regs 2004, reg 4; 4 reg 1(2)(c).

073501 - 073509

The A8 countries

073510 The nationals of the following countries were affected by the derogation

1. Czech Republic
2. Estonia
3. Hungary
4. Latvia
5. Lithuania
6. Poland
7. Slovakia
8. Slovenia.

A8 Nationals - Ending of Restrictions on Right to Reside

073511 Subject to the savings provisions described below, the additional restrictions on the rights of A8 nationals to reside in the UK ceased to have effect on 1.5.11. From that date A8 nationals became subject to the same EU rules about right to reside.

073512

Effect on JSA(IB)

073513 With effect from 1.5.11, A8 nationals can be jobseekers. This means that, for the purposes of JSA (IB) they have a right to reside if they are seeking work¹.

1 JSA Regs, reg 85A(2) & (3); Imm (EEA) Regs, reg 6(1)(a)

073514

Saving Provisions

“Accession Worker”

073515 In the guidance in DMG 073516 to 073520 to the phrase “accession worker” means an A8 national who was required to register as a worker as at 30.4.11.

Right to reside

073516 With effect from 1.5.11 accession workers (as defined in DMG 073515 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, reg 7A(4)

073517 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

073518 An EEA national who has resided in the UK in accordance with the Imm (EEA) regs continuously for five years¹ acquires a permanent right to reside. An accession worker (within the definition in DMG 073515 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 UK 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, reg 15; 2 reg 7A(5); 3 Accession Regs 2004, reg 2(7)

Workers who have ceased activity

073519 Certain persons who permanently cease activity as workers or self-employed persons can acquire a permanent right to reside in the UK¹ (see DMG 073181). The conditions for acquiring this right include the need to have completed certain periods of activity as a worker and the regs² treat certain periods of unemployment, sickness etc as periods of such activity.

1 Imm (EEA) Regs, reg 15(1)(c); 2 reg 5(7)

073520 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, reg 7A(3)

073521 - 073550

Right to reside - A2 country nationals

Nationals of Bulgaria and Romania

073551 Romania and the Republic of Bulgaria joined the EU on 1.1.07. Transitional provisions in the Treaty of Accession allow derogation from the principle of freedom of movement within the EEA¹ for a limited period, initially five years after 1.1.07. Regulations on immigration² restrict the right to reside in the UK 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 UK government decided to exercise this option and the restrictions will continued until 31.12.13³.

Note: from 1.1.14 all A2 nationals have full EU rights in accordance with Directive 2004/38/EC⁴. The guidance at 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.

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 Immigration (European Economic Area) (Amendment) (No. 2) Regs 2013

073552 - 073554

Derogation for A2 nationals

073555 A2 nationals wishing to work in the UK must, except where they are exempt from the requirement, obtain a worker authorization document before they commence employment in the UK¹. (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 UK 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 The Imm (EEA) Regs, reg 6

073559

A2 nationals exempt from the habitual residence test

073560 Amendments to IS, JSA, and SPC legislation, and subsequent ESA legislation, introduced a new category of persons who are exempt from the habitual residence test¹.

1 IS (Gen) Regs, reg 21AA(4)(f)(ii); JSA Regs, reg 85A(4)(f)(ii); ESA Regs, reg 70(4)(f)(ii), SPC Regs, 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 ESA, IS or JSA, or not treated as not in GB for SPC.

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 UK under the Immigration Act 1971 and their immigration status has no condition restricting employment¹ **or**
2. was legally working² in the UK on 31.12.06 and had been so working in the UK without interruption for a continuous period of 12 months ending on that date³ **or**
3. legally works in the UK 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 UK or some other EEA State (other than Bulgaria or Romania)⁵, or during any period where they are the spouse or civil partner of a UK national⁶ **or**
5. is the spouse, civil partner or child under 18 of a person who has leave to enter or remain in the UK⁷, where that leave allows the person to work in the UK⁸ **or**
6. has a permanent right of residence⁹ under regulation 15 of the Immigration (EEA) Regulations 2006 **or**
7. is a family member of an EEA national¹⁰ who has a right to reside in the UK 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 **or**
9. is highly skilled and holds a registration certificate from the HO that includes a statement that they have unconditional access to the UK labour market¹⁵ **or**
10. is in the UK 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 UK labour market for 20 hours a week¹⁶ **or**
11. is a posted worker¹⁷ as defined in EU legislation¹⁸, being an A2 national working for an employer of another member state but posted to work in the UK, 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 Immigration Act 1971; 8 Accession Regs 2006, reg 2(5A); 9 reg 2(7); 10 reg 2(8); 11 Imm (EEA) Regs; 12 Accession Regs 2006, reg 3(8)(a) & (b) 13 reg 2(8A); 14 Imm (EEA) Regs, 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 HO to confirm their status, or will have a valid passport marked with

1. a UK 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 EEA nationals when, for example, temporarily unable to work due to illness or accident¹.

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

073568 - 073580

Uninterrupted work

073581 A person is treated as having worked in the UK without interruption for a period of twelve months if he was legally working in the UK at the beginning and end of that period and any intervening periods in which he was not legally working in the UK 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 EEA¹. Bulgarian and Romanian nationals who are working in the UK in a self-employed capacity are not subject to worker authorization while they are working, and are qualified persons with normal EEA rights whilst pursuing activities as self-employed persons.

1 TFEU, art 49

073584 An A2 national who is a self-employed person in the UK 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, reg 6(3); 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 JSA(IB)

073600 With effect from 1.1.14, A2 nationals can be jobseekers (see DMG 073240). This means that, for the purpose of JSA(IB) they have a right to reside if they are seeking work¹. DMs are reminded however that JSA(IB) claimants with a right to reside as jobseekers must be actually habitually resident in the UK (see DMG 073707 et seq).

1 JSA Regs, reg 85A(2) & (3); Imm (EEA) Regs, reg 6(1)(a)

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 UK, 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, reg 7B(5)

073608

Permanent Right to Reside

073609 An EEA national who has resided in the UK in accordance with the Imm (EEA) regs 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 Imm (EEA) Regs only for those periods when they were "legally working" in the UK² (see DMG 073611 below).

Note: A2 nationals may also have resided in accordance with the Imm (EEA) regs 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, reg 15; 2 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 UK 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 UK domestic law.

073612

Workers who have ceased activity

073613 Certain EEA nationals who permanently cease activity as workers or self-employed persons can acquire a permanent right to reside in the UK¹ (see DMG 073181). The conditions for acquiring this right include the need to have completed certain periods of activity as a worker and the Imm (EEA) regs² treat certain periods of unemployment, sickness etc as periods of such activity.

1 Imm (EEA) Regs, 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, reg 7B(4)

073615 - 073649

Right to reside – Croatian nationals

Introduction

073650 The Republic of Croatia became a member state of the EU on 1.7.13¹. The following DMG paragraphs provide guidance for DMs on the EU law rights to reside of Croatian nationals and their family members. Compared to full EU law rights to reside, these are restricted, initially until 30.6.2018, although restrictions may be extended by a further 2 years until 30.6.2020.

1 Treaty concerning the accession of the Republic of Croatia, Art 3.2

073651 - 073659

Transitional provisions of the Treaty

073660 Transitional provisions in the Croatia Treaty¹ allow EU Member States to impose certain restrictions on the rights to freedom of movement within the EEA², and allow EU Member States to apply national measures restricting the access of Croatian nationals to the UK's labour market for a limited period, initially for five years from 1.7.13³. The rights of EEA nationals (and in some circumstances their family members) to reside in the UK are set out in the Imm (EEA) Regs. The Croatia (I & WA) Regs 2013 limit those rights to reside and set out the measures restricting access to the UK'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 IS, JSA(IB), ESA(IR) and SPC Croatian nationals will fall into two main group

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. This means that, in order to be able to work as employed persons in the UK, 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 UK under the Immigration Act 1971, subject to a condition restricting his employment in the UK to a particular employer or category of employment **or**
2. a worker authorisation registration certificate issued in accordance with the Croatia (I & WA) regs 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, a Croatian national subject to worker authorisation will not have to satisfy the habitual residence test for IS, JSA(IB), ESA(IR) or SPC 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 UK² (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 IS, JSA(IB) or ESA(IB), nor will they be treated as not in GB for the purposes of SPC.

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, reg 21AA(4)(f)(ii); JSA Regs, reg 85A(4)(f)(ii); ESA Regs, reg 70(4)(f)(ii); SPC Regs, reg 2(4)(f)(ii); 2 IS(Gen) Regs, reg 21AA(4)(b); JSA Regs, reg 85A(4)(b); ESA Regs, reg 70(4)(b); SPC Regs, reg 2(4)(b)

073679

Right to Reside

073680 A Croatian national subject to worker authorisation **does 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)

073681 Croatian nationals subject to worker authorisation nonetheless **do** 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, reg 14 & 6(1)(c)

073682

Self-employment stops

073683 A Croatian national subject to worker authorisation will retain the status of being a self-employed person if they are temporarily unable to pursue activity as a self-employed person as a result of illness or accident¹. However if self-employment ceases altogether (on which see DMG 072842) a Croatian national subject to worker authorisation will not have a right to reside as a jobseeker².

1 Imm (EEA) Regs, reg 14 & 6(3); 2 Accession (Croatia I & WA) Regs 2013, reg 5(1)

073684

Self-sufficient persons and students

073685 Croatian nationals subject to worker authorisation do have a right to reside as

1. self-sufficient persons¹ (see DMG 073244 - 073246) **or**
2. students² (see DMG 073248).

However these groups need to have sufficient resources not to become a burden on UK social assistance (which includes IS, JSA(IB), ESA(IR) and SPC) throughout their period of stay and they must have comprehensive sickness insurance-

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

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 IS, JSA(IB), ESA(IR) or SPC. They will usually either be persons from abroad/treated as not in GB for the lack of a right to reside or they will fail to satisfy the other conditions of entitlement.

073688

Croatian nationals who are not subject to worker authorisation

073689 A Croatian national is not subject to worker authorisation if

1. on 30.6.13, they had leave to enter or remain in the UK 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 UK on 30.6.13 and had been legally working in the UK without interruption (see note) throughout the period of 12 months ending on that date² **or**
3. they legally work (see DMG 073691 - 073692) in the UK 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 UK 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 have dual nationality and are also a national of the UK or an EEA State (other than Croatia)⁵, except that, where the person is also a Bulgarian or Romanian national subject to worker authorisation in accordance with the Accession Regs 2006 (see DMG 073551 et seq), they will only be exempt from worker authorisation as a Croat during any period when they are working in accordance with the Accession Regs 2006 **or**
5. during any period in which they are⁶
 - 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 UK under the Immigration Act 1971 where that leave allows that person to work **or**
6. during any period when they are⁷ the spouse, civil partner, unmarried or same sex partner (see DMG 073696) of a national of the UK or a person settled (as defined in specific legislation⁸) in the UK **or**
7. during any period when they are⁹ 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 have a permanent right to reside in the UK under the Imm (EEA) Regs¹² **or**
9. except where sub-paragraph 10 applies, during any period when they are a family member of an EEA national who has a right to reside in the UK¹³ **or**
10. Where the EEA national with a right to reside in the UK referred to in sub-paragraph 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 are 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 **or**
- 11.** they are highly skilled as defined¹⁵ and hold a registration certificate from the HO that includes a statement that they have unconditional access to the UK labour market **or**
- 12** during any period when they are a student in the UK and either
 - 12.1** they hold a registration certificate which states that they are a student who may work on the UK 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 have leave to enter or remain under the Immigration Act 1971 as a student provided they are 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 are a posted worker¹⁹ as defined in specific EU legislation²⁰, being a person posted to the UK by an employer based in another EEA state in pursuance of a contract to provide services in the UK.

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 1971, 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 UK during a period falling before 1.7.13, was working legally in the UK during that period if¹
 - 1.1** they had leave to enter or remain in the UK under the Immigration Act 1971 for that period **and**
 - 1.2** that leave allowed them to work in the UK **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 UK under the Imm (EEA) Regs.

1 Croatia (I & WA) Regs 2013, reg 2(5)(a)

Periods on or after 1.7.13

073692 For the purposes of DMG 073689.3, a Croatian national is legally working in the UK 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 descendents or the direct descendents 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, 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 DM 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 EEA 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 EEA. 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 UK¹.

Note: DMs are reminded that work as a self-employed person must be genuine and effective (see DMG 072816). In addition DMs 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, Art 14 & Art 6(1)(c)

073701 Any Croatian national who is a self-employed person in the UK 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 GB for the purposes of IS², JSA(IB)³, ESA(IR)⁴ or SPC⁵ (see DMG 072800 2.)

*1 Imm (EEA) Regs, Art 6(3); 2 IS (Gen) Regs, reg 21AA(4)(b); 3 JSA Regs, reg 85A(4)(b);
4 ESA Regs, reg 70(1)(4)(b); 5 SPC Regs, reg 2(4)(b)*

073702

Family members

073703 In general the family members of an EEA national with a right to reside in the UK, also have a right to reside derived from and linked to the EEA national’s right to reside¹. Where a Croatian national **not** subject to worker authorisation (“C”) has a right to reside in the UK 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 EEA national.

1 Imm (EEA) Regs, 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 childrenwho 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 an EEA 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 UK 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 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) IWLR 1937 HL

073708 - 073710

Settled intention to remain

073711 The period of time cannot begin before the person is both living in the UK, and has a settled intention to remain in the UK 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 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) IWLR 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 UK. 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 UK, 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 UK resumes that habitual residence immediately when he returns to the UK 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 UK 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 UK, the ties and contacts with the UK retained or established by the person while abroad, the reasons why the claimant left the UK and became habitually resident elsewhere, the similarity between their residence in the UK 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 UK and does not lose their habitual residence during that period of absence.

1 House of Lords, Nessa v CAO (1999) 1WLR 1937 HL; 2 CIS/1304/1997 and CISA/5394/1998

Example

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

073730 - 073745

EC law

073746 When deciding whether a person is habitually resident for EC law DMs 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 072816 et seq.

073747

Resuming previous residence

073748 The guidance at DMG 073749 - 073751 is concerned with EC 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 CTA from a country which is not an EC Member State².

1 Reg (EC) 883/04, art 7;

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 CTA who exercised his right to freedom of movement under European law and then returns to resume his residence in the CTA may be habitually resident immediately on his return¹.

1 Case C-90/97, Swaddling v CAO (1999) All ER (EC) 217

073750 A JSA(IB), IS, ESA(IR) or SPC claimant who

1. was previously habitually resident in the CTA **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 CTA.

073751 In deciding whether the claimant is resuming previous residence the DM should take account of the length and continuity of the previous residence in the CTA, 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 UK national, lived and worked in UK 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 UK where he had family and friends. On claiming JSA(IB) he stated that his intention was to find work and remain permanently in the UK. JSA 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 UK 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 UK in January 2013 and claimed JSA (IB). It emerged that Martina's father had died. She had been unable to find work in Italy and had decided to settle in the UK. Her friends and family all lived 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 UK. The DM 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 EC law, the DM should take into account the

1. person's main centre of interest¹ **and**
2. length and continuity of residence in a particular country **and**
3. length and purpose of the absence from that country **and**
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 UK, for example a home, a job, friends, membership of clubs, are likely to be habitually resident in the UK. 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 UK.

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 UK may be habitually resident here.

073761

Length and purpose of absence

073762 Where a person spends time away from the UK, the DM should consider the frequency, length and purpose of the absences and decide whether habitual residence in the UK 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 UK 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 UK, 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 UK 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 UK and the disposal of property abroad may indicate that the claimant is habitually resident in the UK.

073767 A claimant who intends to reside in the UK for only a short period, for example on holiday, to visit friends or for medical treatment, is unlikely to be habitually resident in the UK.

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 EEA nationals who are seeking work in the UK will be subject to the test if they have no established link with the UK 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 EU 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 ECJ² it was held that although the habitual residence test discriminated against work seekers, because it could be satisfied more easily by UK 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 EU law³.

1 TFEU, Arts 18 & 20; 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 UK 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 UK 17 years previously **and**
2. had not made any real enquiries about work before arriving in the country **and**
3. had not made any arrangements for accommodation and was staying with a friend **and**
4. was single with no dependents **and**
5. had close family and a bank account in the USA **and**
6. had a return ticket to the USA (although that was bought because it was cheaper than a single) **and**
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