This memo provides guidance on the changes brought about by the decisions made by the UT on 27.3.19, related to the CJEU case of *Tolley*¹

1. KR v SSWP²
2. SSWP v MC³
3. JG v SSWP
4. GK v SSWP
5. SSWP v TG

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 UT decision in Tolley, affect how DMs will now decide on whether PIP (Daily Living) (known as cash sickness benefits) can be paid when the claimant is habitually resident in another Member State of the EEA or Switzerland (MS). 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 RITY 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 14081 and Regulation 8832.


BACKGROUND

5 In the case of Tolley, covered by Regulation 1408, the CJEU decided that if you are insured just for a single risk, (in the case of Mrs Tolley, old age by virtue of NI 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 NI contributions in the UK for the minimum qualifying period, had been awarded DLA, and then permanently moved to Spain (becoming habitually resident there), where she did not work. She wished to export her DLA. The CJEU concluded that when she applied for DLA she was insured under the UK’s social security system, was therefore an employed person under Regulation 1408, and that the UK was still the competent MS 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.
SUMMARY OF NEW DECISIONS

6 In the five new cases the UT agreed that

1. once a person has started working in another MS, the UK 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 MS the UK is no longer competent for new claims from that person for cash sickness benefits, where residence is the determining factor for competence\(^2\)

3. if a person in receipt of UK cash sickness benefits becomes permanently resident in another MS then the UK 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 switch\(^3\)

4. the UK cannot generally pay cash sickness benefits if it is not the competent MS\(^4\).

\(^1\) 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 RITY 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 DWP in January 2019. See paragraph 21 below for more detail.

8 For clarification, if the claimant was in receipt of ESA(Cont) (in the support group), IB or SP/RP then they would be classed as a pensioner and the UK would be competent for the payment of cash sickness benefits (ADM C2123-C2124). Additionally, for a claimant who is living in another MS and was receiving payment of cash sickness benefits from that other MS, if they start to receive their (solely) UK SP/RP, then the UK becomes competent for the payment of the cash sickness benefits from that point, and the payment of such from the other MS 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 (FCFA) cases. FCFA cases are currently considered differently from export cases, and DMs must be familiar with those differences.
KR V SSWP

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 UK, and was in receipt of DLA before moving to Finland, and applied to export her benefit. She did not commence work there. She was insured in the UK for old age because she had a future entitlement to State Pension, (as she satisfied the minimum qualifying period through credited NI contributions,) through credited NI contributions, at the point she moved to Finland. It was decided that she was protected from the withdrawal of her DLA because she was covered at the time of her move by regulation 883 and was insured for old age benefits, having regard to *Tolley* and Article 7 of Regulation 883. The UT 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 DMs 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 UK, currently unemployed, but receiving PIP (Daily Living) and PIP (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 SP on reaching state pension age in a few years’ time. The DM 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 883, the Daily Living component of PIP could be exported because it was a cash sickness benefit and competency had not switched to the new MS. The DM determined that the Mobility component of PIP was not exportable because it is a Special Non-Contributory Benefit (SNCB).

SSWP V MC

This case was similar to *Tolley*, in that the claimant was in receipt of a cash sickness benefit before moving to a new MS, and Regulation 1408 applied. The claimant wished to export their benefit. However, in this case the claimant commenced work in that MS as soon as they moved. The UT made it very clear that the applicable legislation and the competent MS must change when a person becomes employed in a different MS. 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 DMs receive any Regulation 883 cases, please refer them to DMA Leeds.

Where the claimant, (or in the case of a child one or both of their parents,) is working in the other MS, then that MS is competent for the payment of cash sickness benefits. If DMs are not sure from the available evidence whether the claimant is working in the other MS, or the person working is a family member of the claimant, please refer the case to DMA Leeds. If the claimant is not working, but their spouse is, please refer the case to DMA Leeds. In the case of a child, if their parents are both working, but in different MS, please refer to DMA Leeds.

Example 1

Louise was in receipt of PIP, 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 SP on reaching State Pension Age. The DM decided that PIP (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 DM 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 PIP (gesetzliche Pflegeversicherung). She returned to the UK, where she took up paid employment. German Social Security contacted UK Social Security to state they were no longer competent to pay Janet’s cash sickness benefits. The UK DM agreed that the UK was competent for the payment of cash sickness benefits to Janet as she was a worker in the UK.

JG V SSWP, GK V SSWP & SSWP V TG

All three of these cases concerned FCFA where claimants were not in receipt of any cash sickness benefits when they moved to a new MS, and they then made a claim for one or more of those benefits. They were not working in the new MS, nor were they (or their spouses) in receipt of any UK benefit that would qualify them as “pensioners”. JG was a case where Regulation 1408 applied, and in both GK & TG Regulation 883 applied.

The UT 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 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 MS 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 MS of residence is competent unless other factors apply.

15 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 MS and MS of residence are different, following the process described in paragraph 21.

16 FCFA claimants cannot rely on the argument of the protection of acquired rights\(^1\) under Article 48 TFEU (previously Article 42 EC and Article 51 EEC), as established in CJEU 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 UK (until they reach SP age, see para 29).

\(^1\) Bosmann (C-352/06) para 29 & da Silva Martins (C-388/09) para74

**DLA (C) TO PIP (DAILY LIVING) TRANSITION, PIP AWARD REVIEWS AND PIP ADVANCE CLAIMS (ON SHORT-TERM AWARDS)**

17 Many claimants in receipt of DLA are going through a mandatory transition onto PIP. Where a claimant resident in another MS, who was able to export their claim to DLA (C) is going through transition to PIP (Daily Living), please refer the case to DMA Leeds.

18 Many PIP 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 MS, 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 DMA Leeds.

19 Some other PIP 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 PIP. 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 DMA Leeds.
LINK BETWEEN PIP (DAILY LIVING) AND CA

The cases of JG & GK also looked at the link between AA and CA. The claimants argued that the competent state for payment of AA should be relevant for establishing competence for the linked CA. The UT explained that despite the requirement for an award of AA to the recipient of care for a successful award of CA, the two claims are separate for the purposes of the co-ordination regulations under both Regulation 1408 and Regulation 883. This finding also applies to CA claims linked to a PIP (Daily Living) claim. DMs should follow the process set out in paragraph 21 below to determine which state is competent for the payment of CA; i.e. just because the UK is the competent state for the payment of PIP (Daily Living), it doesn’t automatically follow that the UK is competent for the payment of a related CA claim.

Example 1

Louise was living in the UK, with her husband, Jeremy and her mother, Mary. She was in receipt of CA due to caring for Mary, who was in receipt of PIP (Daily Living) and ESA(Cont). Jeremy was employed. He changed to a new job and all three had to relocate to Germany for this. Louise took up part-time employment in Germany, below the CA ‘gainful employment’ threshold. The PIP DM determined that Mary was entitled to export her PIP (Daily Living) as she was an insured pensioner. However, the CA DM determined that Louise was not entitled to export her CA, as she was working in Germany, the new MS. Germany was therefore competent.

Example 2

Joseph was living in Italy. He was not in receipt of any UK 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 PIP (Daily Living) and ESA(Cont) before she relocated. The DM decided she could export her PIP (Daily Living). Joseph then put in a brand new claim for CA. The DM decided that the UK was not competent for the payment of Joseph’s CA as the residence rule applied to him, and was not supplanted by the work rule. Italy was therefore competent.

REMOVAL OF RITY

The Secretary of State decided to remove the RITY condition from the consideration of both export and FCFA cases on 14.1 19. As a result, DMs can no longer export benefit, or allow a FCFA, solely on the basis that a person is insured for UK sickness benefit. To determine the competent MS, under both Regulations 1408 and 883 when a change in habitual residence occurs, the DM should establish which of the work, SP
or residence rule applies. The starting point is that the MS in which the claimant works (see paragraph 12 above), or receives SP from will be the competent MS. If neither of these rules apply, then the residence rule applies to determine the competent MS (subject to paragraph 8 above)\(^1\). The relevance of other provisions in Article 11 - 16 of Regulation 883 or Article 13 - 17a of Regulation 1408 should also be considered.

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

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22 In the *JG* case (under Regulation 1408), the claimant had been an “employed person” in the UK, but UK 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 883), the claimants were not “pursuing an activity as an employed or self-employed person”\(^1\) in any MS 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)

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**Example 1**

Nicola moved to Portugal for early retirement. She was not in receipt of any UK benefits and was due to receive a full UK SP 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 PIP (Daily Living), and put in a claim for CA. The DM decided that the residence rule applied to her, such that the applicable legislation was that of Portugal. The UK was not competent for the payment of CA. However, once she starts to receive her UK SP, the UK will be competent for the payment of cash sickness benefits, providing all other relevant criteria are satisfied. The rules on overlapping benefits would apply.

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**Example 2**

Caroline moved to France with her dependant adult son James. She did not carry out any work for a French company, but continued her work as an accountant for a UK Ltd company, receiving a wage from them and paying tax and NI contributions. She put in a claim for PIP (Daily Living) for James. The DM determined that the work rule applied to James’ claim as he was a dependant adult whose parent was a worker in the UK, and that therefore the UK was competent for the payment of PIP (Daily Living).
GENUINE AND SUFFICIENT LINK

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 (GSL) to the UK. (ADM C2130, C2133-C2138 and ADM Memos 20/17 and 11/19.)

INSURED FOR THE RISK OF OLD AGE

A claimant is considered to be insured for the risk of old age if they have a future entitlement to RP/SP at the applicable date. The applicable date is the date the claimant moves abroad in export cases. There are three different RP/SP schemes, and the one that applies to the claimant will determine if they have a future entitlement.

1. 6.4.75 to 25.9.07 rules – in order to have a future entitlement to RP, male claimants required a minimum qualifying period of 11 years of NI contributions and female claimants required 10 years of NI contributions (25% of working life). This had to include 1 year of paid (or treated as paid) NI contributions, but the rest could be made up of NI credits.

2. 26.9.07 – 5.4.16 rules – in order to have a future entitlement to RP all claimants required a minimum qualifying period of only one year on their NI record, which could be either paid NI contributions or NI 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 SP age on or after 6.4.10. If the claimant is due to reach SP after 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 SP, all claimants require a minimum qualifying period of at least 10 years on their NI record, which can be made up of paid NI contributions or NI credits. This set of rules will apply if the applicable date is on or after 6.4.16.

N.B. – In PIP cases there should not be any claimants who fall under the first scheme, unless they are former DLA claimants who have transitioned.

In all three SP rules a person can also get entitlement to UK SP by virtue of EU contributions and credits from another MS making up their UK NI to the minimum qualifying period. Additionally, for pre-25.9.07 claimants, if HRP 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 DMA Leeds for further guidance.
If a claimant is not classified as a pensioner and does not have their own future entitlement to SP, they can rely on any future SP that their spouse or civil partner, (or if they are a child or an adult dependant 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.

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 DMs 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 DMA Leeds, to investigate where the claimant is insured for any of the other risks.

In FCFA 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 UK is not competent and residency takes priority, as per paragraph 21 above. However, once the claimant is in receipt of SP/RP solely from the UK, the UK will be competent for the payment of cash sickness benefits, as per paragraph 8 above. If the claimant has an SP/RP that is made up of pensions from both the UK and one or more MS, please refer to ADM C2126-C2129.

ANNOTATIONS

Please annotate this Memo (ADM 20/19) against ADM C2098, C2110, C2111, C2119, C2123 and Appendix 1 to Chapter C2.

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in Memo ADM 07/19 - Obtaining legal advice and guidance on the Law.

DMA Leeds: November 2019

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