DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 13 January 2014 at Liverpool under reference SC064/12/04136) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the Secretary of State's decisions on the claimant's entitlement to the care component of disability living allowance (15 December 2010) and liability for the resulting overpayment (18 January 2011) are confirmed.

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 to Eleanor Mitchell of counsel who acted pro bono through the Unit.

2. I trust that I have made each of the cases freestanding, but that has come at the price of a lot of repetition. I have not set out all the parties' arguments or explained why I have not accepted those that I have rejected. What I have done is to set out what the law is rather than what it is not, by explaining how the legislation works and why it works as it does.

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

3. 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 (EEC) 1408/71 applies. Regulation (EEC) 574/92 provides for the implementation of the Regulation. The relevant provisions of the Regulations are in Appendices 2 and 3.

4. Exporting is not a term used in Regulation 1408/71, 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. *Tolley* decided that Article 22 allowed a claimant who was an employed person in the first State to retain entitlement to a sickness benefit in the second State. The issue in this case is whether that applies when,

unlike *Tolley*, the claimant has become an employed person in the second State. The same issue arises in *KR v Secretary of State for Work and Pensions* [2019] UKUT 85 (AAC), but in relation to Regulation (EC) 883/2004 and without the element of the claimant becoming employed in the new State.

B. What's happened

5. The claimant's claim for a disability living allowance was treated as made on 12 April 2005 and the Secretary of State made an indefinite award from that date, consisting of the care component at the lowest rate. In November 2010, the claimant reported that he had moved to Germany on 21 July 2010, but his wife told the Department that he had started working in Germany on 1 May 2009 and that the rest of the family had followed on 21 July 2010 after the family home was sold. The Secretary of State decided that the claimant had not been entitled to disability living allowance from and including 1 May 2009. A further decision was made that the claimant was liable to repay £1122.30 that he would not have been paid if he had reported what had happened. Both decisions were before the First-tier Tribunal, which allowed the claimant's appeal, but gave the Secretary of State permission to appeal to the Upper Tribunal.

C. Why Regulation 1408/71 applies

6. I have decided that the key event in this case occurred when the claimant took up employment in Germany. That happened on 1 May 2009 when Regulation 1408/71 was still in force. The transition to Regulation 883/2004 is governed by Article 87(8) of that Regulation, which provides that Regulation 1408/71 continues to apply for so long as 'the relevant situation remains unchanged'. There has been no material change since May 2009, so Regulation 1408/71 continues to apply.

D. What Tolley decided

7. At the heart of the arguments in this case is a dispute about the scope of *Tolley*.

8. That case decided at [74] that Article 22 applies 'where an employed … person transfers his residence during sickness to a Member State other than that of the competent institution'. And at [83] that the competent State 'is necessarily the Member State which was competent to grant those benefits before the transfer of residence.' It is irrelevant at [84] that Article 13(2) would otherwise effect a change in the applicable legislation on that transfer.

9. *Tolley* cannot be distinguished on the ground that Mrs Tolley had definitely ceased all occupational activity. The United Kingdom argued at [76] that Article 22 applied only to persons who had not definitely ceased occupational activity, but the Court rejected that argument at [79], saying that 'Mrs Tolley must be regarded as an "employed or self-employed person" …, irrespective of the fact that she definitely ceased all occupational activity.' In other words, it was irrelevant whether or not she had ceased all occupational activity.

10. Article 10, which prevents residence conditions from blocking the exporting of benefits, does not apply to sickness benefits, but the Court decided at [88] that residence as a condition of entitlement in domestic law cannot operate to override Article 22, since that 'would render that provision entirely devoid of purpose.'

11. The only difference between this case and *Tolley* is that the claimant here took up employment in another State. This possibility was not discussed in *Tolley* because it did not arise on the facts. The Court did accept at [63] the possibility of the applicable legislation changing under Article 13 on the basis that any other interpretation 'would effectively render Article 13(2)(f) … meaningless.' It must change when a person changes employment from one State to another. Any other approach would be inconsistent with mobility of labour, which is an important element in freedom of movement.

E. Tolley does not apply when a claimant becomes an employed person in another State

12. The question I have to answer is: should taking up employment in another State make any difference to the application of Article 22? My answer is: yes. My reason is the role played by authorisation. Article 22 does not simply allow a claimant to transfer residence to another State and retain an existing award. This is only allowed if the competent State authorises it. For reasons of good administration, the Secretary of State has chosen not to take any authorisation point on the facts in the post-*Tolley* cases. But I cannot overlook the role of authorisation in the proper interpretation of the Article. A requirement for authorisation as a possible impediment to taking up employment is incompatible with the free movement of labour, one of the original principles of EU law.

13. It might be said that my interpretation of Article 22 has the effect of depriving a claimant of entitlement, which would also be an impediment. But that is beside the point. Authorisation is built into the structure of Article 22. It does not simply allow sickness benefits to be exported. What it does is create a process of authorisation for that to happen. And that inevitably carries with it the risk that authorisation will be refused. That has to be taken as a given of the operation of Article 22. That suggests that the Article is limited to circumstances in which only residence changes. It does not apply, or ceases to apply, when a claimant takes up employment in a new State.

F. Germany is the competent State

14. It follows that Germany was the competent State for any sickness benefits from the moment the claimant became an employed person there. Leaving aside Article 22 for the moment, this is how Article 13 applies to produce that result.

15. If I have understood the sequence of events correctly, the claimant was working in the United Kingdom at the time of his award of disability living allowance, but subsequently became unemployed. If that is wrong, the analysis will change, but not the outcome.

16. On that basis, the claimant was an employed person in the United Kingdom at the time of the claim for disability living allowance. The legislation applicable

to his claim was that of the United Kingdom under Article 13(2)(a). That is the starting point. It is then necessary to identify the *institution* administering that legislation, the *institution* if there is more than one institution, and finally the *competent institution*. All of those terms are defined in Article 1. The institution responsible for administering the legislation was the Department for Work and Pensions. The claimant was insured, at least in respect of old age, with the Department. That was, therefore, the competent institution because that was the institution with which the claimant was insured at the time of the claim: *Tolley* at [82]. As the Department is situated in the territory of the United Kingdom, this country was the competent State.

17. The claimant did not remain an employed person in the United Kingdom indefinitely. When he ceased to be one was a matter for national law: *Tolley* at [64]. Those circumstances are set out in Annex VI to Regulation 1408/71: see *Tolley* at [65]-[66] and Article 10b of Regulation 574/72.

18. Applying point 19(b) of Annex VI, the claimant ceased to be an employed person under domestic law when he ceased employment in the United Kingdom, regardless of whether he did so temporarily or permanently. Point 20(a) does not help the claimant. Apart from anything else, it only applies for so long as he was *last* insured under United Kingdom legislation. Once he became employed in Germany, that condition was no longer satisfied.

19. Although he ceased to be an employed person in the United Kingdom, this did not affect the identity of the competent State. From that moment, Article 13(2)(f) applied instead of Article 13(2)(a), but the applicable legislation remained that of the United Kingdom, and the institution, competent institution and competent State remained the same.

20. That changed when the claimant became an employed person in Germany on 1 May 2009; the applicable legislation then became that of Germany under Article 13(2)(a). That follows through into the institution, competent institution and competent State. The institution, and therefore the competent institution, must be one administering German legislation, meaning that the competent State must be Germany. Quite how the definition of competent institution applies is beside the point; that will only arise if and when the claimant makes a claim for whatever sickness benefits may be available in Germany. What matters is that United Kingdom legislation no longer applies, with the result that this country is no longer the competent State.

21. This analysis renders irrelevant the precise date when the claimant became habitually resident in Germany. What matters is the date on which he became an employed person there.

G. The claimant is not entitled in domestic law as the United Kingdom is not the competent State

22. Section 72(7B) of the Social Security Contributions and Benefits Act 1992 provides:

> (7B) A person to whom either Regulation (EC) No. 1408/71 or Regulation (EC) No. 883/2004 applies shall not be entitled to the care component of a disability living allowance for a period unless during that period the United Kingdom is competent for payment of sickness benefits in cash to the person for the purposes of Chapter 1 of Title III of the Regulation in question.

That provision came into effect on 31 October 2011. In this case, I have to decide whether it was declaratory of the position. If it was, the same position obtains before 31 October 2011. In *Secretary of State for Work and Pensions v AH* [2016] UKUT 148 (AAC), Upper Tribunal Judge Turnbull decided at [8] that that provision and its equivalents for other benefits had been 'enacted in order to give effect to the position under EC law, as it was considered by the UK legislature to be.' I agree with Judge Turnbull because (a) the history indicates that the United Kingdom did not intend to accept responsibility when it was not the competent State and (b) it would have been in breach of EU law if it had done so.

History - background to section 72(7B)

23. Special non-contributory cash benefits were introduced into Regulation 1408/71 by Regulation (EEC) 1247/92. They are, essentially, benefits that have features of both social security and social assistance. It was, and still is (Article 70(4) of Regulation 883/2004), a feature of those benefits that they are payable exclusively in the State of residence and under its legislation.

24. The United Kingdom included attendance allowance, disability living allowance and invalid care allowance, as carer's allowance was then known, in the list of those benefits. That was the understanding until 18 October 2007, when the European Court of Justice gave its decision in the *European Commission* case. It decided that attendance allowance, the care component of disability living allowance (but not the mobility component), and carer's allowance were sickness benefits and not special non-contributory cash benefits.

25. The Government did not amend domestic law following that decision. As entitlement was subject to presence and residence conditions, it is possible that that was thought to be sufficient to control public expenditure. However, those conditions were themselves subject to scrutiny by the European Court of Justice in *Lucy Stewart v Secretary of State for Work and Pensions* (Case C-503/09 EU:C:2011:500) [2012] AACR 8. That decision was given on 21 July 2011.

26. A few months later, section 72(7B) and its equivalents were introduced by regulation 5 of the Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Miscellaneous Amendments) Regulations 2011 (SI No 2426) with effect from 31 October 2011. The content of the other amendments, made by regulations 2 to 4, show that they were a response to the *European Commission* case; the explanatory memorandum confirms that. But the memorandum does not link regulation 5 to that case. It is possible that it was, though, introduced in view of the combined effect of that case and *Lucy Stewart*. The coincidence is certainly remarkable.

The position in EU law

27. Regulation 1408/71 provides for coordination, not harmonisation. States are free to make their own provision for social security benefits, but only so long as they act 'in compliance with European Union law' (*da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse* (Case C-388/09 EU:C:2011:439) [2011] ECR I-5761 at [71]).

28. The European Court of Justice has relied on the principle of freedom of movement to prevent States removing rights that have been earned when the claimant moves to another State (*Bosmann v Bundesagentur für Arbeit-Familienkasse Aachen* (Case C-352/06 EU:C:2008:290) [2008] ECR I-3827 at [29]). But the Court has recognised that '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' (*da Silva Martins* at [72]). It is, therefore, not permissible to rewrite either the Regulation or domestic law on the basis of a general appeal to freedom of movement. As I explained in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176 (AAC), [2016] AACR 41:

> 37. Unlimited resort to general principles of freedom of movement, non-discrimination and equal treatment would allow the Court of Justice of the European Union and any national court applying EU law to rewrite any EU subordinate legislation to the extent that it might hamper freedom of movement. … Resort to this basic principle could rewrite vast tracts of Directive 2004/38 and undermine the principle of coordination that is the stated purpose of Regulation 883/2004. The ultimate logic of the argument is to lead to increasing harmonisation of social security benefits across the EU. That is not the purpose of the Regulation, as the Court has regularly stated. It would also allow, or even encourage, forum shopping when claimants or their families have connections with a number of States. That would be inconsistent with the coordination principle on which the Regulation is based.

29. The Court has gone so far as to decide that States are not free to make provision when they are not the competent State for a particular class of benefit. It set out its approach in *Ten Holder v Nieuwe Algemene Bedrijfsvereniging* (Case C-302/84 EU:C:1986:242) [1986] ECR 1821:

> 21. … As the Court pointed out in its judgments of 23 September 1982 in Case 276/81 *(Kuijpers* [1982] ECR 3027) and in Case 275/81 *(Koks* [1982] ECR 3013), 'the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable' since they are 'under an obligation to comply with the provisions of Community law in force'.

The Court has allowed exceptions, but only if two conditions are met. They were set out in *Ministerstvo práce a sociálínch věcí v B* (Case C-394/13 EU:C:2014:2199) at [28]:

> 'if there are specific and particularly close connecting factors between the territory of that State and the situation at issue, on condition that the predictability and effectiveness of the application of the coordination rules … are not disproportionately affected'.

Those conditions are not satisfied in this case. I accept that there was a close connecting factor with the *territory* of the United Kingdom, as the claimant's family were still living here until July 2010 and he visited them as and when his work in Germany allowed. But if my analysis of Article 22 is correct, allowing domestic entitlement would have a disproportionate effect on the predictability and effectiveness of the coordination rules. It would, for no good reason, impose a responsibility on a former competent State for sickness benefits for persons employed in another State. There is no question of the claimant having an acquired right as disability living allowance is not a contributory benefit.

H. Overlapping benefits

30. Given my decision so far, there is no need to deal with the argument on this issue.

Signed on original
on 20 March 2019

Edward Jacobs
Upper Tribunal Judge

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 (EEC) 1408/71

Article 1 contains the definitions:

(h) *residence* means habitual residence;

(j) *legislation* means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4 (1) and (2) or those special non-contributory benefits covered by Article 4 (2a). …

(n) *institution* means, in respect of each Member State, the body or authority responsible for administering all or part of the legislation;

(o) *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 entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; or

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

(q) *competent State* means the Member State in whose territory the competent institution is situated;

Article 4 sets out the branches of social security covered by the Regulation:

Article 4

Matters covered

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

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

Article 13 identifies which State's legislation applies:

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 13

General rules

1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State;

…

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.

Article 22 applies when a claimant has an award of a sickness benefit from one State and changes habitually resident to another State:

TITLE III

SPECIAL PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

SICKNESS AND MATERNITY

SECTION 1

Common provisions

Article 22

Stay outside the competent State — Return to or transfer of residence to another Member State during sickness or maternity — Need to go to another Member State in order to receive appropriate treatment

1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State, taking into account the nature of the benefits and the expected length of the stay;

(b) who, having become entitled to benefits chargeable to the competent institution, is authorized by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State;

or

(c) who is authorized by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

…

Article 89 authorises 'special procedures for implementing the legislations of certain Member States'. They are in Annex VI:

Annex VI

Y. United Kingdom

19. Subject to any conventions concluded with individual Member States, for the purposes of Article 13(2)(f) of the Regulation and Article 10b of the Implementing Regulation, United Kingdom legislation shall cease to apply at the end of the day on the latest of the following three days to any person previously subject to United Kingdom legislation as an employed or self-employed person:

(a) the day on which residence is transferred to the other Member State referred to in Article 13(2)(f);

(b) the day of cessation of the employment or self-employment, whether permanent or temporary, during which that person was subject to United Kingdom legislation;

(c) the last day of any period of receipt of United Kingdom sickness or maternity benefit (including benefits in kind for which the United Kingdom is the competent State) or unemployment benefit which

(i) began before the date of transfer of residence to another Member State or, if later,

(ii) immediately followed employment or self-employment in another Member State while that person was subject to United Kingdom legislation.

20. The fact that a person has become subject to the legislation of another Member State in accordance with Article 13(2)(f) of the Regulation, Article 10b of the Implementing Regulation and point 19 above, shall not prevent:

(a) the application to him by the United Kingdom as the competent State of the provisions relating to employed or self-employed persons of Title III, Chapter 1 and Chapter 2, Section 1 or Article 40 (2) of the Regulation if he remains an employed or self-employed person for those purposes and was last so insured under the legislation of the United Kingdom;

(b) his treatment as an employed or self-employed person for the purposes of Chapter 7 and 8 of Title III of the Regulation or Articles 10 or 10a of the Implementing Regulation, provided United Kingdom benefit under Chapter 1 of Title III is payable to him in accordance with paragraph (a).

APPENDIX 3

REGULATION (EEC) 574/72

This deals with the implementation of Regulation 1408/71. Article 10b, which provides for the operation of Article 13(2)(f), is mentioned in points 19 and 20 of Annex VI:

Article 10b

Formalities pursuant to Article 13(2)(f) of the Regulation

The date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of the Regulation shall be determined in accordance with that legislation. The institution designated by the competent authority of the Member State whose legislation becomes applicable to this person shall apply to the institution designated by the competent authority of the former Member State with a request to specify this date.