Decision of the Upper Tribunal (Administrative Appeals Chamber)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC064/10/03306, made on 11 May 2011 at Liverpool, did not involve the making of an error on a point of law.

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 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 a claim for a sickness benefit made to the United Kingdom by a claimant who is habitually resident in another Member State

3. This case concerns carer's 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 [68]. 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. The issue for me is whether the United Kingdom is the competent State for a claim for carer's allowance made from outside the United Kingdom when the claimant was no longer habitually resident here. In *Tolley* at [71]-[72], the Court decided that Article 19 of the Regulation applied when an EU citizen who is habitually residence in one State applies for a benefit in another State. That is what has happened in this case. How does Article 19 apply to that claim? The

claimant's argument is that the United Kingdom is the competent State: (a) because of the correct interpretation of the Regulation or, failing that, (b) because this country was the competent State for the award of attendance allowance to her mother, which is so closely connected to carer's allowance that the same State should be competent for both. I reject those arguments. The same issues arose in *GK v Secretary of State for Work and Pensions* [2019] UKUT 87 (AAC), but in relation to Regulation (EC) 883/2004.

B. What's happened

5. The claimant has cared for her mother since 2000. Her mother was awarded an attendance allowance, but this was terminated when they moved to France in 2003. As a result of the decision in the *European Commission* case, she became entitled to her allowance from and including 18 October 2007.

6. The claimant made two claims for a carer's allowance in 2010, when both she and her mother were habitually resident in France. She had never worked in France. She had worked in the United Kingdom, but not since 2000 at the latest. The first claim was made on 30 June 2010, claiming a carer's allowance from that date. The second claim, strictly an amendment to the first claim, was made on 6 July 2010, claiming an allowance from 18 October 2007. The Secretary of State refused the claims on 16 August 2010. That decision was revised on 4 October 2010 to decide that the claimant was not entitled from and including 18 October 2007 on the ground that the United Kingdom was not the competent State for the claim. The First-tier Tribunal confirmed the refusal of the claim. I gave the claimant permission to appeal to the Upper Tribunal.

C. Why Regulation 1408/71 applies

7. The parties agreed that this Regulation applied. The claims for a carer's allowance were both made after Regulation (EC) 883/2004 came into force on 1 May 2010, but they were treated as made before that date. I accept that Regulation 1408/71 applies.

D. The claimant is an employed person

8. The Secretary of State conceded in *KR v Secretary of State for Work and Pensions* [2019] UKUT 85 (AAC), a Regulation 883/2004 case, that the reasoning in *Tolley* at [38] applies when a claimant wishes to export a sickness benefit. The concession was based on Article 7 or, in the alternative, on Article 21 of that Regulation. The Secretary of State has limited that concession to cases involving the export of sickness benefits and argued that it does not apply to new claims, even in a Regulation 1408/71 case. I do not accept that argument.

9. In *Tolley*, the Court decided at [38] that the claimant was within the scope of the Regulation because she was an employed person, which is defined in terms of being 'insured'. She was an employed person because she was 'covered, even if only in respect of a single risk … by a general or special social security scheme'. That risk in her case was old-age (Article 4(1)(c)). The Court also decided that it was irrelevant that:

- the risk had not materialised (at [41]). In Mrs Tolley's case, that was because she had died, but the point is of general application;
- the claimant had definitely ceased all occupational activity (at [79]).

10. I can see nothing in the Court's reasoning to limit it to cases of exporting benefits. That was, I accept, what the Court was dealing with, but its reasoning on the scope of the Regulation is self-contained, freestanding from the export issue, and not dependent on the Article of the Regulation to which it applied. I am bound to apply *Tolley*.

11. Just to be clear, I am not applying the Secretary of State's concession beyond its terms. What I have decided is that the same position applies to new claim cases.

E. Title II is comprehensive on identifying the applicable legislation

12. The starting point to apply Regulation 1408/71 is Article 13(1), which provides that the 'legislation shall be determined in accordance with the provisions of this Title.' That means Title II. It provides a comprehensive set of rules.

13. I have previously suggested that Title II is not exhaustive. In *Secretary of State for Work and Pensions v AK* [2015] UKUT 110 (AAC), [2015] AACR 27 at [23], I said that 'Article 11(3)(e) is subject not only to Article 12 to 16, but also the subsequent Articles …' in Title III, Chapter 1 of Regulation 883/2004. What I said is consistent with what the European Court of Justice said of the equivalent provisions in Regulation 1408/71 in *van Delft v College voor zorgverzekeringen* (Case C-345/09 EU:C:2010:610) [2010] ECR I-9879:

> 47. However, that provision of a general nature, which appears in Title II of Regulation No 1408/71, 'Determination of the legislation applicable', applies only in the absence of provision to the contrary in the special provisions relating to the various categories or benefits which constitute Title III of that regulation (see Case 227/81 *Aubin* [1982] ECR 1991, paragraph 11).
>
> 48. Articles 28 and 28a of that regulation, which appear in Title III, Chapter 1 of the regulation, 'Sickness and maternity', do in fact derogate from those general rules as regards the provision of sickness benefits in kind to pensioners resident in a Member State other than the State responsible for payment of the pension.
>
> 49. In a case such as that in the main proceedings, the referring court was therefore correct in excluding the application of Article 13(2)(f) of Regulation No 1408/71 in favour of Articles 28 and 28a of that regulation.

On reflection and despite what the Court said, I would now express myself slightly differently. Title II is comprehensive at identifying the applicable legislation. What Title III does is to make further provision consequent upon the decision taken under Title II. So, before Article 19 can apply, there must already be a competent State, which will have been identified pursuant to Article 13. Similarly Article 22, which provides for a State to retain competence despite an

authorised transfer of residence to another State, operates on the basis that there is a competent State, which must have been identified under some other provision. It is compatible with Article 13 because it operates to prevent another State becoming competent and, therefore, blocks the application of Article 13(2)(f) in export cases.

F. Article 19 only applies if the competent State and the State of residence differ

14. Article 19 applies to 'An employed or self-employed person … residing … in a Member State other than the competent Member Sate'. By its terms, the Article does not identify the competent State, nor does it say how to identify it. It takes for granted that there is a competent State and provides for how that State's responsibility works out in practice when the claimant is habitually resident in another State. The competent institution, and therefore the competent State, has to be fixed by the chain of definitions beginning with the legislation that is applicable under Title II.

G. The applicable legislation is that of France

15. Article 13 identifies the applicable legislation. It takes a geographical approach by reference to the claimant's place of work or place of habitual residence. Article 13(2)(a) lays down the place of work rule: the applicable legislation is that of the Member State where the claimant is employed, even if they reside in another State. Article 13(2)(f) lays down the place of residence rule; it applies when the place of work rule does not.

The claimant was an employed person in the United Kingdom

16. The parties agreed that the claimant worked in the United Kingdom, but she had not worked here since at least 2000 when she began looking after her mother, and she had never worked in France. As I have explained, it was sufficient for her to be insured for a single risk covered by Article 4: *Tolley* at [37]-[41].

The claimant ceased to be an employed person when she became habitually resident in France

17. Originally, a claimant who was no longer employed used to remain subject to the legislation of the State where they were last employed (*Coppola v Insurance Officer* (Case 150/82 EU:C:1983:4) [1983] ECR 43 at [11]) until they ceased all work and moved to another State (*Daalmeijer v Bestuur van de Sociale Verzekeringsbank* (Case C-245/88 EU:C:1991:66) [1991] ECR I-555). The position changed when Article 13(2)(f) was introduced; this applies when the legislation of the last State of employment ceases to apply without the legislation of another State becoming applicable under the place of work provisions. The application of Article 13 is qualified by Annex VI of Regulation 1408/71 and Article 10b of Regulation 574/72.

18. This is the relevant part of the United Kingdom's explanatory memorandum for points 19 and 20 of Annex VI:

> EXPLANATORY MEMORANDUM
>
> on the proposal for a Council Regulation (EEC) amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) 1408/71
>
> …
>
> Finally, in view of the proposal to insert a new Article 13(2)(f), some changes must be made and three supplementary entries added in the United Kingdom section to ensure that the proposed new measure does not have undesirable consequences.
>
> The proposed new point 18 is thus intended to prevent any possible doubt as to whether periods completed under British legislation in accordance with Article 13(2)(f) are to be taken into account for the purposes of Title III of Regulation (EEC) No 1408/71 and whether they make the United Kingdom the competent State for provision of benefits under Articles 18, 38 and 39(1) of the same Regulation.
>
> The purpose of the proposed new point 19 is to stipulate the date on which persons cease to be subject to United Kingdom legislation for the purposes of Article 13(2)(f) of Regulation (EEC) No 1408/71 and Article 10(b) of Regulation (EEC) No 574/72 as proposed. This is necessary because the United Kingdom's internal legislation does not make this point clear. Under United Kingdom legislation entitlement to cash sickness and maternity benefits is based on insurance some time before the claim. If the United Kingdom were to treat formerly employed or self-employed people as still subject to United Kingdom legislation until the end of the period - up to three years following the last employment - when they could potentially receive United Kingdom sickness and maternity benefits, this could work to the disadvantage of those who had transferred residence to another Member State and had no reason to claim those benefits during that period, or did so only for intermittent spells. Although under the United Kingdom scheme they would be eligible to be credited with current insurance for periods when sickness and maternity benefits are paid, they would not for other spells during the period of potential entitlement be eligible to contribute under the United Kingdom scheme for any benefits (apart from voluntary contributions for survivor's and retirement pensions). Also the new State of residence would seemingly be precluded from insuring them for such periods. This could lead to the person being excluded from current insurance for some time, at least for certain benefits, resulting in a gap in his insurance record and the possible future loss of benefit entitlement.

> The proposed new entry has therefore been framed so as to avoid such a gap.
> It provides for the person concerned to cease to be subject to United Kingdom legislation on transfer of residence to the other Member State or, if later, on termination of the employment or self-employment during which this person was subject to United kingdom legislation. However. the person would continue to be so subject for any succeeding periods of receipt of United Kingdom sickness, maternity or unemployment benefits which spanned the date of transfer of residence or immediately followed the employment or self-employment.
>
> The proposed new point 20 is intended to ensure that the person who has become subject to the legislation of the new State of residence will be able to receive any United Kingdom sickness, maternity or invalidity benefits under Chapter 1 or 2 of Title III for which he can still qualify on the basis of past insurance. If he receives United Kingdom sickness or maternity benefits under these provisions, he will be allowed to be treated as an employed or self-employed person so that entitlement to benefit in respect of children can be derived under Chapter 7 and so that the relevant priority rules apply in the event of potential entitlement from two Member States.

19. It is for the national court to apply that Annex: *Tolley* at [64]-[69]. By point 19(a) of Annex VI, United Kingdom legislation ceased to apply at the latest when the claimant became habitually resident in France. In this case, the claimant moved to France in 2003. I do not have the evidence to find exactly when she became habitually resident there, but it must have been long before the date when her claims for carer's allowance were treated as made.

The claimant cannot rely on point 20 of Annex VI

20. I accept Ms Smyth's argument. This point does not confer entitlement, but merely protects the position of those who are entitled anyway by reason of past contributions. That is consistent with the wording of the point – 'shall not prevent'. And it makes sense as a companion to point 19; otherwise point 20 would effectively override point 19. It is explained more fully in the explanatory memorandum. This differs from the view of Upper Tribunal Judge Mesher in *JS v Secretary of State for Work and Pensions* [2009] UKUT 81 (AAC), [2012] AACR 7 at [28]-[30], but it seems that he did not have the benefit of seeing the memorandum or of having Ms Smyth's argument.

The claimant does not have an acquired right to a carer's allowance

21. Usually, if the place of work rule does not apply, the place of residence rule in Article 13(2)(f) does. There is, however, an exception when the claimant is residing in one State but has an acquired right to a contributory benefit from another State. As the European Court of Justice held in *Bosmann v Bundesagentur für Arbeit-Familienkasse Aachen* (Case C-352/06 EU:C:2008:290) [2008] ECR I-3827:

> 29. … migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised their right to freedom of movement conferred on them by the Treaty …

And in *da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse* (Case C-388/09 EU:C:2011:439) [2011] ECR I-5761, the Court said:

> 74. As the Court has repeatedly held, the aim of Article 45 TFEU and 48 TFEU would not be achieved if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid …

This cannot help the claimant, as she has no acquired right to a carer's allowance. It is not a contributory benefit and there is no basis on which she could have acquired a right to an allowance in domestic law before she made a claim.

22. The result is that the place of residence rule applies so that the legislation applicable is that of the claimant's State of residence, which is France.

H. The institution and competent institution are situated in France

23. It is not enough to identify the legislation of a Member State, because different legislation may apply in different parts of a State. In the United Kingdom, for example, social security legislation may differ between England and Wales, Scotland, and Northern Ireland. And that means that the body responsible for administering the legislation may differ. For a claimant in England or making a claim to England, it will be the Department for Work and Pensions.

24. So, the focus now shifts from a geographical to an institutional approach. It is necessary to identify first the *institution* and then the *competent institution*; both those terms are defined. The institution is the body responsible for applying the legislation to the claimant. The legislation must be the legislation of the State identified under Article 13; severing that link makes no sense. Here, the institution must be one that applies the legislation of France.

25. The next step is to identify the competent institution. 'Competent institution' must be a subset of 'institution'. It makes nonsense of the structure of the definitions and the provisions in which they are used if the competent institution may be different from one of the institutions that apply the legislation of the State identified under Article 13. And that means, as with institution, that the competent institution must be one that applies the legislation identified under Article 13, which is that of France.

26. The definition of institution consists of a series of alternatives with no indication of which is to have priority in any particular case. The best sense I can make of it is that each alternative deals with a different situation in which it will apply rather than the others. This is how they apply.

Head (i)

27. Head (i) applies when there has been a claim for a benefit. That was how the European Court of Justice reasoned in *Tolley* at [82]. The claimant is insured in the United Kingdom, but none of the institutions of this country apply the law of France. If the claimant is insured in France, this head will apply and the institution will be the relevant body in France. Article 86 imposes a duty on the State to which the claim was submitted to pass it – the United Kingdom in this case - to the competent institution.

Head (ii)

28. The language of head (ii) does not work grammatically or syntactically. In order to make sense, it must be read like this: 'the institution from which the person concerned, if he or a member or members of his family resided in the Member State in which the institution is situated, is or would be entitled to benefits'.

29. There is no authority on this head. It was discussed by the Advocate General in *Coppola* at page 61. He said that head (ii) only applied if head (i) did not and that 'in any event [it] is only applicable where the individual or his family are only disqualified from benefit because they are not resident in the member-State concerned.' The Court did not deal with this issue. It merely said of the definition as a whole:

> 10. That definition must be applied within the framework of Article 18(1), in the light of the general rule contained in Article 13 of Regulation 1408/71, with regard to determination of the applicable legislation. …

I can think of two cases in which head (ii) might apply. One is when the claimant is seeking something that does not require a claim, such as (perhaps) NHS treatment in the United Kingdom. The other is when the claimant's entitlement under domestic law is barred by a residence condition – Article 10, which prevents such provisions, does not apply to sickness benefits.

30. Whatever it means and whenever it applies, head (ii) cannot have the effect of making United Kingdom legislation applicable under Article 13, which is the only way that the institution and, therefore, the competent institution would be in the United Kingdom.

Head (iii)

31. That leaves head (iii). There is no evidence of the social security arrangements in France, but there will be some legislation, some competent authority and some institution to administer the legislation. This is the most likely head to apply. But, to repeat, this head cannot operate to locate the competent institution in the United Kingdom, as the United Kingdom does not apply the legislation of France.

I. France is the competent State

32. Having identified the competent institution, a national approach takes over from the institutional approach in order to identify the *competent State* as the State where the competent institution is situated. Here, the legislation that applies is that of France. The institution is the body located there, as is the competent institution, so the competent State is France.

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

33. Section 70(4A) of the Social Security Contributions and Benefits Act 1992 provides:

> (4A) A person to whom either Regulation (EC) No. 1408/71 or Regulation (EC) No. 883/2004 applies shall not be entitled to an allowance under this section 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 70(4A)

34. 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.

35. 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.

36. 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.

37. A few months later, section 70(4A) 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, shows 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

38. 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* at [71]).

39. 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* 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.

40. 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 an exception, 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. The claimant and her mother had both left the United Kingdom long before the claims for carer's allowance were made, so there was, at that time, no connecting factor between the *territory* of the United Kingdom and the claims; any link had been severed by the parties moving to France. Allowing a State to make domestic provision would undermine the nature of the coordination arrangements in the Regulation. Exercising freedom of movement cannot guarantee a neutral effect on benefit entitlement and, in the absence of any good reason for making provision, requiring a State to do so would introduce an unnecessary and arbitrary element into the coordination system. No good reason has been suggested here, other than the close connection between attendance allowance and carer's allowance, which I now come to.

K. Attendance allowance and carer's allowance cannot be treated as a single benefit

41. The close relationship between attendance allowance and carer's allowance is not a reason to disrupt the coordination system. They are separate benefits. They require separate claims, they are governed by different legislation, and they have to be claimed by different people. They are only related in the sense that an award of attendance allowance is a condition precedent for an award of carer's allowance. It is beyond argument that, domestically, they are different and separate, albeit related, benefits. It would be surprising if EU law did not accept the separate nature in domestic law.

42. It is not possible to avoid this by relying on the definition of competent institution. I accept that 'person concerned' in head (i) of the definition of competent institution is vague enough to cover the disabled person in respect of whom the claim for carer's allowance is made. But that puts the cart before the horse. The competent institution has to be identified by reference to the legislation identified as applicable under Article 13. Article 13 has to be applied before the definitions in Article 1 can operate.

43. This reasoning is consistent with the conclusion of Upper Tribunal Judge Turnbull in *AH* at [23]: 'it is the competent State for payment of benefits to <u>the</u>

claimant which must be determined …' His conclusion was consistent with the purpose of social security coordination, which is to guarantee effective freedom of movement. Depriving one person of another's ability to care for them could, as a matter of fact, restrict their willingness to move freely and reside within the EU. But the caselaw of the European Court of Justice that I have set out in Section J does not support an argument that that result triggers a duty on a State that is competent for one of the benefits to accept responsibility for the other.

L. The date of claim issue

44. Given my decision so far, this issue does not arise. If it should matter at a later stage, I merely record that if I had had to decide the issue, I would have accepted Ms Smyth's argument.

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:

(a) *employed person* and *self-employed person* mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

…

(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 19 applies when a claimant is habitually resident in one State and makes a claim for a sickness benefit in another State:

TITLE III

SPECIAL PROVISIONS RELATING TO THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

SICKNESS AND MATERNITY

SECTION 1

Common provisions

Article 19

Residence in a Member State other than the competent State — General rules

1. An employed or self-employed person residing in the territory of a Member State other than the competent State, 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, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

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

Article 86 provides for a claim submitted to the wrong institution to be forwarded:

TITLE VI

MISCELLANEOUS PROVISIONS

Article 86

Claims, declarations or appeals submitted to an authority, institution or tribunal of a Member State other than the competent State

1. Any claim, declaration or appeal which should have been submitted, inorder to comply with the legislation of one Member State, within a specified period to an authority, institution or tribunal of that State shall be admissible if it is submitted withinthe same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution, or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former State either directly or through the competent authorities of the Member State concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the Second State shall be considered as the date of their submission to the competent authority, institution or tribunal.

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.