

LD v SECRETARY OF STATE FOR WORK AND PENSIONS
[2017] UKUT 65 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2328/2015

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 SC064/14/00932, made on 23 June 2015 at Cambridge, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. Introduction

1. It is a regular feature of cases involving the EU social security co-ordination Regulation that the facts can be stated very briefly, but its application to those facts involves the analysis of provisions and case law that can be unclear in their scope and mind-bogglingly complex in their interaction. So it is here.

2. I held an oral hearing of the appeal on 29 November 2016. Tom Royston of counsel appeared for the claimant. Zoe Leventhal appeared for the Secretary of State. I am grateful to them both for their oral and written arguments, including those submitted after the hearing.

B. The facts

3. The claimant was born in 1968. She is British and has worked, but only in this country. The evidence suggests that she last worked in 1992. She lived in the Netherlands for six years, but did not receive any benefits from this country during that time. The couple moved to this country in 2008, where her husband worked for three years until he died. The claimant has been awarded a survivor's benefit from the Netherlands.

4. The claimant was awarded a disability living allowance from and including 1 September 2008. The decision making that award was superseded on 8 October 2014. The decision-maker decided that there had been a change of circumstances when, from 1 October 2011, the claimant became entitled to her survivor's benefit from the Netherlands, with the effect that that country was now the competent State for paying sickness benefits. The First-tier Tribunal dismissed the claimant's appeal against that decision, but gave her permission to appeal to the Upper Tribunal.

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C. Why I have dismissed the appeal

5. I have dismissed this appeal, because:

- The claimant is receiving a survivor's pension from the Netherland.
- That pension is classified as a pension for the purposes of Regulation (EC) 883/2004.
- Her award of disability living allowance was a sickness benefit and not a pension for the purposes of that Regulation.
- It is common ground that, in those circumstances, the Netherlands is the competent State for the payment of sickness benefits.
- The United Kingdom is not required to pay benefit under its domestic legislation.

D. The award of the Dutch survivor's pension is a pension

6. I accept the Secretary of State's approach to the issue whether the claimant's Dutch survivor's pension is a pension for the purposes of the relevant provisions of Regulation 883/2004. Annex XI to the Regulation makes 'Special provisions for the application of the legislation to the Member States'. Paragraph 3 of the entry for the Netherlands deals with the survivor's pension. Paragraph 3(a) refers to the pension being paid pursuant to Article 51(3) and provides for it to be calculated in accordance with Article 52(1)(b). Both Article 51 and Article 52 are in Chapter 5 of Title III. Chapter 5 deals with 'Old-age and survivors' pensions'. Those provisions indicate that the survivor's pension is a pension for the purposes of the Regulation. There is confirmation for this in paragraph 1(f) of the entry in Annex XI, which provides for a number of benefits to be treated as pensions 'in addition to pensions covered by Title III, Chapters 4 and 5 of this Regulation'.

7. This is the correct approach, rather than Mr Royston's attempt to devise a general definition for 'pension'. After discussion, he settled on a pension being a benefit that was aimed at persons who have left the labour market permanently and would subsist until their death. I reject that attempt at a general definition. The dictionary definitions show that there is a range of meaning for that word in everyday language. And the domestic social security legislation from 1948 used the term to mean a long-term payment. Invalidity pension under section 33 of the Social Security Contributions and Benefits Act 1992 is the last example I know of. As always, precise meanings have to be found in the context. The context is Regulation 883/2004 and Ms Leventhal's argument, as set out in the previous paragraph, correctly works out the meaning in that context.

8. I do not accept the argument for the claimant that 'pension' may have different meanings in different parts of the Regulation. That is not consistent with the structure of the Regulation. Title III deals with 'Special provisions concerning the various categories of benefits'. It contains nine chapters dealing with different categories of benefit, the first of which is divided into three sections distinguishing between pensioners and others. The existence of

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overlapping categories and different uses of the same terminology are not consistent with the organised structure of Title III.

9. I reject the argument for the claimant that Annex XI may refer to a different pension from the one paid to the claimant. Given the provisions I have cited that apply to the Dutch survivor's pension, I would need evidence to show that this was so. Foreign law is a matter of fact and there is no evidence to support that argument. Mr Royston produced evidence to show the nature of the Dutch pension and argued that it did not satisfy his general definition of 'pension'. He was right that it did not, but I have explained why he was wrong to rely on his general definition of what constitutes a pension. His evidence of the nature of the pension cannot overcome the specific terms of the Regulation on which I have relied.

10. As the matter is so clear, I have not taken up Mr Royston's suggestion of making a reference to the Court of Justice of the European Union.

E. The care component of disability living allowance is a sickness benefit

11. This was decided for the purposes of Regulation (EEC) 1408/71 in *Commission v Parliament and Council* (Case C-299/05) EU:C:2007:608 and confirmed in *Secretary of State for Work and Pensions v Tolley* (Case C-430/15) EU:C:2017:74. I can see no material difference between that Regulation and Regulation 883/2004.

F. The award of the care component of disability living allowance is not a pension

12. I accept the Secretary of State's approach to the issue whether the claimant's award of the care component of disability living allowance is a pension for the purposes of the relevant provisions of Regulation 883/2004. Article 29, which deals with cash sickness benefits for persons receiving a pension, does not make sense if the cash benefit is itself a pension, as it assumes that they are separate categories.

13. In *JS v Secretary of State for Work and Pensions* [2012] AACR 12, Upper Tribunal Judge Mesher said:

Regulation No 1408/71 and the export of sickness benefit: Article 28 (pensioners)

13. [Contains the text of Article 28(1) of that Regulation and summarises the content of Article 28(2).]

14. It may be that in some other cases difficult questions might arise about who is a "pensioner" for the purposes of Article 28(1). For instance, although it appears, especially from the definition of 'benefits' and 'pensions' in Article 1(t), that pensions would include payments of incapacity benefit or

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now employment support allowance, would they include payments of DLA? Paragraph 13 of the judgment of the ECJ in Case C-215/90 *Chief Adjudication Officer v Twomey* [1992] ECR I-1823, R(S) 3/92, suggests that the answer is yes in so far as they are payments of sickness benefit. In the present case, the claimant was entitled to his state retirement pension from the UK and there can be no doubt that he was therefore a pensioner. The crucial questions are then whether he was not entitled to benefits under German legislation and whether the UK is the competent State for the purposes of the Article.

14. I do not accept what Judge Mesher says for the purposes of Regulation 883/2004. First, it was said in the different context of Regulation 1408/71. Second, paragraph 14 makes clear that the classification of disability living allowance was not necessary for the decision, as the claimant was receiving a state retirement pension and thereby beyond doubt a pensioner. Third, I do not understand how the reference to *Twomey* supports the judge's argument. Paragraph 13 of that decision says:

13. It should be noted first of all that, as the court has consistently held, the definition of 'worker' in Article 1(a) of Regulation No 1408/71 has a general scope and covers any person having the status of a person insured under the social security legislation of one or more Member States, whether or not pursuing a professional or trade activity (see *inter alia* the judgment in case 182/87 *Algemene Zickenfonds Drenthe-Platteland v Pierik* [1979] ECR 1977, at para 4). Mrs Twomey does have the status of a person insured under the legislation of the United Kingdom, inasmuch as she would be entitled to sickness benefit if she resided in the United Kingdom.

The Court was not dealing with the issue of whether a payment was a pension.

G. The United Kingdom is not required to pay disability living allowance under its domestic legislation

15. Section 72(7B) of the Social Security Contributions and Benefits Act 1992 provides that a claimant to whom Regulation 883/2004 applies is not entitled to the care component of disability living allowance unless the United Kingdom is the competent State for the payment of cash sickness benefits. I dealt with the equivalent provision for attendance allowance in *IG v Secretary of State for Work and Pensions* [2016] UKUT 0176 (AAC).

16. I take my reasoning in *IG* at [27]-[35] as read. It is sufficient to summarise it like this:

- Regulation 883/2004 provides for a particular State to be the competent State for payment of a specific class of benefit.
- No State is required to make provision for benefits of a specific class.
- It follows that the Regulation may operate to a claimant's advantage or disadvantage.

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- A State may make provision for entitlement even though it is not the competent State for that class of benefit.
- This is subject to the condition that the payment must not affect disproportionately the predictability and effectiveness of the application of the co-ordination rules.
- Although a State may have the power to award benefits for which it is not the competent State, it is not under a duty to do so unless failing to do so would constitute a substantial disadvantage for migrant workers when compared with settled workers.

17. Mr Royston argued that the claimant had suffered a substantial disadvantage in that she had lost: (i) the severe disability premium in the calculation of her housing benefit; (ii) her cold weather and winter fuel payments; and (iii) free prescriptions. These factors were not mentioned in *IG*, probably because they did not have any (or any significant) effect in view of the claimant's age and circumstances. She had been born in 1942 and was living with her son. Ms Leventhal provided detailed submissions on this argument following the hearing.

18. I do not need to deal with the points she made, because there is a flaw in the argument that renders the issue irrelevant. The flaw is that it begins at the end of the chain of reasoning, set out in *IG* and summarised above, by concentrating on the issue of substantial disadvantage. That issue only arises if allowing the State to pay would have a disproportionate effect on the predictability and effectiveness of the application of the co-ordination rules. As Mr Royston's argument fails at this stage, the logically subsequent issue of substantial disadvantage does not arise. Accepting Mr Royston's argument would change a set of co-ordination provisions based on identifying a single competent State for specific classes of benefit into the starting point for claimants to obtain a package of benefits from whichever State makes appropriate provision. His argument is contrary to the regularly repeated statement that moving between States will not necessarily be neutral in its effect on social security entitlement: *da Silva Martins v Bank Betriebskrankenkasse-Pflegekasse* (Case C-388/09) [2011] ECR I-5761 at [72]. As Ms Leventhal argued, the argument would produce the opposite effect to the Regulation by requiring a State to pay benefits both when it was competent and when it was not.

19. It also follows that I do not need to deal either with Ms Leventhal's argument that the matter had to be judged at the date of the decision under appeal or with Mr Royston's response. Nor do I need to deal with the different responses from the authorities in the Netherlands that have been received by the Secretary of State and the claimant.

H. Article 11(2) does not apply

20. This provision applies to 'persons receiving cash benefits because of or as a consequence of their activity as an employed or self-employed person'. The effect

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of the provision is that the person is 'considered to be pursuing the said activity', subject to some exceptions.

21. I reject the argument that this applies to the claimant. The receipt of her disability living allowance is not 'because of or as a consequence of' her activity as an employed person. It is because of or as a consequence of her disabilities and the needs that they generate. This is the approach I took in *BM v Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT (AAC) 0526 (AAC) at [24]. Mr Royston argued that this was wrong because 'receiving benefits "in consequence of" being insured is not limited to benefits paid because of a NI contributions record.' That argument does not touch my reasoning in *BM*. I did not refer to a national insurance record. What I did was to apply the wording of the legislation to the nature of the benefits in that case: income-based jobseeker's allowance and income support. I have done the same in this case to disability living allowance. I have never decided that the language of Article 11(2) only applies to contributory benefits. It may be that it does, but if it does, that is because the wording has that effect.

I. Article 81

22. This provides for a State that decides it is not competent to pass the claim to the State that it considers to be competent. There was an issue of what documents should have been referred to the Netherlands under this Article. In her submissions after the hearing, Ms Leventhal accepted that pursuant to Article 2(2) of Regulation (EC) 987/2009 the material forwarded to the Netherlands should have included 'all data necessary for establishing and determining the rights and obligations of persons to whom' Regulation 883/2004 applies. She accepted that the following should also have been sent: (i) the decision awarding disability living allowance; (ii) the original claim form; and (iii) the claimant's medical evidence submitted in support of her claim. Obviously, that concession reflects what was available in this case. In other cases, different material will be relevant.

Signed on original
on 09 February 2017

Edward Jacobs
Upper Tribunal Judge