

TOLLEY LEAD CASES GUIDANCE (REVISED)

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INTRODUCTION

1. This memo replaces DMG Memo Vol 2/75 which has been cancelled. Please no longer refer to that memo.
2. This memo is being published to provide 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, and the subsequent Court of Appeal decision in *George Konevod*², made on 30.6.20. It will clarify how the Department treats the claims of those who wish to export their award of a non-contributory cash sickness benefit, or make a new claim for one of these benefits, when moving to a different European Union member state. The decisions made by the Upper Tribunal on 27.3.19 were

1. KR v Secretary of State for Work and Pensions³
2. Secretary of State for Work and Pensions v MC⁴
3. JG v Secretary of State for Work and Pensions⁵
4. GK v Secretary of State for Work and Pensions⁶
5. Secretary of State for Work and Pensions v TG⁷.

Note: The claimant in *GK v Secretary of State for Work and Pensions* appealed the decision to the Court of Appeal in the case which became *George Konevod*.

1 *Tolley Judgement (C-430/15)*; 2 *George Konevod and SSWP [2020] EWCA Civ 809*;
3 *KR v SSWP [2019] UKUT 85 (AAC)*; 4 *SSWP v MC [2019] UKUT 84 (AAC)*;
5 *JG v SSWP [2019] UKUT 83 (AAC)*; 6 *GK v SSWP [2019] UKUT 87 (AAC)*;
7 *SSWP v TG [2019] UKUT 86 (AAC)* 13

3. These decisions, along with the original Upper Tribunal decision in *Tolley*, affect how decision makers will now decide on whether the care component of Disability Living Allowance, Attendance Allowance or Carer's Allowance (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. These changes come into effect immediately and will have retrospective effect back to 19.7.12 (the date of the decision of the Upper Tribunal in *Tolley*, which is the relevant determination for the purposes of article 27¹). This memo therefore applies to all stockpiled cases and future cases.

1 *SS (NI) Order 98, art 27*

4. The cases discussed in this memo are covered by either Regulation 1408¹ or Regulation 883².

1 *Council Regulation (EEC) No.1408/71*; 2 *Regulation (EC) No.883/04*

5. This memo also provides guidance on the removal of the Relevant Income Tax Year Policy (see DMG 071769), approved by the Minister on 14.1.19 and the application of Article 7 to export cases¹.

1 Article 7 of Regulation (EC) No.883/04

6. Additionally, the guidance on the prioritisation of rights, including spousal work, has been updated, due to the decision in *AH v Secretary of State for Work and Pensions*¹. This decision is currently subject to an application for permission to appeal to the Court of Appeal.

1 AH v SSWP, CDLA/0882/2017 [2020] UKUT 53 (AAC)

BACKGROUND

7. In the case of *Tolley*, covered by Regulation 1408, 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 1408, and that the United Kingdom was still the competent Member State under Article 22 of Regulation 1408 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.
8. Unlike Regulation 1408, Regulation 883 does not provide a clear definition of an "insured person" for the purposes of establishing which Member State is competent and whether a person comes within scope of the regulation. Therefore, the question of 'insurance' is not a requirement to bring people within the scope of Regulation 883 and 'insurance' does not in itself confer any entitlement to benefits, it is simply a status given to people who already satisfy the eligibility criteria for an award under the law of the Member State who is competent.
9. In *AH*, Judge Jacobs found that 'insured person' is an 'umbrella term' covering the range of potential social security claimants under Regulation 883 which does not justify limiting the scope of the definition of 'insurance' to benefits that are based on insurance or contributions. The Court of Appeal in *George Konevod* said that a person falling within the definition of insured person must meet the conditions for benefit under the legislation of the Member State competent under Title II of Regulation 883, i.e. the Member State of applicable law.

SUMMARY OF UPPER TRIBUNAL DECISIONS LINKED TO TOLLEY AND THE COURT OF APPEAL DECISION IN GEORGE KONEVOD

10. In the five 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*

11. In *George Konevod*, the Court of Appeal built upon the decision in *GK v Secretary of State for Work and Pensions* as per points **2.** and **4.**.
12. What this also means is that the method of using a 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 the Department for Work and Pensions in January 2019. See paragraph 26 below for more detail.
13. 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 (DMG 071766 and 071770-71). 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 Pension, 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 37 below).
14. Paragraphs 15 to 17 below refer to export cases, and paragraphs 18 to 23 below refer to first claim from abroad cases. First claim from abroad cases are considered differently from export cases, and decision makers must be familiar with those differences.

KR V SECRETARY OF STATE FOR WORK AND PENSIONS

15. The relevant facts of this case were the same as those in *Tolley*, but Regulation 883 applied rather than Regulation 1408. 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. It was decided that she was protected from p withdrawal of her Disability Living Allowance because she was covered at the time of her move by Regulation 883 and her award from benefits was protected from reduction or withdrawal on account of her change of residence to a new Member State, having regard to *Tolley* and Article 7 of Regulation 883. 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) but the Department has now accepted that Article 7 applies to the export of existing claims (see paragraph 28 below). It was not relevant whether KR was ‘insured’, because under Regulation 883, insurance is not a requirement to come within the scope of Regulation.

Example

Bob was living in the United Kingdom, currently unemployed, but receiving Disability Living Allowance both care and mobility components. He decided to move to southern France on 1.9.17 due to the warmer climate. He did not commence work there. Having regard to *Tolley* and the terms of Article 7 of Regulation 883, Disability Living Allowance (Care) could be exported because it is protected from being reduced or withdrawn by Article 7 of Regulation 883, provided that there has been no other relevant change in circumstances. The Department remains responsible for paying Disability Living Allowance (Care) as long as Bob continues to meet all other eligibility criteria and there are no changes in his economic activity. The United Kingdom is not competent more broadly, because the legislation of France now applies to Bob and France is the competent state for all other benefits. The decision maker determined that Disability Living Allowance (Mobility) was not exportable because it is a special non-contributory benefit.

SECRETARY OF STATE FOR WORK AND PENSIONS v MC

16. 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 1408 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 clear that the applicable legislation and the competent Member State changed when a person becomes employed in a different Member State. Although this case centred on Regulation 1408, we currently consider that the analysis applies to Regulation 883, since the fundamental basis behind the switching of competence relates to free movement, which applies equally to Regulation 883. However, if decision makers receive any Regulation 883 cases, please refer them to Decision Making Services.

17. 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, please refer the case to Decision Making Services. In the case of a child, if their parents are both working, but in different Member State, please refer to Decision Making Services. Where the claimant is not working, but their spouse is, please refer to paragraph 38 below, on the Prioritisation of Rights.

Example 1

Louise was in receipt of Disability Living Allowance, both Care and Mobility components. She moved with her husband to Spain, as they wanted to take early retirement there. The decision maker decided that Disability Living Allowance (Care) could be exported under Article 7. 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. Withdrawal of the benefit in this case would not be contrary to Article 7 of Regulation 883 because the reason for the withdrawal is the fact that Louise has started to work in the new Member State, and not simply because she has changed her place of residence.

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

18. All three of these cases concerned first claims 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 1408 applied, and in both *GK* & *TG* Regulation 883 applied.
19. The Upper Tribunal confirmed (and the Court of Appeal agreed) that in these types of cases the starting point is the principle of single applicable legislation, which is determined by considering a comprehensive subset of rules in the

Regulations (Article 13 and the rest of Title II in Regulation 1408 and Article 11 and the rest of Title II in Regulation 883). 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 27 below and DMG 073707 - 073745).. In short, the Member State of residence is competent unless other factors apply¹.

1 Article 13(2)(f) of Regulation (EEC) 1408/71 and Article 11(3)(e) of Regulation (EC) No.883/04

20. In the *JG* case (under Regulation 1408), 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.
21. In the cases of *GK & TG* (under Regulation 883), 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. It was accepted by the parties in *George Konevod* that the appellant fell within Article 11(3)(e) and was subject to the law of Cyprus.

1 Article 11(3)(a) of Reg 883/04

22. Article 21 of Regulation 883 and Article 19 of Regulation 1408 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. The Court of Appeal in *George Konevod* held that the competent state in Article 21 is the state of applicable law in Title II.
23. First claim from abroad claimants cannot rely on the argument of the protection of acquired rights¹ under Article 48 of the 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 Court of Justice of the European Union case law, as the protection does not apply to these 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 paragraphs 13 and 37).

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

LINK BETWEEN ATTENDANCE ALLOWANCE/DISABILITY LIVING ALLOWANCE AND CARER’S ALLOWANCE

24. 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 Court of Appeal and 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 with different conditions of entitlement, payable to different people. There is nothing in the language of Regulation 1408 and Regulation 883 to suggest that the competent Member State for Attendance Allowance payable to the severely disabled person is also the competent state for Carer's Allowance. The claimants were not relevant family members of the disabled person, so were unable to be classed as family members of a pensioner for competency purposes (DMG 071770). This finding also applies to Carer's Allowance claims linked to a Disability Living Allowance (Care) claim. Decision makers should follow the process set out in paragraphs 25 - 29 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 Attendance Allowance or Disability Living Allowance, 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 Attendance Allowance and State Pension. 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 Attendance Allowance decision maker determined that Mary was entitled to export her Attendance Allowance as she was a United Kingdom 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 Attendance Allowance and Retirement Pension before she relocated. The decision maker decided she could export her Attendance Allowance. 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.

CARER'S ALLOWANCE - BACKDATED CLAIMS

25. Where a claim to Carer's Allowance is made from another member state, but due to the backdating rules¹ (see DMG 2277) the date of claim is for a period before the claimant moved abroad, normal exportability rules will apply to that claim; it will not be treated as a first claim from abroad.

1 SS (C&P) Regs (NI), reg 6(33) & (34)

Example 1

Sally cares for her son Benjamin who has had physical difficulties from birth. She submitted a claim for Disability Living Allowance for him and on 27 April 2020 he is awarded the higher rate mobility component and the lowest rate care component from 27 January 2020. She requests a mandatory reconsideration as she feels that Benjamin satisfies the qualifying criteria for the award of the middle rate care component. The mandatory reconsideration upholds the original decision and Sally appealed against this decision on 17 August 2020.

On 23 September 2020 Sally and Benjamin move to Spain as she feels that the climate will be beneficial to Benjamin. Sally intends to start work in Spain when Benjamin is a little older, but is living on her savings as she receives no other benefits from the United Kingdom. On 19 October 2020, a Social Security Appeal Tribunal in the United Kingdom allowed Benjamin's appeal and awarded middle rate care component to him from 27 January 2020.

Sally submits a claim for Carer's Allowance on 11 January 2021 requesting that her claim be backdated to 27 January 2020. As her claim was submitted within 3 months of the tribunal decision, Regulation 6(33) of the Social Security (Claims & Payments) Regulations (Northern Ireland) 1987 applies and the claim may be backdated to and considered from this date.

The decision maker is satisfied that as Sally met the entitlement conditions for Carer's Allowance before her move to Spain, Article 7 of European Community regulation 883/2004 applies and the United Kingdom remains the competent state for payment of cash sickness benefits despite the move abroad. Therefore, Carer's Allowance is exported to Sally from 27 January 2020.

Example 2

George and Mildred retired to France on 17 February 2020. They do not receive any benefits from the United Kingdom and are living on their work pensions. Mildred has disputed a decision given on 5 February 2020 to disallow her application for Personal Independence Payment daily living component from 6 January 2020.

On 17 April 2020, the decision maker accepted that Mildred satisfied the entitlement conditions and revised the decision in Mildred's favour awarding standard rate Personal Independence Payment to her from 6 January 2020.

On 27 July 2020, George submitted a claim for Carer's Allowance from 6 January 2020. As the date of receipt was more than three months after the date on which Personal Independence Payment was awarded to Mildred, Regulation 6(33) does not apply and Carer's Allowance can only be backdated a maximum of three months from the date the claim form was received. As the first date of possible entitlement is 27 April 2020, which is after the date on which they moved to France, Article 7 does not apply and the Carer's Allowance claim is disallowed as a first claim from abroad.

DISABILITY LIVING ALLOWANCE AND ATTENDANCE ALLOWANCE RENEWAL CLAIMS

26. Some Disability Living Allowance and Attendance Allowance claimants are granted a fixed term award, especially those in receipt of Disability Living Allowance as a child. 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 under Article 7 is due a review, **please refer the case to Decision Making Services.**

REMOVAL OF RELEVANT INCOME TAX YEAR AND THE APPLICATION OF ARTICLE 7

27. 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 allow export of a benefit, or allow a first claim from abroad, solely on the basis that a person meets the contribution requirements for United Kingdom sickness benefit. For export claims, Article 7 will now apply for the majority (see paragraphs 28 - 31), but for first claim from abroad claims, to determine the competent Member State, under both Regulations 1408 and 883, the decision maker should establish which of the work, State Pension or residence rules applies. The starting point is that the Member State in which the claimant works (see paragraph 16), or receives State Pension/contribution-based Employment and Support Allowance 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 37 below)¹. The relevance of other provisions (e.g. working in two or more member states/posted work) in Article 11-16 of Regulation 883 or Article 13-17a of Regulation 1408 should also be considered.

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

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, who was in receipt of United Kingdom Attendance Allowance, 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 Disability Living Allowance 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 Disability Living Allowance to him.

28. Article 7 is a provision in Regulation 883 which protects the export of an existing award from being withdrawn/reduced solely because the claimant has moved to another Member State. Export under Article 7 is not reliant on the claimant having been employed in the United Kingdom because the United Kingdom cash sickness benefits in scope of this memo are non-contributory.
29. Under Article 7 a non-contributory cash sickness benefit award can be exported for the length of that one award as long as the only relevant change to the customer's circumstances is that their residence has changed. After the award that was protected by Article 7 has expired, the United Kingdom would not be competent for any new claims to cash sickness benefits and the Member State of residence would be considered competent (for economically inactive claimants). This is because the legislation of the Member State of residence applies and the United Kingdom has no continuing obligations under Article 7.
30. Receipt of a non-contributory cash sickness benefits in accordance with Article 7 doesn't confer general United Kingdom competency because the legislation of the United Kingdom will no longer apply to an economically inactive person residing in a European Union Member State. Claims for other benefits, including healthcare, should be directed to the competent institution of the Member State whose legislation applies.
31. Where a claimant's benefit was previously exported under the Relevant Income Tax Year conditions, the award should not be ended at the end of the Relevant Income Tax Year period, but at the original award end date to align with Article 7.

Example

Simon was awarded Disability Living Allowance (Care) for a 10-year period, from October 2013 to October 2023. He moved to France in September 2018 and his Disability Living Allowance (Care) award was exported under the Relevant Income Tax Year conditions. His Relevant Income Tax Year cover was due to end in January 2020, but as Article 7 is now the basis for export, the decision maker does not terminate Simon's award in January 2020, as it should now continue until the original award end date in October 2023 (as long as no other circumstances (e.g. work) have changed).

GENUINE AND SUFFICIENT LINK

32. It must be remembered that in order for a non-contributory cash sickness benefit to be exported, the customer has to show a genuine and sufficient link to the United Kingdom (DMG 071753, 071781-071782, 071786-071787 and DMG Memo Vol 2/72).

PRIORITISATION OF RIGHTS

33. In *AH v Secretary of State for Work and Pensions*, the claimant (a child) and her mother were resident in the United Kingdom. Her mother did not work as she was her full time carer. Her father was resident, and working in Belgium.
34. The claimant's mother applied for both components of Disability Living Allowance. The Secretary of State stated that the claimant was ineligible for the Mobility component due to her age and that the Care component could not be paid as Belgium was the competent state.
35. The Upper Tribunal agreed with the Secretary of State that Belgium was the competent state for the payment of cash sickness benefits to the claimant. As the claimant's father was working he was classed as an insured person under Article 21. This in turn encompasses his family members (including the claimant), even though they were living in a different Member State. Only one Member State can be competent at one time and the court prioritised the Article 21 right over the residence based right of the claimant herself and her derived right from her mother who was also resident in the United Kingdom. This is consistent with the Department's position that priority should be given to a work based right over a residence based right.
36. It is important to distinguish 'competency' from 'entitlement'. Competency is not affected if the other Member State does not have an equivalent benefit, or if their domestic conditions of entitlement do not allow payment to non-residents; the European Union regulations are centred around coordination, not harmonisation and *"the primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned"*¹.

¹ Para 72 *Silva Martins EUECJ C-388/09*

37. Competency generally follows applicable legislation. To determine competency decision makers should look at the claimant's circumstances and then those of their spouse/parent/relevant family member. Spousal work will only affect the competent state for the claimant if the claimant is being assessed purely on residency. If the claimant is still working in the United Kingdom or classed as a pensioner, then spousal work will not override the United Kingdom being competent. In simple terms there is a hierarchy for the different rights, both individual and derived

1. Member State claimant is working in
2. Member State claimant is receiving a pension from

3. Member State claimant's family member is working in
4. Member State claimant's family member is receiving a pension from
5. Member State where claimant is residing.

Note: Where a claimant is separated from, but still married to, their spouse, then spousal work or pension receipt will still be considered when looking at competency. In the case of a child, the marital status of the parents has no bearing, both parents are family members of the child.

Example 1

Claire is in receipt of Disability Living Allowance (Care). She and her spouse move to France, which means France becomes the competent Member State to provide Social Security benefits, including healthcare, but Article 7 protects the Disability Living Allowance award. Her spouse tries to make a claim to Disability Living Allowance once they have settled, but the United Kingdom is no longer competent for them and the claim is forwarded to France. Her spouse then starts to work in France, which ends United Kingdom competency for Claire's Disability Living Allowance award. Claire starts receiving her United Kingdom State Pension in 2025 and is able to make a claim for Attendance Allowance to the United Kingdom. However, France remains competent for her spouse, who is still working in France, due to their individual rights as an employed person.

Example 2

David and his spouse lived in Italy, where his spouse was working. The relationship broke down and David returned to the United Kingdom to live with his mother but did not take up any employment. He made a claim to Carer's Allowance. The decision maker determined that Italy was still competent for the payment of cash sickness benefits to David as his spouse was still working there, overriding David's individual right based solely on residency. David later notified that his divorce from his spouse was finalised, and at that point the decision maker determined that the United Kingdom was competent for the payment of cash sickness benefits.

ANNOTATIONS

Please annotate the number of this memo (DMG Memo Vol 2/81) against the following DMG paragraphs:

071740, 071753, 071761, 071767, 071779, 071785, 071790 and Appendix 3 to Chapter 07 - Part 02.

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