ADM Memo 10/19

 PERSONAL INDEPENDENCE PAYMENT DAILY LIVING COMPONENT – EFFECT OF RECENT COURT OF APPEAL DECISION REGARDING THE PAST PRESENCE TEST AND A GENUINE AND SUFFICIENT LINK

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 Introduction

1 The purpose of this memo is to:

 **1.** inform decision makers about a recent decision of the Court of Appeal1 in Great Britain which deals with the circumstances in which a claimant is entitled to Disability Living Allowance care component and Attendance Allowance (and, by implication, Carer’s Allowance, Winter Fuel Payment and the Personal Independence Payment daily living component) when moving from another European Economic Area Member State and Switzerland, **and**

 **2.** instruct decision makers to follow the decision.

*1 [2019] EWCA Civ 272*

 **THE UPPER TRIBUNAL DECISION**

 **BACKGROUND**

2 The case involved two claimants who claimed benefit (Disability Living Allowance care component and Attendance Allowance) shortly after arriving in the United Kingdom. The decision maker in both cases disallowed benefit on the basis that they did not have a genuine and sufficient link and did not satisfy the past presence test.

3 In the Disability Living Allowance case, the First-tier Tribunal dismissed the appeal, deciding that neither the claimant nor his mother satisfied the genuine and sufficient link test and that he could not aggregate his residence in the Republic of Ireland with his residence in this country in order to satisfy the past presence test.

4 In the Attendance Allowance case, the First-tier Tribunal allowed the appeal, deciding that the claimant’s residence in Germany could be aggregated with her residence in this country, with the effect that she satisfied the past presence test.

 **WHAT THE UPPER TRIBUNAL DECIDED**

5Both cases were appealed to the Upper Tribunal in Great Britain1. The Upper Tribunal did not award benefit in either case and decided that:

 **1.** mere residence could not be aggregated for the purpose of the past presence test, only residence that equates to insurance in a Member State can be aggregated; **and**

 **2.** for the purpose of the genuine and sufficient link test, the link was with the Member State, not with it’s social security system

*1 [2016] UKUT 0547 (AAC)*

6 Both parties appealed the decision to the Court of Appeal. The Secretary of State for Work and Pensions agreed with the first point (however, the claimants were appealing this aspect of the decision); and the Secretary of State appealed the second point, disagreeing that the words “social security system” should be disregarded from the genuine and sufficient link test.

**THE COURT OF APPEAL DECISION**

 **WHAT THE COURT OF APPEAL DECIDED**

7 The Court of Appeal confirmed that the link in the genuine and sufficient link test should be to the United Kingdom, not the United Kingdom’s social security system.

8 In addition to the factors set out in ADM paragraph C2130 et seq the Court of Appeal found that it is equally clear that, in assessing whether such a genuine and sufficient link is established, objective evidence to prove the link is plainly critical; but evidence of the motives, intentions and expectations of the applicant should be taken into account if they are relevant to proof of the link and are convincing.

9 However, as the Court of Appeal stated at paragraph 69 of their decision;

 *“Decision makers and, on appeal, the courts are entitled to be cautious about self-serving statements by applicants, especially if the benefits are claimed immediately on or only shortly after arrival in the* United Kingdom*. Such caution is justified not only because self-serving statements as to motives, intentions and expectations may not be genuine but also because, even if they are genuine, actual realisation of the intentions and expectations of the applicant will not have been tested by the passage of time and the realities of the situation.”*

**Example 1**

BK’s Mother relocated from the Republic of Ireland to the United Kingdom, which was her country of nationality, as a result of domestic violence. She stated that;

* she required the support of her own mother, grandmother and two brothers, all of whom resided in England;
* she did not believe that she could turn to her father for help in Republic of Ireland as he was a heavy drinker and she did not consider that this was a suitable or safe environment to reside with BK and his two siblings;
* on coming to England she severed all ties with Republic of Ireland and had had no intention of returning. The latter was evidenced by the fact that she closed her sole bank account in Republic of Ireland in the week preceding her return to England at the end of June, took steps to register her children for school in England in July 2013 and they attended school in England from September the same year.

The Court of Appeal found that BK had a genuine and sufficient link to the United Kingdom.

 **Example 2**

 MM decided to move from Germany to the United Kingdom to live with her daughter, who is a British citizen. The Court of Appeal found as fact that

* she suffered with several physical ailments including osteoporosis, rheumatoid arthritis, incontinence and high blood pressure, and used a catheter and a wheelchair;
* she required support with mobility, washing, toilet, cooking meals, dressing and administering medication;
* she moved to the United Kingdom to join her daughter, who was a British citizen and would provide daily care for her.

 The Court of Appeal decided she had a genuine and sufficient link to the United Kingdom.

 **Example 3**

 Estelle decides to move from France to the United Kingdom. She makes a claim for Disability Living Allowance care component three days after arriving. She states that her intention is to live here permanently so that she can be closer to cousins who already live here. Her cousins will not be providing her care, whereas in France, her sister assisted with her care. She has not identified care assistance in the United Kingdom. She has not yet closed all of her French bank accounts, and still has belongings in a friend’s spare room in France. She has opened one current account in the United Kingdom, but is staying in a B&B as she has not organised rental of a property to live in. She has not made any claim to any other United Kingdom benefit and she has not previously worked or lived in the United Kingdom. The decision maker determines that she does not yet have a genuine and sufficient link to the United Kingdom, despite her stated intention to settle here in the long term.

**APPLYING THE DECISION OF THE COURT OF APPEAL**

10 The effect of the decision is that decision makers are to read the phrase “the United Kingdom social security system” as simply saying “the United Kingdom” when considering a genuine and sufficient link. This change therefore broadened the factors set out in ADM paragraph C2130 et seq which are to be taken into account when considering whether a claimant has a genuine and sufficient link. Decision makers should consider additional factors such as;

* Whether the claimant has any United Kingdom bank accounts (or other financial products)
* Whether they have any United Kingdom property (owned or rented)
* Whether they have any other family members in the United Kingdom (and frequency of visits to them)
* For “out-goers” – the number of years they have lived and worked in the United Kingdom prior to leaving.

 However, this list is **non-prescriptive and non-exhaustive**; decision makers should weigh up any evidence provided to them by the claimant which they state shows a genuine and sufficient link to the United Kingdom. For difficult and/or borderline cases decision makers can refer the case to Decision Making Services for guidance.

 Annotations

 Please annotate the number of this memo (ADM Memo 10/19) against the following paragraphs: C2130

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