

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

ATTENDANCE ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 9 May 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal with reference DG/8800/21/13/D.
2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1999. I refer the appeal to a newly constituted tribunal for determination.
3. I am informed that on a subsequent claim, made on 10 February 2023, the appellant was awarded attendance allowance (AA) at the high rate for an indefinite period from and including 10 February 2023. The new tribunal is therefore constrained to a consideration of the issue of entitlement within the closed period from 12 March 2021 to 9 February 2023.

REASONS

Background

4. The appellant is a Lithuanian national with indefinite leave to remain in the United Kingdom (UK). At age 66, she claimed AA from the Department for Communities "the Department) from 12 March 2021 on the basis of needs arising from arthritis, hearing loss, high blood pressure, high cholesterol, and an allergy. The appellant enclosed a letter along with her claim that demonstrated her settled status in the United Kingdom (UK). On her claim form, she indicated that she was

receiving a pension or benefit from another European Economic Area State or Switzerland.

5. A BF500 telephone call record was made of a conversation with the appellant's son about her pension entitlement. He confirmed that she received a state pension from Lithuania, and state pension credit in the UK. On 27 July 2021 the Department decided on the basis of all the evidence that the appellant did not satisfy the conditions of entitlement to AA. The decision was taken on the ground that the UK was not the competent State for the payment of sickness benefits in relation to her claim. The appellant requested a reconsideration of the decision. Following a further telephone conversation, recorded on a BF500 form, the Department reconsidered but did not revise the decision to disallow the AA claim. The appellant appealed but waived the right to attend an oral hearing of the appeal.
6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 12 August 2022. Separately, the appellant was awarded a UK state pension on 1 August 2022. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by a determination issued on 19 October 2022. Leave to appeal was granted on the question of whether the letter of 1 August 2022 could be considered in relation to the appeal and, if so, whether it had an effect on the outcome. On 10 November 2022 the appeal was lodged in the office of the Social Security Commissioners.

Grounds

7. The appellant, represented by Anna Louise Smyth of Francis J Madden & Company Solicitors, submits that the tribunal has erred in law on the basis that the subsequent award of the retirement pension in August 2022 demonstrated that the UK was the competent State under Regulation 883/2004, that by Article 23 of that Regulation the appellant was entitled to AA, and that by disallowing the claim the tribunal had erred in law.
8. The Department was directed to make observations on the appellant's grounds. Mr Gorman of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the appeal. Francis J Madden & Co. duly responded, making further submissions of law.

The tribunal's decision

9. The applicant had waived her right to an oral hearing of her appeal and the tribunal proceeded on the basis of the documents before it. Among

these, it had sight of a Departmental submission that included the AA claim form and attached information, a BF500 record of a telephone call, an “AA foreign authority letter”, an E115 letter, reconsideration request and a related BF500 record of a telephone call and the decisions on the claim. It accepted that the applicant had been resident in Northern Ireland and had availed of various services here over a number of years. It accepted that she was in receipt of pension credit.

10. It addressed the Department’s submission in the section headed “Competent State regarding payment of Sickness Benefit”. It stated that the tribunal could find no flaw in the Department’s arguments and agreed with its conclusion that the Competent State in this case was Lithuania rather than the UK. It disallowed the appeal accordingly.

Relevant legislation

11. By section 65(7) of the Social Security Contributions and Benefits Act (NI) 1992:

(7) A person to whom either Regulation (EC) No 1408/71 or Regulation (EC) No 883/2004 applies shall not be entitled to an attendance allowance for a period unless during that period the United Kingdom is competent for payment of sickness benefits in cash to the person for the purposes of Chapter 1 of Title III of the Regulation in question.

12. It is common case that Regulation 883/2004 of the European Parliament applies to the present case. Regulation 883/2004 was introduced from 1 May 2010, replacing Regulation 1408/71 in most situations, which in turn had replaced Regulation 3 of 1958. Its legal base is what is now Article 48 of the Treaty on the Functioning of the European Union (EU). This provides:

“The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purposes of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States:

...”

13. The context for understanding Regulation 883/2004 is therefore that of the fundamental EU right of freedom of movement of workers.
14. The preamble to Regulation 883/2004 sets out some important guidance on its application and interpretation. Recital 4 indicates that, “It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination”. Therefore, the aim of Regulation 883/2004 is not to provide for the harmonisation of different national security systems but for their coordination.
15. Regulation 883/2004 is divided into six Titles. These are I - General provisions, II - Determination of the legislation applicable, III - Special provisions concerning the various categories of benefits, IV - Administrative Commission and Advisory Committee, V - Miscellaneous Provisions and VI - Transitional and final provisions.
16. Within Title I, the personal scope of the Regulations is given by Article 2.1. This provides that the Regulation applies to “nationals of a Member State ... who are or have been subject to the legislation of one or more Member States...”.
17. Article 3 sets out the material scope of the Regulation. This sets out a list of a number of branches of social security, notably including sickness benefits and invalidity benefits as distinct categories. It excludes social assistance and various types of victim compensation.
18. Article 7 provides, “Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated”.
19. Within Title II, Article 11 sets out the general rules relating to the determination of applicable national legislation. It provides:
 - “1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.
 2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age, or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

(b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;

(d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

...”

Assessment

20. Leave to appeal was given on the ground that a state pension had been awarded to the appellant by the United Kingdom, and the factual basis of the situation had therefore been misunderstood by the tribunal. However, a Commissioner has an inquisitorial jurisdiction and this case involves broader questions of law as to whether the UK was the competent state for the payment of sickness benefits, regardless of the issue of the subsequent pension award.
21. To the extent that it engaged with the relevant law, that part of the Department’s initial submission to the tribunal in the section headed “Competent State regarding payment of Sickness Benefit”, addressing the principles forming the basis of its decision was brief. It read:

“I submit that the issue for determination is whether NI (UK) is the competent state for payment of Attendance Allowance. Where the claimant is in receipt of certain benefits from another EEC country, that country will be the competent state for payment of sickness benefits (see below).

Regulation (EC) 883/04 which covers the coordination of the different social security schemes within the European Union determines which Member state will be competent for paying sickness benefits. Chapter 1 of Title III: Annex IIa

2.. the cost of benefits in kind shall be borne by the institution as determined in accordance with the following rules:

- (a) where the pensioner is entitled to benefits in kind under the legislation of a single Member State, the cost shall be borne by the competent institution of that Member State;
- (b) where the pensioner is entitled to benefits in kind under the legislation of two or more Member States, the cost thereof shall be borne by the competent institution of the Member State to whose legislation the person has been subject for the longest period of time; should the application of this rule result in several institutions being responsible for the cost of benefits, the cost shall be borne by the institution applying the legislation to which the pension was last subject.

As [the appellant] is in receipt of State Pension from Lithuania and she is not in receipt of social security benefits from the UK then the Competent State for sickness benefits would be Lithuania...”

22. The tribunal stated that it “could find no flaw” in the Department’s arguments. However, some obvious flaws occur to me on reading the submission. Firstly, the legislative extract cited by the Department refers to “benefits in kind” – not benefits. Therefore, it did not relate to the subject matter in hand. “Benefits in kind” are defined in Article 1 of Regulation (EC) 883/2004 as the supply or reimbursement of costs of medical care and products and services ancillary to that care or benefits relating to accidents at work or occupational diseases. Neither was relevant in the present case.
23. Secondly, whereas the Departmental submission generally referred to Chapter 1 of Title III of Regulation (EC) 883/2004 as the basis for the decision under appeal, it did not specifically identify the cited legislation. On consideration of Regulation 883/2004, the specific provision relied upon by the Department appears to me to be Article 24. However, it is incompletely set out. Just immediately after the numeral “2” in the paragraph set out above, the Departmental submission omitted the phrase “In the cases covered by paragraph 1”. It then further omitted

paragraph 1 in its entirety. Paragraph 1 makes clear that Article 24 relates to benefits in kind, which rather tends to reinforce the point above.

23. More generally, the Departmental submission made the assertion that the relevant provision governing which Member State was responsible for paying sickness benefits was the particular unspecified provision within Title III of the Regulation. It did not set out any other relevant parts of Regulation 883/2004, and the tribunal appears to have accepted the submission on trust without itself looking at Regulation 883/2004. Consideration of Regulation 883/2004 would have demonstrated that the starting point for determining the competent Member State is Article 11 of the Regulation, within Title II. It appears to me that the Department's submission to the tribunal was not merely flawed, it was utterly incoherent and misleading.
24. Fundamentally, however, it is not the tribunal's job to find flaws in the Department's arguments. It is the tribunal's job to consider the relevant law and apply it to the facts of the case. In any case where the tribunal has not cited the relevant law and applied it to the facts of the case, it is difficult to accept that the tribunal has done its job properly. While EU law is not always easily accessible, I expect the tribunal to have looked for the relevant sources of law and to have addressed them. If the Department has not fully set out the law that is relevant to a particular case, I expect the tribunal to direct it to do so. Alternatively, it should at least address the relevant Sweet and Maxwell commentary. The statement of reasons in this case does not indicate or imply at any point that the tribunal has actually addressed and properly considered Regulation 883/2004. Therefore, I consider that the tribunal's reasons in this case are inadequate.
25. The appellant, through Ms Smyth, submits that the tribunal has erred in law by finding that the UK was not the competent state for the payment of a sickness benefit – and therefore AA – to the applicant. She relies on the subsequent award of UK state pension to her as evidence that the UK was the competent state for AA. The appellant places particular reliance upon Article 23 of Regulation 883/2004 and highlights a difference between Regulation 883/2004, which refers to receipt of a pension and its predecessor Regulation 1408/71, which refers to entitlement to a pension. Without meaning any disrespect to Ms Smyth, I have not addressed this argument further as it appears to me that broader errors arise that can resolve the appeal.
26. In the proceedings before me, the Department's submissions in this case responded to the appellant's submissions. However, I considered that it had at no stage set out a reasoned case from first principles on how the law should be applied in the particular case. I therefore directed the Department to set out a reasoned argument for the proposition that the UK was not competent for the payment of sickness benefits in cash to the appellant for the purposes of Chapter 1 of Title III of Regulation

883/2004 of the European Parliament (the Regulation). I directed the respondent in particular to address the question of:

- (i) Whether, in general, the identification of the “competent Member State” for the payment of benefits (including sickness benefits in cash) is properly determined by Article 11 within Title II of the Regulation;
- (ii) if so, which sub-paragraph of Article 11(3) applies in this case;
- (iii) also, if so, whether any of Articles 12-16 have any application on the facts of the case;
- (iv) whether any of the provisions of Title III have the effect of changing the basis of the identification of the competent Member State for the payment of sickness benefits in cash otherwise determined under Article 11(3);
- (v) if so, please explain the basis in law for this, citing any relevant Article or jurisprudence that supports the proposition;
- (vi) alternatively, whether any of the provisions of Title III give rise to any exception from responsibility for the payment of sickness benefits in cash of the competent Member State otherwise determined and identified under Article 11(3);
- (vii) if so, please explain the basis in law for this, citing any relevant Article or jurisprudence that supports the proposition.

27. Mr Gorman for the Department duly responded. Prior to addressing the specific questions, he indicated a change of approach by the Department. He said:

“The Department had previously submitted that the UK was not the competent State for the payment of cash sickness benefits to [the appellant] as she was in receipt of a Lithuanian State Pension when she applied for Attendance Allowance (AA).

As part of her appeal [the appellant] notified the Department that she had subsequently been notified by the Department for Work and Pensions on 01.08.22 that she was entitled to a UK State Pension from 06.01.20 and that this was due to go into payment from 08.08.22. [The appellant] submitted that in accordance with Article 23 of the Regulations this meant that the UK was the competent State. The Department’s response to this was to accept the contention that the UK would be the competent State under Article 23 of the Regulations, but only from the date that payment of the UK State Pension began in accordance with [2019] UKUT 55 (AAC). [my

comment - this is a reference to *Secretary of State for Work and Pensions v SO*]

The Department now wishes to resile from its previous position and to accept that the UK is the competent State for the payment of cash sickness benefits from the date that [the appellant] claimed AA. This is because the Department failed to take account of case law relevant to the appeal.

In the Court of Appeal decision *George Konevod v SSWP* [2020] EWCA Civ 809 (GK) the appellant was living in Cyprus and was receiving an old-age pension from the UK. The Court found that Cyprus was the competent State under Article 11(3)(e) of Title II of the Regulations as that was the appellant's State of residence. The Court then went on to consider if Article 21 of Title III applied, finding that it would only be applicable in cases where a person was *residing or staying in a Member State other than the competent Member State*, as determined under Title II:

37. I take as my starting point the principle of single applicable legislation and the rules under Title II of Regulation 883/2004 for determining which state's legislation applies. It is common ground that the appellant falls within Article 11(3)(e) and is subject to the legislation of Cyprus, as the state of residence. To express the same point in another way, Cyprus is in his case the state of applicable legislation under Title II.

38. As its wording makes clear and as is again common ground, Article 11(3)(e) is without prejudice to other provisions of the Regulation guaranteeing benefits under the legislation of another Member State. The only other provision relied on by the appellant is Article 21.

39. Article 21 applies to an "insured person" and members of his or her family. Since the definition of "insured person" in Article 1(c) relates in terms to the use of that expression in Chapters 1 and 3 of Title III, and Article 21 is part of Chapter 1 of Title III, I think it inescapable that the first question to be asked under Article 21 is whether, in respect of his claim to UK benefit, the appellant falls within that definition. To fall within it, he would have to meet the requisite conditions for benefit "under the legislation of the Member State competent under Title II". The "Member State competent under Title II" must mean the Member State to the legislation of which he is subject by virtue of the rules under Title II, i.e.

the state of applicable legislation under Title II. That state is Cyprus, not the United Kingdom. It follows that the appellant does not get off the ground in his attempt to bring his claim to UK benefit within Article 21.

40. The definition of “insured person” also informs the interpretation of the rest of Article 21. The article applies to an insured person or members of his or her family “residing or staying in a Member State other than the competent Member State”. Again, the “competent Member State” must be the state of applicable legislation under Title II.

Consequently, the Department now submits that the UK is the competent State in [the appellant’s] case in accordance with Article 11(3)(e) of Title I of the Regulations and that the provisions of Title III do not apply as [the appellant] is resident in the UK.

28. As the Department has now accepted that the UK is the competent Member State, I will not set out its response to the specific questions directed to it. I have previously addressed the principles relevant to identifying the competent Member State in the case of *SP v Department for Communities* (PIP) [2023] NI Com 23. It may be helpful to set out some of what I said in that case at paragraphs 52 to 60.

“52. By Article 11(1), the persons to whom the Regulation applies shall be subject to the legislation of a single Member State only, to be determined in accordance with Title II. In other words, people who have exercised the right of free movement and who have been subject to the legislation of one or more Member States should be subject to the legislation of only one Member State in matters of social security.

53. By Article 11(2), it is clear that the appellant does not fall to be considered as receiving cash benefits because or as a consequence of their activity as an employed or self-employed person and therefore considered to be pursuing the said activity. This is because this category does not apply to invalidity, old-age or survivors' pensions.

54. Article 11(3) makes provision, subject to Articles 12 to 16, for persons pursuing an activity as an employed or self-employed person in a Member State, civil servants, persons receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence, persons called up or recalled for service in the armed forces or for civilian service in a Member State.

The appellant does not fall into any of those categories. It appears to me therefore that she falls into the category in 11(3)(e), namely “any other person to whom subparagraphs (a) to (d) do not apply”. Such persons “shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States”.

55. The expression “without prejudice to” in the particular context means “without affecting”. Thus, the determination under Article 11(3)(e) that an individual shall be subject to the legislation of the Member State of residence does not affect other provisions guaranteeing benefits under the legislation of other Member States.

56. ... [omitted as not relevant]

57. While Article 11 appears within Title II of the Regulation, the specific provisions governing sickness benefits appear within Title III at Chapters 1, 2 and 3. In its early submissions to me, the Department had relied on the general assertion that “the rest of Regulation 883/2004 must be considered”. In its final submissions to me, having changed its position on this key issue, the Department indicated that it was influenced in its interpretation by *LD v Secretary of State for Work and Pensions* [2017] UKUT 65. That decision in turn was built on the foundations laid down in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176, both decisions of Upper Tribunal Judge Jacobs in Great Britain. However, in neither case (*IG v SSWP*, paragraph 24; *LD v SSWP*, paragraph 5) was there a dispute about which Member State was competent.

58. There had been suggestions in previous editions of the Sweet & Maxwell commentary on Regulation 883/2004 that Article 11 was qualified not just by the other articles in Title II, but also by the articles in Title III, based on cases such as *SSWP v AK* [2015] UKUT 110. However, Judge Jacobs in paragraph 8 of *Secretary of State for Work and Pensions v TG* [2019] UKUT 86 and in paragraph 7 of *GK v SSWP* [2019] UKUT 87 had departed from that view, saying:

“I have previously suggested that Title II was not exhaustive. In *Secretary of State for Work and Pensions v AK* [2015] UKUT 110 (AAC), [2015] AACR 27 at [23], I said that ‘Article 11(3)(e) is subject not only to

Article 12 to 16, but also the subsequent Articles ...' in Title III, Chapter 1. What I said is consistent with what the European Court of Justice said of the equivalent provisions in Regulation 1408/71 in *van Delft v College voor zorgverzekeringen* (Case C-345/09 EU:C:2010:610) [2010] ECR I-9879:

47. However, that provision of a general nature, which appears in Title II of Regulation No 1408/71, 'Determination of the legislation applicable', applies only in the absence of provision to the contrary in the special provisions relating to the various categories or benefits which constitute Title III of that regulation (see Case 227/81 *Aubin* [1982] ECR 1991, paragraph 11).

48. Articles 28 and 28a of that regulation, which appear in Title III, Chapter 1 of the regulation, 'Sickness and maternity', do in fact derogate from those general rules as regards the provision of sickness benefits in kind to pensioners resident in a Member State other than the State responsible for payment of the pension.

49. In a case such as that in the main proceedings, the referring court was therefore correct in excluding the application of Article 13(2)(f) of Regulation No 1408/71 in favour of Articles 28 and 28a of that regulation.

On reflection and despite what the Court said, I would now express myself slightly differently. Title II is comprehensive at identifying the applicable legislation. What Title III does is to make further provision consequent upon the decision taken under Title II. So, before Article 21 can apply, there must already be a competent State, which will have been identified pursuant to Article 11. Similarly Articles 23 and following link entitlement to sickness benefits to one of the States competent for providing a claimant's pension, consistently with the 'single Member State only' principle in Article 11(1)".

59. This position is supported by the judgment of the Court of Appeal in England and Wales in *Konevod v Secretary of State for Work and Pensions* (upholding Judge Jacobs in *GK v SSWP* [2019] UKUT 87, but for different reasons). The issue was, in circumstances where an attendance allowance claimant had retired to Cyprus, whether her friend in Cyprus could also export carer's allowance from the UK. The Court of Appeal identified the competent Member State as Cyprus, before considering whether Article 21 within Title III could assist the claimant so as to make the UK responsible. However, it found that Cyprus remained the competent State under Article 11.

60. Subsequent to the final submissions in the case I also became aware of the decision of the Court of Appeal in England and Wales in *Harrington v Secretary of State for Work and Pensions* [2023] EWCA Civ 433. That concerned a DLA claim for a British child resident in the UK, whose father was separated from the family and working in Belgium. The Upper Tribunal (again Judge Jacobs in *AH v SSWP* [2020] UKUT 53) had found that Belgium was the competent State for the father under Article 11(3)(a), and the UK the competent State for the mother and child under Article 11(3)(e). The Upper Tribunal held that Article 21 took priority over entitlement under UK legislation meaning that Belgium was the competent State. Overturning that decision, the Court of Appeal in England and Wales found that the wording and purpose of Article 21 do not suggest that the article was intended as a rule of priority unlike other articles of the Regulations, such as Article 32. It found that the child claimant was an "insured person", that the UK was the competent State under Article 11(3)(e) and that there was entitlement to DLA".

29. As I indicated in *SP v DfC*, my own interpretation of Regulation 883/2004, which is supported by the above case law, is that Title II provides the rules identifying the competent Member State. This is without prejudice to entitlement to particular categories of benefit being established separately under the rules of Title III in relevant circumstances, but these provisions do not affect the determination of the identity of the competent Member State. No argument has been presented that would allow me to be satisfied that any such circumstances are established in the present case. The Department resiles from its previous submission to this effect and I do not accept that its original submission was established by any legally authoritative path.

30. By Article 11(3)(e), the state of residence is the competent Member State in this case – namely the UK. Therefore, it appears to me that the UK was competent for the payment of sickness benefits in cash to the appellant for the purposes of Chapter 1 of Title III of Regulation (EC) 883/2004 of the European Parliament. Consequently, the appellant was not someone falling within section 65(7) of the Social Security Contributions and Benefits Act (NI) 1992. I find that the tribunal has erred in law by holding otherwise. I allow the appeal and I set aside the decision of the appeal tribunal.
31. This is not conclusive of the appeal, as the core issue of whether the appellant satisfies the general conditions of entitlement to AA remains. As the issue of whether she satisfies the disability conditions relevant to the present claim for AA remains in dispute, and as I consider that such questions are best determined by a tribunal that includes a medical and disability qualified member, I must refer the appeal to a newly constituted tribunal for determination.
32. I am informed that on a subsequent claim, made on 10 February 2023, the appellant was awarded AA at the high rate for an indefinite period from and including 10 February 2023. The new tribunal is therefore constrained to a consideration of the issue of entitlement within the closed period from 12 March 2021 to 9 February 2023.

(signed): O Stockman

Commissioner

18 September 2023