

TOLLEY LEAD CASES GUIDANCE

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INTRODUCTION

- 1 This memo provides guidance on the changes brought about by the decisions made by the Upper Tribunal on 27.3.19, related to the Court of Justice of the European Union case of *Tolley*¹

1. KR v Secretary of State for Work and Pensions²
2. Secretary of State for Work and Pensions v MC³
3. JG v Secretary of State for Work and Pensions⁴
4. GK v Secretary of State for Work and Pensions⁵
5. Secretary of State for Work and Pensions v TG⁶.

*1 Tolley Judgement (C-430/15); 2 KR v SSWP [2019] UKUT 85 (AAC);
3 SSWP v MC [2019] UKUT 84 (AAC); 4 JG v SSWP [2019] UKUT 83 (AAC);
5 GK v SSWP [2019] UKUT 87 (AAC); 6 SSWP v TG [2019] UKUT 86 (AAC)*

- 2 These decisions, along with the original Upper Tribunal decision in *Tolley*, affect how decision makers will now decide on whether Personal Independence Payment (daily living) (known as cash sickness benefits) can be paid when the claimant is habitually resident in another Member State of the European Economic Area or Switzerland (Member State). These changes come into effect immediately and will have retrospective effect back to 19.7.12. This memo therefore applies to all stockpiled cases and future cases.
- 3 This memo also provides guidance on the removal of the relevant income tax year policy (see ADM C2122), approved by the Minister on 14.1.19.
- 4 Unless otherwise stated, all changes apply equally to cases covered by both Regulation (EEC) No 1408/71¹ and Regulation (EC) No 883/2004².

1 Council Regulation (EEC) No1408/71; 2 Regulation (EC) No 883/04

BACKGROUND

- 5 In the case of *Tolley*, covered by Regulation (EEC) No 1408/71, the Court of Justice of the European Union decided that if you are insured just for a single risk, (in the case of Mrs Tolley, old age by virtue of national insurance contributions) that is sufficient for you to continue to be treated as an employed person under that regulation. This continues to be the case even when any work activity has ceased. The claimant had paid and been credited national insurance contributions in the United Kingdom for the minimum qualifying period, had been awarded Disability Living Allowance, and then permanently moved to Spain (becoming habitually resident there), where she did not work. She wished to export her Disability Living Allowance. The Court of Justice of the European Union concluded that when she applied for Disability Living Allowance she was insured under the United Kingdom's social security system, was therefore an employed person under Regulation (EEC) No 1408/71, and that the United Kingdom was still the competent Member State under Article 22 of Regulation (EEC) No 1408/71 when she moved abroad. The key point is that there was a permanent change in residence, and the status of an employed person already in receipt of benefits continued under Article 22.

SUMMARY OF NEW DECISIONS

- 6 In the five new cases the Upper Tribunal agreed that
1. once a person has started working in another Member State, the United Kingdom is no longer competent for paying cash sickness benefits to that person (this maintains the status quo)¹
 2. once an individual has switched their permanent residence to another Member State the United Kingdom is no longer competent for new claims from that person for cash sickness benefits, where residence is the determining factor for competence²
 3. if a person in receipt of United Kingdom cash sickness benefits becomes permanently resident in another Member State then the United Kingdom continues to be competent for paying those cash sickness benefits for the length of the award, so long as there is not another reason for the competency to switch³
 4. the United Kingdom cannot generally pay cash sickness benefits if it is not the competent Member State⁴.

*1 SSWP v MC; 2 JG v SSWP, GK v SSWP & SSWP v TG; 3 KR v SSWP;
4 JG v SSWP, GK v SSWP & SSWP v TG*

- 7 What this also means is that the method of using relevant income tax year to determine if a claimant can export their benefit, or make a first claim from abroad, is no longer to be used. This point was conceded by Department For Work And Pensions in January 2019. See paragraph 21 below for more detail.
- 8 For clarification, if the claimant was in receipt of contribution-based Employment and Support Allowance (in the support group), Incapacity Benefit or State Pension/Retirement Pension then they would be classed as a pensioner and the United Kingdom would be competent for the payment of cash sickness benefits (ADM C2123 - C2124). Additionally, for a claimant who is living in another Member State and was receiving payment of cash sickness benefits from that other Member State, if they start to receive their (solely) United Kingdom State Pension/Retirement, then the United Kingdom becomes competent for the payment of the cash sickness benefits from that point, and the payment of such from the other Member State would cease (see also paragraph 29 below).
- 9 Paragraphs 10 to 12 below refer to export cases, and paragraphs 13 to 16 below refer to first claim from abroad cases. First claim from abroad cases are currently considered differently from export cases, and decision makers must be familiar with those differences.

KR V SSWP SECRETARY OF STATE FOR WORK AND PENSIONS

- 10 The relevant facts of this case were the same as those in *Tolley*, but Regulation (EC) No 883/2004 applied rather than Regulation (EEC) No 1408/71. The claimant had not worked in the United Kingdom, and was in receipt of Disability Living Allowance before moving to Finland, and applied to export her benefit. She did not commence work there. She was insured in the United Kingdom for old age because she had a future entitlement to State Pension, (as she satisfied the minimum qualifying period through credited national insurance contributions), through credited national insurance contributions, at the point she moved to Finland. It was decided that she was protected from the withdrawal of her Disability Living Allowance because she was covered at the time of her move by Regulation (EC) No 883/2004 and was insured for old age benefits, having regard to *Tolley* and Article 7 of Regulation (EC) No 883/2004. The Upper Tribunal decision did not resolve whether Article 21 (on cash sickness benefits for “insured persons”) applies in place of Article 7 (on the waiving of residence rules). In practice, for the time being decision makers should check whether a claimant is “insured for old age” (see paragraphs 25 - 29 below) before exporting a benefit. Exporting the benefit in those circumstances would be consistent with both approaches.

Example

Bob was living in the United Kingdom, currently unemployed, but receiving Personal Independence Payment (daily living) and Personal Independence Payment (Mobility). He decided to move to southern France on 1.9.17 due to the warmer climate. He did not commence work there. He was due to start receiving his full rate State Pension on reaching state pension age in a few years' time. The decision maker determined that Bob was insured for the risk of old age because he met the minimum qualifying period, and that, having regard to *Tolley* and the terms of Article 7 of Regulation (EC) No 883/2004, daily living component of Personal Independence Payment could be exported because it was a cash sickness benefit and competency had not switched to the new Member State. The decision maker determined that the mobility component of Personal Independence Payment was not exportable because it is a special non-contributory benefit.

SECRETARY OF STATE FOR WORK AND PENSIONS V MC

- 11 This case was similar to *Tolley*, in that the claimant was in receipt of a cash sickness benefit before moving to a new Member State, and Regulation (EEC) No 1408/71 applied. The claimant wished to export their benefit. However, in this case the claimant commenced work in that Member State as soon as they moved. The Upper Tribunal made it very clear that the applicable legislation and the competent Member State must change when a person becomes employed in a different Member State. Although this case centered on Regulation (EEC) No 1408/71, we currently consider that the analysis applies to Regulation (EC) No 883/2004, since the fundamental basis behind the switching of competence relates to free movement, which applies equally to Regulation (EC) No 883/2004. However, if decision makers

receive any Regulation (EC) No 883/2004 cases, please refer them to Decision Making Services.

- 12 Where the claimant, (or in the case of a child, one or both of their parents) is working in the other Member State, then that Member State is competent for the payment of cash sickness benefits. If decision makers are not sure from the available evidence whether the claimant is working in the other Member State or the person working is a family member of the claimant, please refer the case to Decision Making Services. If the claimant is not working, but their spouse is, please refer the case to Decision Making Services. In the case of a child, if their parents are both working, but in different Member States, please refer to Decision Making Services.

Example 1

Louise was in receipt of Personal Independence Payment both daily living and mobility components. She moved with her husband to Spain, as they wanted to take early retirement there. Both would be entitled to State Pension on reaching state pension age. The decision maker decided that Personal Independence Payment (daily living) could be exported as she was insured for the risk of old age. After 6 months, she decides to get a job as their savings are dwindling faster than anticipated. On being notified of the change of circumstances, the decision maker determines that Spain is now competent for the payment of cash sickness benefits to Louise as the evidence provided clearly shows that she was working in Spain.

Example 2

Janet lived in Germany. She had carried out work in Germany, which later ceased and she made a claim for the German equivalent of Personal Independence Payment (*gesetzliche Pflegeversicherung*). She returned to the United Kingdom, where she took up paid employment. German Social Security contacted United Kingdom Social Security to state they were no longer competent to pay Janet's cash sickness benefits. The United Kingdom decision maker agreed that the United Kingdom was competent for the payment of cash sickness benefits to Janet as she was a worker in the United Kingdom.

JG V SECRETARY OF STATE FOR WORK AND PENSIONS, GK V SECRETARY OF STATE FOR WORK AND PENSIONS & SECRETARY OF STATE FOR WORK AND PENSIONS V TG

- 13 All three of these cases concerned first claim from abroad where claimants were not in receipt of any cash sickness benefits when they moved to a new Member State, and they then made a claim for one or more of those benefits. They were not working in the new Member State, nor were they (or their spouses) in receipt of any United Kingdom benefit that would qualify them as "pensioners". *JG* was a case where Regulation (EEC) No 1408/71 applied, and in both *GK* & *TG* Regulation (EC) No 883/2004 applied.

- 14 The Upper Tribunal confirmed that in these types of cases the applicable legislation is determined by considering a comprehensive subset of rules in the Regulations (Article 13 and the rest of Title II in Regulation (EEC) No 1408/71 and Article 11 and the rest of Title II in Regulation (EC) No 883/2004). A step by step approach should be taken to establish the competent state, which in these cases found that the Member State of applicable legislation was competent, from the point when the claimants became habitually resident there (see paragraph 21 below and ADM C2110 - C2112). In short, the Member State of residence is competent unless other factors apply.
- 15 Article 21 of Regulation (EC) No 883/2004 and Article 19 of Regulation (EEC) No 1408/71 contain provisions on benefits for people living in a state other than the competent state. They should only be considered if the competent Member State and Member State of residence are different, following the process described in paragraph 21.
- 16 First claim from abroad claimants cannot rely on the argument of the protection of acquired rights¹ under Article 48 Treaty on the Functioning of the European Union (previously Article 42 of the Treaty establishing the European Community and Article 51 of the Treaty establishing the European Economic Community), as established in the Court of Justice of the European Union case law as the protection does not apply to cash sickness benefits because they are not contributory benefits; a claimant cannot rely on any periods of past insurance in the United Kingdom (until they reach state pension age, see para 29).

1 Bosmann (C-352/06) para 29 & da Silva Martins (C-388/09) para 74

DISABILITY LIVING ALLOWANCE (CARE COMPONENT) TO PERSONAL INDEPENDENCE PAYMENT (DAILY LIVING) TRANSITION, PERSONAL INDEPENDENCE AWARD REVIEWS AND PERSONAL INDEPENDENCE AWARD CLAIMS (ON SHORT TERM AWARDS)

- 17 Many claimants in receipt of Disability Living Allowance are going through a mandatory transition onto Personal Independence Payment. Where a claimant resident in another Member State, who was able to export their claim to Disability Living Allowance (care component) is going through transition to Personal Independence Payment (daily living), please refer the case to Decision Making Services.
- 18 Many Personal Independence Payment claimants are entitled to an award of 3 - 10 years. Those claimants will be contacted 6 months - one year before the end of their award and invited to give an update on their condition and how it currently affects them. If a claimant resident in another Member State, who was able to export their current award (due to being insured for the risk of old age) is due a review, please refer the case to Decision Making Services.
- 19 Some other Personal Independence Payment claimants are entitled to a short-term award of 2 years or less. Those claimants will be contacted 14

weeks before the end of their award and be invited to make a new claim to Personal Independence Payment. As above, if a claimant, who was able to export their award (due to being insured for the risk of old age), falls into this category, please refer the case to Decision Making Services.

LINK BETWEEN PERSONAL INDEPENDENCE PAYMENT (DAILY LIVING) AND CARER'S ALLOWANCE

- 20 The cases of *JG & GK* also looked at the link between Attendance Allowance and Carer's Allowance. The claimants argued that the competent state for payment of Attendance Allowance should be relevant for establishing competence for the linked Carer's Allowance. The Upper Tribunal explained that despite the requirement for an award of Attendance Allowance to the recipient of care for a successful award of Carer's Allowance, the two claims are separate for the purposes of the co-ordination regulations under both Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004. This finding also applies to Carer's Allowance claims linked to a Personal Independence Payment (daily living) claim. Decision makers should follow the process set out in paragraph 21 below to determine which state is competent for the payment of Carer's Allowance; i.e. just because the United Kingdom is the competent state for the payment of Personal Independence Payment (daily living), it doesn't automatically follow that the United Kingdom is competent for the payment of a related Carer's Allowance claim.

Example 1

Louise was living in the United Kingdom, with her husband, Jeremy and her mother, Mary. She was in receipt of Carer's Allowance due to caring for Mary, who was in receipt of Personal Independence Payment (daily living) and contribution-based Employment and Support Allowance. Jeremy was employed. He changed to a new job and all three had to relocate to Germany for this. Louise then took up part-time employment in Germany, below the Carer's Allowance 'gainful employment' threshold. The Personal Independence Payment decision maker determined that Mary was entitled to export her Personal Independence Payment (daily living) as she was an insured pensioner. However, the Carer's Allowance decision maker determined that Louise was not entitled to export her Carer's Allowance, as she was working in Germany, the new Member State. Germany was therefore competent.

Example 2

Joseph was living in Italy. He was not in receipt of any United Kingdom benefit and he was not working in Italy. His mother came to live with him as she could no longer live on her own. She was in receipt of Personal Independence Payment (daily living) and contribution-based Employment and Support Allowance before she relocated. The decision maker decided she could export her Personal Independence Payment (daily living). Joseph then put in a brand new claim for Carer's Allowance. The decision maker decided that the United Kingdom was not competent for the payment of Joseph's

Carer's Allowance as the residence rule applied to him, and was not supplanted by the work rule. Italy was therefore competent.

REMOVAL OF RELEVANT INCOME TAX YEAR

- 21 The Secretary of State decided to remove the relevant income tax year condition from the consideration of both export and first claim from abroad cases on 14.1.19. As a result, decision makers can no longer export benefit, or allow a first claim from abroad, solely on the basis that a person is insured for United Kingdom sickness benefit. To determine the competent Member State, under both Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 when a change in habitual residence occurs, the decision maker should establish which of the work, State Pension or residence rule applies. The starting point is that the Member State in which the claimant works (see paragraph 12 above), or receives State Pension from will be the competent Member State. If neither of these rules apply, then the residence rule applies to determine the competent Member State (subject to paragraph 8 above)¹. The relevance of other provisions in Article 11 - 16 of Regulation (EC) No 883/2004 or Article 13-17a of Regulation (EEC) No 1408/71 should also be considered.

1 Reg 1408/741, Art 13(2)(f) & Reg 883/04, Art 11(3)(e)

- 22 In the *JG* case (under Regulation (EEC) No 1408/71), the claimant had been an "employed person" in the United Kingdom, but United Kingdom legislation stopped applying to her when she became habitually resident in France such that the residence rule applied when she made her claim for cash sickness benefits.
- 23 In the cases of *GK & TG* (under Regulation (EC) No 883/2004), the claimants were not "pursuing an activity as an employed or self-employed person"¹ in any Member State at the time of the claim, so the residence rule applied because the work rule did not.

1 Reg 883/04, Art 11(3)(a)

Example 1

Nicola moved to Portugal for early retirement. She was not in receipt of any United Kingdom benefits and was due to receive a full United Kingdom State Pension in 4 years' time. She had never been married. After a year, she moved in with her new partner, a fellow ex-pat who was in receipt of Personal Independence Payment (daily living), and put in a claim for Carer's Allowance. The decision maker decided that the residence rule applied to her, such that the applicable legislation was that of Portugal. The United Kingdom was not competent for the payment of Carer's Allowance. However, once she starts to receive her United Kingdom State Pension, the United Kingdom will be competent for the payment of cash sickness benefits, providing all other relevant criteria are satisfied. The rules on overlapping benefits would apply.

Example 2

Caroline moved to France with her son James. She did not carry out any work for a French company, but continued her work as an accountant for a United Kingdom Ltd company, receiving a wage from them and paying tax and national insurance contributions. She put in a claim for Personal Independence Payment (daily living) for James. The decision maker determined that the work rule applied to James' claim as he was a child whose parent was a worker in the United Kingdom, and that therefore the United Kingdom was competent for the payment of Personal Independence Payment (daily living).

GENUINE AND SUFFICIENT LINK

- 24 It must be remembered that in order for a cash sickness benefit to be exported, the customer has to show a genuine and sufficient link to the United Kingdom (ADM C2130, C2133 - C2138 and ADM Memos 20/17 and 11/19).

INSURED FOR THE RISK OF OLD AGE

- 25 A claimant is considered to be insured for the risk of old age if they have a future entitlement to Retirement Pension/State Pension at the applicable date. The applicable date is the date the claimant moves abroad in export cases. There are three different Retirement Pension/State Pension schemes, and the one that applies to the claimant will determine if they have a future entitlement.
1. 6.4.75 - 25.9.07 rules – In order to have a future entitlement to Retirement Pension, male claimants required a minimum qualifying period 11 years of national insurance contributions and female claimants required 10 years of national insurance contributions (25% of working life). This had to include 1 year of paid (or treated as paid) national insurance contributions, but the rest could be made up of national insurance credits.
 2. 26.9.07 - 5.4.16 rules – In order to have a future entitlement to Retirement Pension, all claimants require a minimum qualifying period of only one year on their national insurance record, which could be either paid national insurance contributions or national insurance credits. This set of rules will only apply if the applicable date is after 25.9.07, but before 6.4.16, and the claimant is due to reach State Pension age on or after 6.4.10. If the claimant is due to reach State Pension age before 6.4.10 then the first set of rules will still apply.
 3. Post 5.4.16 rules – In order to have a future entitlement to State Pension, all claimants require a minimum qualifying period of 10 years on their national insurance record, which can be made up of paid national insurance contributions or national insurance credits. This set of rules will apply if the applicable date is on or after 6.4.16.

Note: In Personal Independence Payment cases there should not be any claimants who fall under the first scheme, unless they are former Disability Living Allowance claimants who have transitioned.

- 26 In all three State Pension rules a person can also get entitlement to United Kingdom State Pension by virtue of European Union contributions and credits from another Member State making up their United Kingdom national insurance to the minimum qualifying period. Additionally, for pre-25.9.07 claimants, if home responsibilities protection was ever applied, then the number of required years for qualification will be reduced. For post 5.4.16 claimants, some Reciprocal Agreements may alter the entitlement conditions. Please refer all cases mentioned in this paragraph to Decision Making Services for further guidance.
- 27 If a claimant is not classified as a pensioner and does not have their own future entitlement to State Pension, they can rely on any future State Pension that their spouse or civil partner, or (if they are a child or an adult dependent) their parents will be entitled to. Unmarried couples cannot rely on their partner, but a claimant separated from their spouse or civil partner, can still rely on that spouse or civil partner.
- 28 It may be possible for a claimant to be insured for a risk other than old age, i.e. sickness, maternity, invalidity, survivor's benefits, benefits in respect of accidents at work and occupational diseases, bereavement support, unemployment or family. If decision makers have a case where the claimant is not insured for the risk of old age (e.g. young adult who has not been in the labour market long enough to meet the minimum qualifying period) then that case should be referred to Decision Making Services, to investigate where the claimant is insured for any of the other risks.
- 29 In first claim from abroad cases, if the claimant is not in receipt of any current benefit and only has a future entitlement against the risk of old age, then the United Kingdom is not competent and residency takes priority, as per paragraph 21 above. However, once the claimant is in receipt of State Pension/Retirement Pension solely from the United Kingdom, the United Kingdom will be competent for the payment of cash sickness benefits, as per paragraph 8 above. If the claimant has a State Pension/Retirement Pension that is made up of pensions from both the United Kingdom and one or more Member State, please refer to ADM C2126 - C2129.

ANNOTATIONS

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

C2098
C2110
C2111
C2119

C2123
Appendix 1 to Chapter C2

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