IN THE UPPER TRIBUNAL **Appeal No: CDLA/2186/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Bolton on 17 April 2015 under reference SC122/14/00778 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The decision is to set aside the Secretary of State's decision of 4 June 2014 and replace it with a decision that as at the date of his claim for Disability Living Allowance (DLA) of 29 March 2014 the appellant satisfied the prescribed conditions as to presence and residence in Great Britain for the purposes of DLA. The determination of whether he satisfied the 'disability conditions' of entitlement to DLA under sections 72 and 73 of the Social Security Contributions and Benefits Act 1992 now fall to be decided by the Secretary of State.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This appeal concerns what is sometimes termed the 'the past presence test' found in regulation 2(1)(a)(iii) of the Social Security (Disability Living Allowance) Regulations 1991 (the "DLA Regs"), made under section 71(6) of the Social Security Contributions and Benefit Act 1992. The test in regulation 2(1)(a)(iii) of the DLA Regs requires that a claimant for Disability Living Allowance ("DLA") "has been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 104 weeks in the 156 weeks immediately preceding [the first day from which entitlement is claimed]".

2. This test however is modified by regulation 2A of the DLA Regs, which provides:

> "2A.—(1) Regulation 2(1)(a)(iii) shall not apply where on any day—
>
> (a)the person is habitually resident in Great Britain;
>
> (b) a relevant EU Regulation applies; and
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> (c)the person can demonstrate a genuine and sufficient link to the United Kingdom social security system."

3. It is whether regulation 2A applies so as to exempt the appellant, who is a Czech national, from the past presence test in regulation 2(1)(a)(iii) that is the issue on this appeal. The short answer is that it does because the Secretary of State now concedes that the appellant had a "genuine and sufficient link " to the UK social security system (sub-paragraphs (1)(a) and (1)(b) of regulation 2A not being in issue on this appeal) at the time of his March 2014 claim for DLA. That link was through the appellant's sister

4. Given this concession the facts may be taken quite briefly, though they are important. The appellant is a Czech national. He has ADHD, autism and a learning disability. He came to the UK with his mother on 14 March 2014 to live with the appellant's sister (the mother's daughter). At that time he was just short of his 13th birthday, his mother was aged 54 and his sister 27 years of age. It is now accepted that the appellant's sister had been working in the UK for a number of years (it would seem at least five) at the time of her brother's claim for DLA on 29 March 2014 earning a salary of £10,000 per year. She was and is his appointee on the claim for DLA. She also claimed and was awarded child and working tax credits in respect of her brother. In addition, she provided care for her brother.

5. A claim for DLA was made by the appellant through his sister as his appointee for benefit purposes with effect from 29 March 2014. The claim was refused by a decision of the Secretary of State on 4 June

2014. The basis for the decision was that the appellant had arrived in the UK accompanied by his sister (and mother) on 14 March 2014 and therefore he did not have a genuine and sufficient link to the UK because neither he nor his sister had previously lived or worked in the UK.

6. The appellant appealed against this decision on the ground that the Secretary of State had failed to consider the appellant's link to the UK through his main carer, that being his sister, who it was said had lived and worked in the UK for six years. It was said that as the appellant was only a child he was unable to establish any links to the UK social security scheme himself but he could rely on the link of his sister to the UK as she was his carer. Reliance was placed on the CJEU's decision in *Lucy Stewart –v- SSWP* (Case C-503/09) [2012] AACR 8. That reliance, I assume, was on paragraph 100 of the CJEU's judgment where it said:

> "Other elements capable of demonstrating the existence of a genuine link between the claimant and the competent Member State may, secondly, be apparent from the claimant's family circumstances. In the case in the main proceedings, it is common ground that Ms Stewart, who is incapable of acting on her own behalf because of her disability, remains dependent on her parents who care for her and represent her in her relations with the outside world. Both Ms Stewart's mother and her father receive retirement pensions under United Kingdom legislation. In addition, her father worked in that Member State before retiring, whereas her mother previously received, also under United Kingdom legislation, incapacity benefit."

7. The Secretary of State now accepts that he was wrong to argue before the First-tier Tribunal that the appellant, his mother and his sister had all arrived in the UK in March 2014 and none of them, therefore, had previously worked in the UK. As set out above, it is accepted that the appellant's sister had lived and worked in the UK for a number of years before her mother and brother came to live with her here.

8. The First-tier Tribunal dismissed the appeal. It accepted that the appellant's sister cared for him and had lived and worked in the UK for

at least five years. However it decided that this did not assist the appellant as he was not a "member of the family" of his sister under Article 1(i) of Regulation (EC) No 883/2004. The term "member of the family" as there defined limits it, relevantly, to (a) a person recognised as a member of the family under the relevant UK legislation (which did not assist the appellant as the legislation concerning DLA does not provide a definition of 'family') or, (b) if the national legislation does not give a definition of 'family', "spouse, minor children, and dependent children who have reached the age of majority", which did not cover the appellant's relationship with his sister.

9. The First-tier Tribunal further concluded, rightly in my judgment, that on the facts the appellant and his mother could not satisfy the past presence test in regulation 2(1)(a)(iii) of the DLA Regs. It also concluded that although the appellant was a "member of the family" of his mother under Regulation (EC) No 883/2004, she had not worked in the UK and the UK was not the 'competent' state for her.

10. In giving the appellant, through his sister, permission to appeal I said:

> "I do not give permission to appeal on the ground advanced on behalf of [the appellant]. In my judgment the First-tier Tribunal arrived at the legally correct decision on [the appellant] not being a member of his sister's family.
>
> The definition of "member of a family" in Article 1(i) of Regulation (EC) No 883/2004 is clear. [The appellant's] sister.....,is not defined or recognised as a member of the family, nor is she designated as a member of the household, for DLA purposes and therefore the definition in Article 1(i)(2) must apply. It does not cover.....the sister. The reliance on the DMA guidance is misplaced. It is no more than guidance and in any event seemingly predates Reg 883/2004 coming into effect. If reliance is to be placed on such guidance, however, the more relevant part would be that which deals with DLA. This is in paragraph 071759 of Chapter 7, which refers expressly to Reg 883/2004 and defines members of the family in line with Article 1(i)(2). Moreover, a similar conclusion was reached in *KT –v- HMRC* [2013] UKUT 0151 (AAC) (see paragraphs 20 and 21).
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> I give permission to appeal, however, on two grounds.
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> First, it is unclear why the tribunal analysed matters in terms of [the mother's] status and not [the appellant's]. Nor is it clear why the

> tribunal concluded that the UK was not the competent state for paying DLA. On the face of section 7B SSCBA 1992 and Article 11(3)(e) of Reg 883/2004, was not the UK the "competent state" for [the appellant] under Reg 883/2004? If it was then arguably the next step to be taken, which arguably the tribunal did not do, was to address and as to whether [the appellant] was (i) habitually resident in the UK, and (ii) had a "genuine and sufficient link" to the UK social security system: per regulation 2A(1) of the Social Security (Disability Living Allowance) Regulations 1991. If regulation 2A(1) did apply to [the appellant] then the "past presence test" in regulation 2(1)(a)(iii) could not have applied to him, and therefore the tribunal would have been in wrong in law to find against [the appellant] under regulation 2(1)(a)(iii).
>
> Relatedly, and more particularly, did the First-tier Tribunal err in law in not having regard to [the sister's] ties with the UK (in terms of her working here and paying taxing and national insurance for some 5 years, and providing care and support for [the appellant] and being in receipt of child tax credit and child benefit for him) when assessing her brother's link with the UK? Even if [the sister] was not a member of [the appellant's] family for the purposes of Article 1(i) of Reg 883/2004, was their status as (wider) family members not still relevant to the genuine and sufficient link test either given the terms of Article 11 of Regulation (EC) No 987/2009 or generally?
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> Second, assuming a genuine and sufficient link to the UK could not be shown by [the appellant], did the tribunal err in law in not aggregating [the appellant's] periods of qualifying residence in the Czech Republic with his period of residence in the UK pursuant to Article 6 of Reg 883/2004? And what steps did the Secretary of State take under Article 12 of Reg 987/2009 to contact the Czech Republic to identify all periods of qualifying residence completed under Czech legislation? It would appear that [the appellant] was in receipt of disability benefit(s) for a considerable period of time in the Czech Republic before he came to the UK. (Similar arguments may have already arisen in cases *CDLA/703/2015* and *CG/5566/2014*.)"

11. The Secretary of State's agreement to the appeal being allowed does not relate to the second ground of appeal I suggested but the first. On the basis of the following facts, which he does not contest, the Secretary of State concedes that the appellant had a genuine and sufficient link with the UK social security system as at the date of his claim for DLA on 29 March 2014 and so was exempted from the 'past presence test'. These facts are:

    (i) the appellant had just turned 13 years of age at the time of the DLA for DLA and therefore was a minor;
    (ii) the appellant was living with his sister;

(iii) the sister had lived and worked in the UK for several years prior to the appellant's claim for DLA;

(iv) the appellant's mother, by contrast, was not working at the time of the DLA claim;

(v) the appellant's sister was in receipt of child and working tax credits in respect of her brother (the appellant), and child benefit for him; and

(vi) the sister was providing regular care for the appellant.

12. In my judgment findings as to these facts were and are properly and rationally available on the evidence before the First-tier Tribunal and I accept the concession of the Secretary of State on this case that these facts ought to have led the First-tier Tribunal to conclude that the appellant at the time of his claim for DLA had a genuine and sufficient link with the UK social security system through his sister. I further accept that the First-tier Tribunal erred in law in not so finding.

13. Although it is not necessarily material to my decision, I also accept the Secretary of State's criticism that the First-tier Tribunal wrongly focused on the definition of 'member of family' under Regulation EC 883/2004. The task for the First-tier Tribunal was to determine the domestic law tests of (i) whether the appellant met the 'past presence test' (which he could not on the facts) and, (ii) if he could not, whether he was exempted from that test by reason of his having a genuine and sufficient link with the UK social security system. In determining that last issue the First-tier Tribunal, and the Secretary of State's decision maker beforehand, was not limited to considering the links the appellant himself had to the UK or the links of those family members defined as such under Article 1(i) of Regulation (EC) 883/2004.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 15th June 2016