



**THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2023-SCO-000146-PIP  
[2024] UKUT 97 (AAC)  
ES v SECRETARY OF STATE FOR WORK AND PENSIONS**

Decided without a hearing

**Representatives**

ES	DK (ES's daughter)
Secretary of State	DMA Leeds

**DECISION OF UPPER TRIBUNAL JUDGE JACOBS**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference:	SC100/22/00762
Decision date:	14 August 2023
Hearing:	Glasgow

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the Secretary of State is to proceed with ES's claim for a personal independence payment made on 23 September 2021 on the basis that she satisfies regulation 22 of the Social Security (Personal Independence Payment) Regulations 2013 SI No 377).

**REASONS FOR DECISION**

1. The case decides that the effect of Article 31 of the Withdrawal Agreement is that Regulation (EC) 883/2004 'applies' for the purposes of regulation 22(b) of the Social Security (Personal Independence Payment) Regulations 2013.

**A. History and background**

2. ES is Polish. She has lived in Scotland since 2017, where she is cared for by DK, who is her daughter and representative. It was ES's habit to visit her family in Poland

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each year. She went there on 18 December 2020, intending to return on 16 January 2021. She was prevented from returning on that date by Covid travel restrictions and only returned on 9 August 2021. She made a claim for a personal independence payment on 23 September 2021. By that time, she had been absent from this country for these periods:

11 January 2019 to 30 March 2019

14 May 2019 to 4 September 2019

8 January 2020 to 4 March 2020

18 December 2020 to 9 August 2021.

3. The Secretary of State refused the claim on 11 January 2022:

[ES] is not entitled to Personal Independence Payment from and including 23/09/2021 because she hasn't been present in Great Britain for a total of 104 weeks out of the previous 156 weeks and couldn't be treated as present.

4. ES exercised her right of appeal to the First-tier Tribunal, but the tribunal dismissed her appeal. The Upper Tribunal set aside the tribunal's decision under reference UA-2022-SCO-000134-PIP and remitted the case for rehearing. This appeal is against the decision made by the tribunal at the rehearing. It will be easier to understand that decision if I next set out the relevant legislation

## **B. Personal independence payment legislation**

5. Personal independence payments are governed by the Welfare Reform Act 2012. Section 77(3) provides:

(3) A person is not entitled to personal independence payment unless the person meets the prescribed conditions relating to residence and presence in Great Britain.

Those conditions are prescribed by Part 4 of the Social Security (Personal Independence Payment) Regulations 2013. Regulation 16 deals with presence. Regulation 16(b) makes it a condition that the claimant:

(b) has been present in Great Britain for a period of, or periods amounting in aggregate to, not less than 104 weeks out of the 156 weeks immediately preceding [the date of claim].

This is subject to regulation 22:

### **22. Persons residing in Great Britain to whom a relevant EU Regulation applies**

Regulation 16(b) does not apply in relation to a claim for personal independence payment where on any day:

- (a) C [the claimant] is habitually resident in Great Britain;
- (b) a relevant EU Regulation applies; and

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- (c) C can demonstrate a genuine and sufficient link to the United Kingdom social security system.

Section 84(2)(b) of the 2012 Act provides that Regulation (EC) 883/2004 is a relevant EU Regulation.

**C. The First-tier Tribunal's decision**

6. This was the summary of the First-tier Tribunal's decision. I have substituted initials for the claimant's name.

1. The appeal is refused.
2. The Secretary of State's decision dated 11/01/2022 is confirmed.
3. ES is not entitled to Personal Independence Payments 23/09/2021.
4. ES did not satisfy Regulation 16 of the Social Security (Personal Independence Payment) Regulations as she was not present in the United Kingdom for 104 weeks out of the 156 weeks\* preceding her claim. (\* The original decision incorrectly referred to 'days' instead of 'weeks')
5. ES could not rely on Regulation 22 to disapply Regulation 16 because Regulation 22(b) requires an applicable EU regulation.
6. Regulation (EC) No 883/2004 of the European Parliament and of the Council, which allowed reciprocal arrangement between EU countries, was revoked with effect from 31.12.2020 by The Social Security Co-ordination (Revocation of Retained Direct EU Legislation and Related Amendments) (EU Exit) Regulations 2020 (S.I. 2020/1508), Regulations 1(3) and 3(a).

**D. Retained direct EU Legislation**

7. The tribunal made an error of law by misunderstanding the 2020 regulations mentioned in paragraph 6 of its decision.

8. The tribunal was wrong to decide that 'Regulation (EC) No 883/2004 ... was revoked with effect from 31.12.2020' by the 2020 Regulations. That Regulation remained in existence and in force. This country had no power to revoke it. What this country had power to do was to revoke Regulation 883/2004 as 'retained direct EU legislation'. That is what regulation 3(a) did and all that it did.

9. Moreover, the tribunal did not explain why, if Regulation 883/2004 had been revoked, it remained in section 84 of the 2012 Act as a relevant EU Regulation.

**E. The decision the tribunal should have made**

10. The Secretary of State's representative has invited me to remit the case to the First-tier Tribunal with directions. That is not necessary, as I am able to re-make the decision so that the Secretary of State can now process ES's claim.

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*Regulation 22*

11. ES did not satisfy regulation 16(b). So the question arises: did regulation 22 disapply that provision?

12. There are three conditions in regulation 22. All must be satisfied if it is to apply. The Secretary of State has accepted that ES was habitually resident in Great Britain and had a genuine and sufficient link to the United Kingdom social security system. So, the question arises: did a relevant EU Regulation apply? The only relevant EU Regulation listed in section 84 is Regulation 883/2004.

*The withdrawal agreement*

13. The effect of the United Kingdom's withdrawal from the EU on Regulation 883/2004 is governed by the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (2019/C 384 I/01). Title III deals with coordination of social security systems. Article 30 deals with the persons covered by Title III of Part 2 of the Agreement:

1. This Title shall apply to the following persons:
  - (a) Union citizens who are subject to the legislation of the United Kingdom at the end of the transition period, as well as their family members and survivors; ...

Article 126 provides for the transition period to end on 31 December 2020.

14. The Secretary of State's representative submits that ES is covered by Title III, as: (a) her daughter has had Settled Status since 9 November 2019; (b) her daughter provides daily care for a range of medical problems; and (c) she is a member of her daughter's family. I accept that submission. Article 9 provides:

For the purposes of this Part [Part 2], and without prejudice to Title III, the following definitions shall apply:

- (a) 'family members' means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:
  - (i) family members of Union citizens ... as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and the Council;  
...

Article 2(2)(d) of Directive 2004/38/EC applies to:

- (d) the dependent direct relatives in the ascending line ...

15. Time to move on to Article 31, which provides:

1. The rules and objectives set out in ... Regulation (EC) 883/2004 ... shall apply to the persons covered by this Title.

Regulation 22(b) requires that a relevant EU Regulation 'applies'. Article 31 does not provide that Regulation 883/2004 itself applies. That would be inappropriate in a

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withdrawal agreement. What it does is the next best thing, which is to provide for the rules and objectives of the Regulation to apply. The Regulation continues to be referred to in section 84 and in regulation 22. If I were to decide that Article 31 did not satisfy those provisions, it would render them redundant. Accordingly, I accept the Secretary of State's submission that regulation 22 is satisfied. I have remitted the case to the Secretary of State on that basis.

**Authorised for issue  
on 10 April 2024**

**Edward Jacobs  
Upper Tribunal Judge**