

[2019] AACR 22
(KR v Secretary of State for Work and Pensions
[2019] UKUT 85 (AAC))

Judge Jacobs
20 March 2019

CDLA/2168/2014

European Union Law – (EC) Regulation 883/2004 – exporting entitlement to a sickness benefit.

The Secretary of State made an indefinite award of disability living allowance (DLA) to the claimant from and including 30 April 2009, consisting of the mobility component and the care component. She was later awarded contributory employment and support allowance for the inclusive period 26 March 2012 to 26 March 2013. In September 2012, she moved with her husband to Finland. Following her departure, the Secretary of State superseded the decision awarding the DLA and decided the claimant was no longer entitled to an allowance from and including 22 September 2012. The claimant appealed to the First-tier Tribunal, which decided that following her move to Finland she remained entitled to the care component of DLA, but not to the mobility component. The claimant appealed to the Upper Tribunal. The claimant originally argued that she was entitled to retain the mobility component; and that her case fell within Article 15 of Regulation 883/2004 on the basis of her husband's employment. Those arguments were not pursued. The appeal before the Upper Tribunal concerned the exportability of the care component, which is a sickness benefit in EU law.

Held, dismissing the appeal, that:

1. the claimant was (the Secretary of State conceding) entitled to export her entitlement on different bases at different times (paragraph 4);
2. the claimant was a pensioner for so long as she was receiving contributory employment allowance and as the United Kingdom was responsible for the cost of benefits in kind, it had to pay cash benefits to the claimant under Article 29, which covered her award of the care component of DLA (paragraphs 13 to 17);
3. from the time the claimant ceased to be a pensioner, she remained entitled to the care component by virtue of: (a) Article 7; or (b) Article 21 in conjunction with the decision of the European Court of Justice in *Secretary of State for Work and Pensions v Tolley* (Case C-430/15 EU:C:2017:74) [2017] 1 WLR 1261 (paragraphs 18 to 21).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC064/13/02752, made on 20 January 2014 at Liverpool, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. This is one of five cases that were heard around the same time, involving issues relating to the EU social security coordination Regulations that arise following the decision of the European Court of Justice in *Secretary of State for Work and Pensions v Tolley* (Case C-430/15 EU:C:2017:74) [2017] 1 WLR 1261. The cases are set out and the issues are summarised in Appendix 1. Although there were different representatives in some of the cases, I have taken account of the arguments as a whole. I am grateful to Julia Smyth, David Blundell and Alistair Mills, all of counsel, who appeared for the Secretary of State; I am also

grateful to Joshua Yetman of the Free Representation Unit and Eleanor Mitchell of counsel who acted pro bono through the Unit.

A. This case is about exporting entitlement to a sickness benefit

2. This case concerns the care component of disability living allowance, which is a sickness benefit in EU law: *Commission of the European Communities v European Parliament and Council of the European Union* (Case-299/05 EU:C:2007:608) [2007] ECR I-8695 at [67]-[68] and *Tolley* at [51] and [55]. It is also a cash benefit. Regulation (EC) 883/2004 applies. The relevant provisions are in Appendix 2.

3. Exporting is not a term used in the Regulation, but it is the word used to describe what happens when a claimant who was habitually resident in a Member State of the EU and was awarded benefit there moves their habitual residence to another State. Can the claimant retain the entitlement under that award after becoming habitually resident in the other State? The same issue arises in *Secretary of State for Work and Pensions v MC* [2019] UKUT 84 (AAC), but in relation to Regulation (EEC) 1408/71. Unlike *MC*, the claimant in this case did not become employed in the new State.

4. The Secretary of State has conceded that the claimant was entitled to export her entitlement on different bases at different times. The claimant, who is now represented by the Free Representation Unit, has accepted that concession and no longer needs to present arguments on a broader basis. I accept the Secretary of State's concessions, and I have set out why I have done so in detail as this decision will affect the way that the Secretary of State and the First-tier Tribunal deal with the exporting of sickness benefits.

B. What's happened

5. The Secretary of State made an indefinite award of a disability living allowance to the claimant from and including 30 April 2009, consisting of the mobility component at the higher rate and the care component at the lowest rate.

6. The claimant has never worked. She received the benefit usually known as incapacity benefit in youth. She was later awarded a contributory employment and support allowance for the inclusive period from 26 March 2012 to 26 March 2013. During that period, in September 2012, she moved with her husband to Finland. Following her departure, the Secretary of State superseded the decision awarding the disability living allowance and decided that the claimant was no longer entitled to an allowance from and including 22 September 2012.

7. The claimant exercised her right of appeal to the First-tier Tribunal, which decided that following her move to Finland she remained entitled to the care component of the disability living allowance award, but not to the mobility component. The tribunal gave her permission to appeal to the Upper Tribunal.

C. What this case is not about

8. The claimant originally argued that she was entitled to retain the mobility component of her award of disability living allowance. That is no longer pursued. The mobility component is not a sickness benefit: *Bartlett, Ramos and Taylor v Secretary of State for Work and Pensions* (Case C-537/09 EU:C:2011:278) [2012] AACR 34. It is a special non-contributory cash benefit under Article 70 and Annex X. Article 7 is expressly excluded for those benefits by Article 70(3). The result is that they cannot be exported.

9. The claimant also argued that her case fell within Article 15 on the basis of her husband's employment. That argument also is no longer pursued.

D. Why Regulation 883/2004 applies

10. When the Secretary of State made the award of disability living allowance, Regulation 1408/71 applied. It is now governed by Regulation 883/2004 by virtue of Article 87(8), which preserves the operation of Regulation 1408/71 for so long as ‘the relevant situation remains unchanged’.

11. Domestic law decides whether the relevant situation remains unchanged: *Jeltes, Peeters and Arnold v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (Case C-443/11 EU:C:2013:224):

59. In that regard, it should be noted that the concept of ‘unchanged situation’ is not defined by Regulation No 883/2004. However, as the regulation is not a measure harmonising national social security systems but an enactment intended to coordinate those systems, each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions pursuant to which benefits may be granted under a social security scheme (see, to that effect, Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012] ECR I-0000, paragraph 42). The concept of ‘unchanged situation’ within the meaning of Article 87(8) of that Regulation must, consequently, be interpreted by reference to the definition given by national social security legislation (see, by analogy, with regard to the term ‘employment’ within the meaning of Article 71(1) of Regulation No 1408/71, Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 33).

12. In this case, there was a change in the relevant situation that triggered the operation of Article 87(8). That change occurred either when the claimant moved to Finland or when she became habitually resident there. Given the nature of habitual residence in EU law, there may be little or no practical difference between those alternatives.

E. Classification of the benefits

13. The claimant’s contributory employment and support allowance was a Type A invalidity benefit. Article 44(1) and Annex VI provide that ‘employment and support allowance’ is an invalidity benefit, but this has to be reconciled with Article 70 and Annex X, which provide that ‘employment and support allowance income-related’ is a special non-contributory cash benefit. The result is that a contributory employment and support allowance is an invalidity benefit.

14. The Secretary of State accepts that that award was a pension. There is no dispute that the care component of disability living allowance is a sickness benefit and a cash benefit.

F. How Regulation 883/2004 applies when the claimant was a pensioner

15. The claimant was a pensioner for so long as she was receiving the contributory employment and support allowance.

16. I do not know whether or not she was entitled to benefits in kind in Finland, but it does not matter because, either way, the position is the same. If she was not entitled, those benefits were provided by Finland ‘at the expense of’ the United Kingdom under Article 24(1) and (2)(a). If she was entitled, the cost was ‘borne by’ the United Kingdom under Article 25.

17. As the United Kingdom was responsible for the cost of benefits in kind, it had to pay cash benefits to the claimant under Article 29. That covered her award of the care component of disability living allowance.

G. How Regulation 883/2004 applies when the claimant was no longer a pensioner

18. From the time that the claimant ceased to be a pensioner, the Secretary of State has conceded that she remained entitled to the care component by virtue of: (a) Article 7; or (b) Article 21 in conjunction with *Tolley*.

Article 7

19. Article 7 provides that cash benefits cannot be withdrawn just because the claimant's habitual residence changes to another State. If this Article applies, the United Kingdom could not terminate the claimant's award of the care component of disability living allowance and she was entitled to retain it.

20. This is the analysis that I prefer. The equivalent to Article 7 in Regulation 1408/71 was Article 10. It did not apply to sickness benefits. However, the European Court of Justice achieved the same effect under Article 22 of that Regulation. In *Tolley*, the Court rejected the argument that the United Kingdom could rely on residence provisions in domestic law in order to terminate the claimant's award of disability living allowance when she went to Spain. It decided at [88] that this approach to Article 22 'would render that provision entirely devoid of purpose.' There is no equivalent to Article 22 in Regulation 883/2004, but Article 7 covers sickness benefits. It makes sense that the need for an equivalent to Article 22 was obviated by the extension of Article 7. There is no need to rely on Article 21, which is the natural successor to Article 19 in the earlier Regulation.

Article 21

21. The difficulty is that Article 7 applies 'Unless otherwise provided for by this Regulation'. Some Articles expressly provide that Article 7 does not apply; Article 70, which I have mentioned, is one. Article 21 does not contain such a provision. That Article may displace Article 7 by implication. If it does not, Article 7 applies and there is no more to be said. If it does, the Secretary of State has conceded that a claimant who is insured for old age is entitled to export sickness benefits, like the care component. I do, though, have concerns about the interpretation of 'insured person', as I have explained in *Secretary of State for Work and Pensions v TG* [2019] UKUT 86 (AAC) and *GK v Secretary of State for Work and Pensions* [2019] UKUT 87 (AAC), which is why I prefer to rely on Article 7.

22. Assuming that Article 21 does apply, it would work like this. The claimant has never paid contributions, but they have been added to her account by credit. The result is that she is insured for the purpose of old age, which is one of the risks covered by the Regulation (Article 3(1)(d)). In *Tolley*, the European Court of Justice decided at [38] that insurance against any risk was sufficient for the purposes of Regulation 1408/71. The Secretary of State has conceded that that approach applies to Article 21 of Regulation 883/2004. On that basis, Article 21 applies like this:

- Article 21 applies when the claimant is residing in a State other than the competent State.
- When the claimant made her claim for a disability living allowance, the United Kingdom was the competent State by reference to head (i) of the definition of competent institution. That was the approach in *Tolley* at [82].
- When she transferred her habitual residence to Finland, she was no longer resident in the competent State for her disability living allowance. There was, therefore, a separation of her competent State for the care component and her State of residence.
- As she is an insured person, the effect of Article 21 is that she remains entitled to the care component.

This is the same result as under Article 7, but it only applies to insured persons. Which leads to my next point.

H. When the Secretary of State's concession might not apply

23. The reasoning in Section G should cover most, perhaps all, cases. The only possible exception might arise if Article 7 is displaced by Article 21 and the claimant is not covered by any insurance for old age. That would not necessarily mean that they could not export a sickness benefit. They might, though: (a) be able to satisfy Article 21 as a family member of an insured person; or (b) qualify under some other analysis that has not been explored in this case. Those issues will have to be decided if and when they arise.

I. Conclusion

24. It follows that the First-tier Tribunal was entitled to allow the appeal. The Secretary of State has conceded that the tribunal came to the correct decision for the reasons I have set out. The claimant agrees with that concession and I am satisfied that the tribunal's decision and, subject to my concern about Article 21, the Secretary of State's concession are correct in law. That is why I have dismissed the appeal.

APPENDIX 1

Regulation (EEC) 1408/71 cases

Tolley decided that a claimant who remained an employed person in the United Kingdom could export her entitlement when she moved her habitual residence to another Member State.

Secretary of State for Work and Pensions v MC [2019] UKUT 84 (AAC) CDLA/2438/2014 decides that *Tolley* does not apply when a claimant has not only moved habitual residence to another State but become an employed person there.

JG v Secretary of State for Work and Pensions [2019] UKUT 83 (AAC) CG/1810/2011 decides:

- the United Kingdom is not competent in respect of a new claim for a sickness benefit made from another Member State where the claimant has become habitually resident;
- a carer's allowance and the related attendance allowance cannot be treated as single benefit in order to allow the competent State for the latter to be competent also for the former.

Regulation (EC) 883/2004 cases

KR v Secretary of State for Work and Pensions [2019] UKUT 85 (AAC) CDLA/2168/2014 deals with exporting and accepts the Secretary of State's concession that a claimant retains entitlement after changing habitual residence to another State.

Secretary of State for Work and Pensions v TG [2019] UKUT 86 (AAC) CDLA/2590/2013 and *GK v Secretary of State for Work and Pensions* [2019] UKUT 87 (AAC) CG/3395/2016 deal with new claims. They decide that the competent State is the State where the claimant is habitually resident. *GK* also rejects the carer's allowance/attendance allowance argument that arose in *JG*.

Domestic entitlement

The cases decide that the United Kingdom is neither obliged nor allowed to confer domestic entitlement when it is not the competent State.

APPENDIX 2

REGULATION (EC) 883/2004

Whereas: ...

- (20) In the field of sickness, maternity and equivalent paternity benefits, insured persons, as well as the members of their families, living or staying in a Member State other than the competent Member State, should be afforded protection.
- (21) Provisions on sickness, maternity and equivalent paternity benefits were drawn up in the light of Court of Justice case-law. Provisions on prior authorisation have been improved, taking into account the relevant decisions of the Court of Justice.
- (22) The specific position of pension claimants and pensioners and the members of their families makes it necessary to have provisions governing sickness insurance adapted to this situation.
- (23) In view of the differences between the various national systems, it is appropriate that Member States make provision, where possible, for medical treatment for family members of frontier workers in the Member State where the latter pursue their activity.
- (24) It is necessary to establish specific provisions regulating the non-overlapping of sickness benefits in kind and sickness benefits in cash which are of the same nature as those which were the subject of the judgments of the Court of Justice in Case C-215/99 *Jauch* and C-160/96 *Molenaar* provided that those benefits cover the same risk.

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation:

...

(c) ‘insured person’, in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

...

(j) ‘residence’ means the place where a person habitually resides;

...

(l) ‘legislation’ means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1); ...

(m) ‘competent authority’ means, in respect of each Member State, the Minister, Ministers or other equivalent authority responsible for social security schemes throughout or in any part of the Member State in question;

...

(p) ‘institution’ means, in respect of each Member State, the body or authority responsible for applying all or part of the legislation;

(q) ‘competent institution’ means:

(i) the institution with which the person concerned is insured at the time of the application for benefit; or

(ii) the institution from which the person concerned is or would be entitled to benefits if he or a member or members of his family resided in the Member State in which the institution is situated;

(iii) the institution designated by the competent authority of the Member State concerned; ...

(r) ‘institution of the place of residence’ and ‘institution of the place of stay’ mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, in accordance with the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State concerned;

(s) ‘competent Member State’ means the Member State in which the competent institution is situated;

Article 3

Matters covered

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

...

(d) old-age benefits; ...

Article 7

Waiving of residence rules

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.

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

General rules

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.
4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits

SECTION 1

INSURED PERSONS AND MEMBERS OF THEIR FAMILIES, EXCEPT PENSIONERS AND MEMBERS OF THEIR FAMILIES

Article 21

Cash benefits

1. An insured person and members of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.
2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.
3. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.
4. Paragraphs 2 and 3 shall apply *mutatis mutandis* to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States.

SECTION 2

PENSIONERS AND MEMBERS OF THEIR FAMILIES

Article 24

No right to benefits in kind under the legislation of the Member State of residence

1. A person who receives a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State of residence shall nevertheless receive such benefits for himself and the members of his family, insofar as he would be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of his pensions, if he resided in that Member State. The benefits in kind shall be provided at the expense of the institution referred to in paragraph 2 by the institution of the place of residence, as though the person concerned were entitled to a pension and benefits in kind under the legislation of that Member State.
2. In the cases covered by paragraph 1, 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 pensioner was last subject.

Article 25

Pensions under the legislation of one or more Member States other than the Member State of residence, where there is a right to benefits in kind in the latter Member State

Where the person receiving a pension or pensions under the legislation of one or more Member States resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self-employed person, and no pension is received from that Member State, the cost of benefits in kind provided to him and to members of his family shall be borne by the institution of one of the Member States competent in respect of his pensions determined in accordance with Article 24(2), to the extent that the pensioner and the members of his family would be entitled to such benefits if they resided in that Member State.

Article 29

Cash benefits for pensioners

1. Cash benefits shall be paid to a person receiving a pension or pensions under the legislation of one or more Member States by the competent institution of the Member State in which is situated the competent institution responsible for the cost of benefits in kind provided to the pensioner in his Member State of residence. Article 21 shall apply *mutatis mutandis*.

2. Paragraph 1 shall also apply to the members of a pensioner's family.

TITLE VI

TRANSITIONAL AND FINAL PROVISIONS

Article 87

Transitional provisions

8. If, as a result of this Regulation, a person is subject to the legislation of a Member State other than the one determined in accordance with Title II of Regulation (EEC) No 1408/71, that legislation shall continue to apply as long as the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation. The request shall be submitted within three months after the date of application of this Regulation to the competent institution of the Member State whose legislation is applicable under this Regulation if the person concerned is to be subject to the legislation of that Member State as of the date of application of this Regulation. If the request is made after the time limit indicated, the changeover shall take place on the first day of the following month.