



## TOLLEY LEAD CASES GUIDANCE (REVISED)

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### INTRODUCTION

1. This Memo replaces DMG Memo 20/19, 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 UT on 27.3.19, related to the CJEU case of *Tolley*<sup>1</sup>, and the subsequent Court of Appeal Decision in *George Konevod*<sup>2</sup>, made on 30.06.20. It will



clarify how the SSWP 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 EU member state. The decisions made by the UT on 27.3.19 were;

1. KR v SSWP<sup>3</sup>
2. SSWP v MC<sup>4</sup>
3. JG v SSWP<sup>5</sup>
4. GK v SSWP<sup>6</sup>
5. SSWP v TG<sup>7</sup>.

**NB.** The claimant in *GK v SSWP* 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)*<sup>13</sup>

3. These decisions, along with the original UT decision in *Tolley*, affect how DMs will now decide on whether PIP (known as a cash sickness benefit) can be paid when the claimant is habitually resident in another Member State of the EEA (MS) 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 UT in *Tolley*, which is the relevant determination for the purposes of Section 27<sup>1</sup>). This memo therefore applies to all stockpiled cases and future cases.

*1 Section 27 of the Social Security Act 1998*

4. The cases discussed in this memo are covered by either Regulation 1408<sup>1</sup> or Regulation 883<sup>2</sup>.

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

5. This memo also provides guidance on the removal of the RITY Policy (see ADM C2122), approved by the Minister on 14.1.19 and the application of Article 7 to export cases<sup>1</sup>

*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 SSWP*<sup>1</sup>. 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 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.
8. Unlike Regulation 1408, Regulation 883 does not provide a clear definition of an "insured person" for the purposes of establishing which MS 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 MS 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 MS competent under Title II of Regulation 883, i.e. the MS of applicable law.

## SUMMARY OF UT DECISIONS LINKED TO TOLLEY AND THE COA DECISION IN GEORGE KONEVOD.

10. In the five 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)<sup>1</sup>



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<sup>2</sup>
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<sup>3</sup>
4. the UK cannot generally pay cash sickness benefits if it is not the competent MS<sup>4</sup>.

*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 CoA built upon the decision in *GK v SSWP* as per points 2. and 4.
12. 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 25 below for more detail.
13. 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 C2123-2124). 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 38 below).
14. Paragraphs 15 to 17 below refer to export cases, and paragraphs 18 to 23 below refer to first claim from abroad (FCFA) cases. FCFA cases are considered differently from export cases, and DMs must be familiar with those differences.

## **KR V SSWP**

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 UK, and was in receipt of DLA before moving to Finland, and applied to export her benefit. She did not commence work there. 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



her award of benefits was protected from reduction or withdrawal on account of her change of residence to a new MS, 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) but DWP has now accepted that Article 7 applies to the export of existing claims (see para 27 below). It was not relevant whether KR was ‘insured’, because under Regulation 883, insurance is not a requirement to come within the scope of the Regulation.

### **Example**

Bob was living in the UK, currently unemployed, but receiving PIP Daily Living and Mobility (PIP (DL) and PIP (Mob)). 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, PIP (DL) 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. DWP remains responsible for paying PIP (DL) as long as Bob continues to meet all other eligibility criteria and there are no changes in his economic activity. The UK 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 DM determined that PIP (Mob) was not exportable because it is a Special Non-Contributory Benefit (SNCB).

## **SSWP 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 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 clear that the applicable legislation and the competent MS changed 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.
17. 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, 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. Where the claimant is not working, but their spouse is, please refer to para 38 below, on the Prioritisation of Rights.



### 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. The DM decided that PIP (DL) 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 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. 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 MS, 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 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

18. 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.
19. The UT confirmed (and the CoA 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 MS of applicable legislation was competent, from the point when the claimants became habitually resident there (See paragraph 25 below and ADM C2110 – C21112). In short, the MS of residence is competent unless other factors apply<sup>1</sup>.

<sup>1</sup> 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 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.
21. In the cases of *GK & TG* (under Regulation 883), the claimants were not “pursuing an activity as an employed or self-employed person”<sup>1</sup> in any MS 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 MS and MS 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. FCFA claimants cannot rely on the argument of the protection of acquired rights<sup>1</sup> 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 these 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 paras 13 and 38).

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

## **LINK BETWEEN PIP AND CA**

24. 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 Court of Appeal and 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 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 MS for AA payable to the severely disabled person is also the competent state for CA. 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 (ADM C2123). This finding also applies to CA claims linked to a PIP (DL) claim. DMs should follow the process set out in paragraphs 25-29 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, 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 (DL) and ESA (Cont) in the support group. 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 PIP DM determined that Mary was entitled to export her PIP as she was a UK 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(DL) and ESA (Cont) in the support group before she relocated. The DM decided she could export her PIP. 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 AND THE APPLICATION OF ARTICLE 7**

25. 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 allow export of a benefit, or allow a FCFA, solely on the basis that a person meets the contribution requirements for UK sickness benefit. For export claims, Article 7 will now apply for the majority (see paras 26-28), but for FCFA claims, to determine the competent MS, under both Regulations 1408 and 883, the DM should establish which of the work, State Pension or residence rule applies. The starting point is that the MS in which the claimant works (see paragraph 16), or receives SP/ESA(C) 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 38)<sup>1</sup>. The relevance of other provisions (e.g. working in two or 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 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, who was in receipt of PIP, 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.

### **Example 2**

Caroline moved to France with her adult dependent 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 (DL) for James. The DM determined that the work rule applied to James' claim as he was a dependent adult whose parent was a worker in the UK, and that therefore the UK was competent for the payment of PIP (DL).

26. 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 MS. Export under Article 7 not reliant on the claimant having been employed in the UK because the UK CSBs in scope of this memo are non-contributory (NC).
27. Under Article 7 a NC CSB 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 UK would not be competent for any new claims to cash sickness benefits and the MS of residence would be considered competent (for economically inactive claimants). This is because the legislation of the MS of residence applies and the UK has no continuing obligations under Article 7.
28. Receipt of a NC CSB in accordance with Article 7 doesn't confer general UK competency because the legislation of the UK will no longer apply to an economically inactive person residing in an EU MS. Claims for other benefits, including healthcare, should be directed to the competent institution of the MS whose legislation applies.
29. Where a claimant's benefit was previously exported under the RITY conditions, the award should not be ended at the end of the RITY period, but at the original award end date to align with Article 7.



### Example

Simon was awarded DLA(C) for a 10-year period, from October 2013 to October 2023. He moved to France in September 2018 and his DLA(C) award was exported under the RITY conditions. His RITY cover was due to end in January 2020, but as Article 7 is now the basis for export, the DM 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

30. 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 (GSL) to the UK. (ADM [C2130](#), [C2133-C2138](#) and ADM Memo [11/19](#))

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

31. 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.**
32. 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 under Article 7 is due a review, **please refer the case to DMA Leeds.**
33. 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 under Article 7 falls into this category, **please refer the case to DMA Leeds.**

## PRIORITISATION OF RIGHTS

34. In *AH v SSWP*, the claimant (a child) and her mother were resident in the UK. Her mother did not work as she was her full time carer. Her father was resident, and working in Belgium.



35. The claimant applied for DLA (Child) Care and Mobility. The SoS 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.
36. The UT agreed with the SoS 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 MS. Only one MS 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 UK. This is consistent with DWP's position that priority should be given to a work based right over a residence based right.
37. It is important to distinguish 'competency' from 'entitlement'. Competency is not affected if the other MS does not have an equivalent benefit, or if their domestic conditions of entitlement do not allow payment to non-residents; the EU 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"*<sup>1</sup>.

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

38. Competency generally follows applicable legislation. To determine competency DMs 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 UK or classed as a pensioner, then spousal work will not override the UK being competent. In simple terms there is a hierarchy for the different rights, both individual and derived;

1. MS claimant is working in
2. MS claimant is receiving a pension from
3. MS claimant's family member is working in
4. MS claimant's family member is receiving a pension from
5. MS where claimant is residing

N.B. 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 PIP (DL). She and her spouse move to France, which means France becomes the competent MS to provide SS benefits, including healthcare, but Article 7 protects the PIP (DL) award. Her spouse tries to make a claim to PIP once they have settled, but the UK is no longer competent for them and the claim is forwarded to France. Her spouse then starts to work in France, which ends UK competency for Claire's PIP award. Claire starts receiving their UK State Pension in 2025 and is able to make a claim for AA to the UK. 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 UK to live with his mother but did not take up any employment. He made a claim to PIP. The DM determined that Italy was still competent for the payment of CSB 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 DM determined that the UK was competent for the payment of CSB.

## **ANNOTATIONS**

Please annotate this Memo (ADM 17/20) 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: August 2020**

**The content of the examples in this document (including use of imagery) is for illustrative purposes only**