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STATUTORY INSTRUMENTS

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**2008 No. 794**

**The Employment and Support Allowance Regulations 2008**

**PART 9**

**AMOUNTS OF ALLOWANCE**

**CHAPTER 1**

**Prescribed amounts**

**Prescribed amounts**

**67.**—(1) Subject to regulations 68, 69<sup>F1</sup>... (amounts in other cases, special cases<sup>F1</sup>...), the amounts prescribed for the purposes of the calculation of the amount of an income-related allowance under section 4(2)(a) of the Act in relation to a claimant are such of the following amounts as may apply in the claimant's case—

- (a) an amount in respect of the claimant or, if the claimant is a member of a couple, an amount in respect of both of them determined in accordance with paragraph 1(1), (2) or (3) of Schedule 4 (amounts) as the case may be;
- (b) the amount of any premiums which may be applicable to the claimant determined in accordance with Parts 2 and 3 of that Schedule (premiums);
- (c) any amounts determined in accordance with Schedule 6 (housing costs) which may be applicable to the claimant in respect of mortgage interest repayments or such other housing costs as are prescribed in that Schedule.

(2) Subject to regulation 69 (special cases) the amount prescribed for the purposes of the calculation of the amount of a claimant's contributory allowance under section 2(1)(a) of the Act is the amount determined in accordance with paragraph 1(1) of Schedule 4 as may apply in the claimant's case.

(3) Subject to regulation 69, the amount of the work-related activity component and the support component are prescribed in Part 4 of Schedule 4.

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**Textual Amendments**

**F1** Words in reg. 67(1) omitted (25.1.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009](#) (S.I. 2009/3228), regs. 1(2), **3(4)(a)**

**Polygamous marriages**

**68.**—(1) Subject to regulation 69<sup>F2</sup>... (special cases<sup>F2</sup>...), where a claimant is a husband or wife by virtue of a polygamous marriage the amounts prescribed for the purposes of the calculation of the amount of an income-related allowance under section 4(2)(a) of the Act are such of the following amounts as may apply in the claimant's case—

*Status: Point in time view as at 29/10/2013.*

*Changes to legislation: There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008, CHAPTER 1. (See end of Document for details)*

- (a) an amount in respect of the claimant and the other party to the marriage determined in accordance with paragraph 1(3) of Schedule 4;
  - (b) an amount equal to the difference between the amounts specified in paragraph 1(3)(a) (couple where both aged 18 and over) and 1(1)(b) (single claimant aged 25 and over) of Schedule 4 in respect of each spouse additional to the marriage;
  - (c) the amount of any premiums which are applicable to the claimant determined in accordance with Parts 2 and 3 of that Schedule (premiums);
  - (d) any amounts determined in accordance with Schedule 6 (housing costs) which may be applicable to the claimant in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule.
- (2) In the case of a partner who is aged less than 18, the amount which applies in respect of that partner is nil unless—
- (a) that partner is treated as responsible for a child; or
  - (b) that partner is a person who—
    - (i) had that partner not been a member of a polygamous marriage would have qualified for an income-related allowance; or
    - (ii) satisfies the requirements of section 3(1)(f)(iii) of the Jobseekers Act (prescribed circumstances for persons aged 16 but less than 18); or
    - (iii) is the subject of a direction under section 16<sup>F3</sup> of that Act (persons under 18: severe hardship).

#### Textual Amendments

- F2** Words in reg. 68(1) omitted (25.1.2010) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2009 \(S.I. 2009/3228\)](#), regs. 1(2), **3(4)(b)**
- F3** Section 16 was amended by paragraph 139(1) and (2) of Schedule 7 to the [Social Security Act 1998 \(c. 14\)](#).

#### Special cases

**69.**—(1) In the case of a claimant to whom any paragraph in column (1) of Schedule 5 applies (amounts in special cases), the amount in respect of the claimant is to be the amount in the corresponding paragraph in column (2) of that Schedule.

(2) In Schedule 5—

“partner of a person subject to immigration control” means a person—

- (a) who is not subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act; or
- (b) to whom section 115 of that Act does not apply by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000<sup>F4</sup>; and
- (c) who is a member of a couple and the member's partner is subject to immigration control within the meaning of section 115(9) of that Act and section 115 of that Act applies to the partner for the purposes of exclusion from entitlement to an income-related allowance;

“patient” means a person (other than a prisoner) who is regarded as receiving free in-patient treatment within the meaning of regulation 2(4) and (5) of the Social Security (Hospital In-Patients) Regulations 2005<sup>F5</sup>;

“person from abroad” has the meaning given in regulation 70;

“person in hardship” means a person who satisfies regulation 158 but only for a period not exceeding 6 weeks;

“prisoner” means a person who—

- (a) is detained in custody pending trial or sentence on conviction or under a sentence imposed by a court; or
- (b) is on temporary release in accordance with the provisions of the Prison Act 1952 <sup>F6</sup> or the Prisons (Scotland) Act 1989 <sup>F7</sup>,

other than a person who is detained in hospital under the provisions of the Mental Health Act 1983 <sup>F8</sup> or, in Scotland, under the provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 <sup>F9</sup> or the Criminal Procedure (Scotland) Act 1995 <sup>F10</sup>.

[<sup>F11</sup>(3) In Schedule 5 “person serving a sentence of imprisonment detained in hospital” means a person (“P”) who satisfies either of the following conditions.

- (4) The first condition is that—
  - (a) P is being detained under section 45A or 47 of the Mental Health Act 1983 (power of higher courts to direct hospital admission; removal to hospital of persons serving sentences of imprisonment etc.); and
  - (b) in any case where there is in relation to P a release date within the meaning of section 50(3) of that Act, P is being detained on or before the day which the Secretary of State certifies to be that release date.
- (5) The second condition is that P is being detained under—
  - (a) section 59A of the Criminal Procedure (Scotland) Act 1995 (hospital direction); or
  - (b) section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (transfer of prisoners for treatment of mental disorder).]

#### Textual Amendments

- F4** S.I. 2000/636.
- F5** S.I. 2005/3360.
- F6** 1952 c. 52.
- F7** 1989 c. 45.
- F8** 1983 c. 20.
- F9** 2003 asp. 13.
- F10** 1995 c. 46.
- F11** Reg. 69(3)-(5) added (25.3.2010) by [The Social Security \(Persons Serving a Sentence of Imprisonment Detained in Hospital\) Regulations 2010 \(S.I. 2010/442\)](#), regs. 1, **5(2)**

#### Special cases: supplemental – persons from abroad

**70.**—(1) “Person from abroad” means, subject to the following provisions of this regulation, a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

(2) A claimant must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the claimant has a right to reside in (as the case may be) the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland other than a right to reside which falls within paragraph (3).

- (3) A right to reside falls within this paragraph if it is one which exists by virtue of, or in accordance with, one or more of the following—
- (a) regulation 13 of the Immigration (European Economic Area) Regulations 2006 <sup>F12</sup>;
  - (b) regulation 14 of those Regulations, but only in a case where the right exists under that regulation because the claimant is—
    - (i) a jobseeker for the purpose of the definition of “qualified person” in regulation 6(1) of those Regulations; or
    - (ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker;
  - <sup>F13</sup>(bb) regulation 15A(1) of those Regulations, but only in a case where the right exists under that regulation because the claimant satisfies the criteria in regulation 15A(4A) of those Regulations;]
  - (c) Article 6 of Council Directive No. [2004/38/EC](#) <sup>F14</sup>, <sup>F15</sup> ...
  - (d) [<sup>F16</sup>Article 45 of the Treaty on the Functioning of the European Union] (in a case where the claimant is a person seeking work in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland) [<sup>F17</sup>; or]
  - <sup>F17</sup>(e) Article 20 of the Treaty on the Functioning of the European Union (in a case where the 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 Union citizen).]
- (4) A claimant is not a person from abroad if the claimant is—
- (a) a worker for the purposes of Council Directive No. [2004/38/EC](#);
  - (b) a self-employed person for the purposes of that Directive;
  - (c) a person who retains a status referred to in sub-paragraph (a) or (b) pursuant to Article 7(3) of that Directive;
  - (d) a person who is a family member of a person referred to in sub-paragraph (a), (b) or (c) within the meaning of Article 2 of that Directive;
  - (e) a person who has a right to reside permanently in the United Kingdom by virtue of Article 17 of that Directive;
  - <sup>F18</sup>(f) a person who is treated as a worker for the purpose of the definition of “qualified person” in regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 pursuant to—
    - (i) regulation 6 of the Accession (Immigration and Worker Authorisation) Regulations 2006 (right of residence of a Bulgarian or Romanian who is an “accession State national subject to worker authorisation”), or
    - (ii) regulation 5 of the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013 (right of residence of a Croatian who is an “accession State national subject to worker authorisation”);]
  - (g) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 <sup>F19</sup>, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967 <sup>F20</sup>;
  - <sup>F21</sup>(h) a person who has been granted leave or who is deemed to have been granted leave outside the rules made under section 3(2) of the Immigration Act 1971 where that leave is—
    - (i) discretionary leave to enter or remain in the United Kingdom;
    - (ii) leave to remain under the Destitution Domestic Violence concession; or

- (iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005;]
- (i) a person who has humanitarian protection granted under those rules; [<sup>F22</sup>or]
- (j) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act and who is in the United Kingdom as a result of deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom; <sup>F23</sup> ...
- <sup>F24</sup>(k) .....
- <sup>F24</sup>(l) .....

**Textual Amendments**

- F12** S.I. 2006/1003.
- F13** Reg. 70(3)(bb) inserted (8.11.2012) by [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2012 \(S.I. 2012/2587\)](#), regs. 1, **9(2)**
- F14** OJL 158, 30.4.04, p. 77.
- F15** Word in reg. 70(3)(c) omitted (8.11.2012) by virtue of [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2012 \(S.I. 2012/2587\)](#), regs. 1, **9(3)**
- F16** Words in reg. 70(3)(d) substituted (1.8.2012) by [The Treaty of Lisbon \(Changes in Terminology or Numbering\) Order 2012 \(S.I. 2012/1809\)](#), art. 2(1), **Sch. Pt. 2** (with art. 2(2))
- F17** Reg. 70(3)(e) and word added (8.11.2012) by [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2012 \(S.I. 2012/2587\)](#), regs. 1, **9(4)**
- F18** Reg. 70(4)(f) substituted (1.7.2013) by [The Social Security \(Croatia\) Amendment Regulations 2013 \(S.I. 2013/1474\)](#), regs. 1, **7(2)**
- F19** Cmnd. 9171.
- F20** Cmnd. 3906.
- F21** Reg. 70(4)(h) substituted (29.10.2013) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2013 \(S.I. 2013/2536\)](#), regs. 1(1), **13(24)(a)**
- F22** Word in reg. 70(4)(i) added (29.10.2013) by [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2013 \(S.I. 2013/2536\)](#), regs. 1(1), **13(24)(b)**
- F23** Word in reg. 70(4)(j) omitted (18.3.2009) by virtue of [The Social Security \(Habitual Residence\) \(Amendment\) Regulations 2009 \(S.I. 2009/362\)](#), regs. 1(2), **9(2)**
- F24** Reg. 70(4)(k)(l) omitted (29.10.2013) by virtue of [The Social Security \(Miscellaneous Amendments\) \(No. 3\) Regulations 2013 \(S.I. 2013/2536\)](#), regs. 1(1), **13(24)(c)**

**Definition of non-dependant**

71.—(1) In these Regulations, “non-dependant” means any person, except someone to whom paragraph (2), (3) or (4) applies, who normally resides with a claimant or with whom a claimant normally resides.

- (2) This paragraph applies to—
  - (a) any member of the claimant's family;
  - (b) a child or young person who is living with the claimant but who is not a member of the claimant's household;
  - (c) a person who lives with the claimant in order to care for the claimant or for the claimant's partner and who is engaged for that purpose by a charitable or voluntary organisation which makes a charge to the claimant or the claimant's partner for the care provided by that person;

- (d) the partner of a person to whom sub-paragraph (c) applies.
- (3) This paragraph applies to a person, other than a close relative of the claimant or the claimant's partner—
- (a) who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of the person's occupation of the claimant's dwelling;
  - (b) to whom the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the claimant's occupation of that person's dwelling;
  - (c) who is a member of the household of a person to whom sub-paragraph (a) or (b) applies.
- (4) Subject to paragraph (5), this paragraph applies to—
- (a) a person who jointly occupies the claimant's dwelling and who is either—
    - (i) a co-owner of that dwelling with the claimant or the claimant's partner (whether or not there are other co-owners); or
    - (ii) jointly liable with the claimant or the claimant's partner to make payments to a landlord in respect of the person's occupation of that dwelling;
  - (b) a partner of a person to whom sub-paragraph (a) applies.
- (5) Where a person is a close relative of the claimant or the claimant's partner, paragraph (4) applies to that person only if the claimant's, or the claimant's partner's, co-ownership, or joint liability to make payments to a landlord in respect of occupation of the dwelling arose either before 11th April 1988 or, if later, on or before the date on which the claimant or the claimant's partner first occupied the dwelling in question.
- (6) For the purposes of this regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area but not if each person is separately liable to make payments in respect of occupation of the dwelling to the landlord.
- (7) In this regulation “communal area” means any area (other than rooms) of common access (including halls and passageways) and rooms of common use in sheltered accommodation.

**Status:**

Point in time view as at 29/10/2013.

**Changes to legislation:**

There are currently no known outstanding effects for the The Employment and Support Allowance Regulations 2008, CHAPTER 1.