07-24 Competing Competency & the AH Judgment

Introduction

1. The purpose of this memo is to
    1. inform DMs about a recent Court of Appeal (CoA) judgment[1] which deals with how to determine competency for a child or economically inactive adult where they have a parent or family member economically active in a separate Member State (MS).
    2. inform DMs how to view the 'reverse scenario' where the child or economically inactive claimant is resident in, and has exported their benefit to, another MS and their family member is economically active in the UK.
    3. instruct DMs how to proceed with affected cases, and
    4. instruct DMs how the First-tier Tribunal (FtT) should be advised in dealing with lookalike cases where a DM's decision has already been made and an appeal is received.

1 AH v SSWP [2023] EWCA Civ 433

2. The CoA judgment clarifies how the different articles of Regulation (EC) 883/2004 (Reg 883) apply when an economically inactive claimant is resident in the UK and their family member is economically active in an EU MS. The CoA judgment was handed down on 21 April 2023 and it will affect cases from this date.

THE CoA judgment

Background

3. The claimant, AH, is an Austrian born, British national child who came to the UK in August 2012 with her mother, father and sibling. Her mother, acting as her appointee, made a claim to DLA Child on 30 October 2013. An award of the care component was made on 29 January 2014.
4. However, it was then discovered that the claimant's father had separated from the household and moved to Belgium for work in September 2012. The claimant's mother was not working in the UK, being a carer for the claimant and her sibling. Consequently, the decision of 29 January 2014 was revised on 19 May 2015 to disallow the award of the care component of DLA Child, on the basis that Belgium was competent for payments of cash sickness benefits to the father and his family, due to his status as a worker in Belgium.
5. This decision was upheld at the Mandatory Reconsideration stage but was then revised by a FtT, who allowed the appeal because they determined there was a difference of opinion on competency between the UK and Belgium within the meaning of Article 6 of Regulation (EC) 987/2009 (Reg 987). This article states that the MS of residence will make interim payments of cash sickness benefits to the claimant until the difference of opinion is settled.
6. DWP appealed to the UT, and the UT allowed the appeal finding that;
    1. There was no difference of opinion between the UK and Belgium on the issue of competency, allowing the UT to set aside the decision of the FtT,
    2. The father fell under article 11(3)(a) of Reg 883, and the claimant and her mother fell under article 11(3)(e),
    3. That in such a scenario Article 21 took priority over any entitlement under UK legislation, making Belgium the competent state for the payment of cash sickness benefits.
7. The claimant was granted permission to appeal to the CoA. The Secretary of State (SoS) accepted prior to the hearing that there was a difference of opinion between the UK and Belgium on the issue of competency, therefore, pursuant to Article 6 of Reg 987 the matter was referred to the Administrative Commission, and the CoA hearing was stayed pending the consideration of the matter. In the meantime, the SoS commenced interim payments of the care component DLA Child, as per Article 6.
8. The Administrative Commission did not definitively decide the question of which legislation was applicable and therefore took priority in the present case and the matter was returned to the UK courts.
9. The CoA hearing was held on February 2023, with the decision being handed down on 21 April 2023. The CoA decided that Article 21 did not displace the default position established by Article 11(3)(e) for determining the state of applicable legislation and, accordingly, competence.
10. It clarified that when Article 11(3)(e) applies to a person, Article 21 steps in if that person has no entitlement to benefits under the legislation of their state of residence (being the competent state under Article 11(3)(e)) and that the effect of Article 21 is then that the person in question

would be entitled to benefits under the legislation of the state where their family member works or is self-employed. In effect, the CoA held that Article 21 was a 'safety net' provision, not one which determined competence and so it was not engaged in the claimant's case.

Affected claims

11. The CoA judgment concerns the following cohort and claimants must satisfy the below conditions:
    1. Be in the UK
    2. Be claiming Attendance Allowance, Carer's Allowance, Disability Living Allowance (Care Component) or Personal Independence Payment (Daily Living Component)
    3. Be economically inactive (an adult who is not employed or self-employed, or a child)
    4. Have a family member (spouse or parent) who is economically active in an EU member state (MS) or Iceland, Norway, Liechtenstein or Switzerland
    5. Is covered by Reg 883 via the EU Withdrawal Agreement (EUWA), the EEA EFTA Separation Agreement or the Swiss Citizen's Rights Agreement.
12. In circumstances where the Court of Appeal's judgment applies, the UK is competent for the claimant's cash sickness benefits pursuant to Article 11(3)(e) of Reg 883. The judgment does not apply to circumstances prior to 21 April 2023.

Example 1

Alex was a dependant adult in receipt of PIP (Daily Living Component). In 2019, his mother, Rachel, accepted a job in France and notified the department straight away. Alex remained in the UK with his father, David, who is his carer, and is otherwise economically inactive. Rachel's work brought the family into scope of the EU regulations from the date of change. Under the pre-AH policies that were in place, Rachel's work and contributions to the French social security system meant that France became the competent state for the payment of Cash Sickness Benefits to her immediate family due to the operation of the derived rights reading of Article 21. Alex's award of PIP was superseded and his entitlement to it ended. The AH Judgment does not work to reverse this decision as it was made before the date of the relevant determination – 21 April 2023.

However, the situation may be different if the relevant change of circumstances was not notified immediately. What would happen if the department was notified of Rachel's move and commencement of employment on 10 July 2023?

The family are still covered by the EUWA as Rachel was a UK citizen working in an EU MS prior to the end of the Transition Period (TP) and has remained continuously so, since. However, the decision maker must perform a closed period supersession, and apply the pre-AH policies for the period from commencement of employment until 20 April 2023 (the day before the AH judgment was handed down) and then apply the AH principles from the 21 April 2023 onwards. These are that, even though his immediate family

member is working, Article 11(3)(e) of Reg 883 applies to Alex, which states that where a person is economically inactive the legislation of the MS of residence applies to them. Therefore, the UK is competent for payments of cash sickness benefits to him from 21 April 2023.

Example 2

Beverley is in receipt of PIP (Daily Living Component) from 2018. She is otherwise economically inactive. In May 2023 her husband, John, a Dutch National who holds Settled Status under the EU Settlement Scheme, accepts a job offer in Germany while Beverley remained in the UK. John is covered by Article 10 of the EUWA as he was an EU Citizen in the UK at the end of the Transition Period, so he and Beverley are within scope of the EU Regulations via Article 30(3) of the EUWA. As Beverley is still resident in the UK and remains economically inactive, Article 11(3)(e) of Reg 883 applies to her, and the UK, as the MS of residence, is competent for payments of cash sickness benefits to her. John will fall out of scope of the EUWA after five years absence from the UK and at such time competency rules will no longer be a consideration.

13. The Court of Appeal's judgment concerns the application of Reg 883 and so will now only be relevant for those who fall under the EUWA (plus the Swiss Citizen's Rights Agreement and EEA-EFTA Separation Agreement).
14. Cases falling under the TCA, the UK/Switzerland Convention on Social Security or the Convention on Social Security between Iceland, Norway, Liechtenstein and the UK, are not affected by this judgment due to the benefits listed at 11.2 not being in scope of those agreements.
15. It should be noted that cases where the claimant's family member is economically inactive, but in receipt of an old age pension from another MS, are **not** affected by this judgment. This is because those in receipt of a pension are also covered by Articles 24, 25 and 29 of Reg 883, which displace the default position of Article 11(3)(e).

Example

Lena, a Polish national, is in receipt of PIP (Daily Living Component). She and her husband, Jan (also a Polish national) have been living in the UK since 2016 and are covered by the EUWA. In November 2022, Jan becomes eligible to claim his State Pension from Poland. Article 29 of Reg 883 is applicable to both Jan and Lena, and the UK is no longer competent for the payment of cash sickness benefits to Lena. This does not change after 21 April 2023.

Reverse Scenarios: Export Cases

16. DMs may encounter scenarios where the claimant has exported their benefit to another MS, are economically inactive in that state, and their family member is economically active in the UK. Export of cash sickness benefits under Reg 883 are made by virtue Article 7.
17. Article 7 allows for acquired rights to continue to be paid when the only change to a claimant's circumstances is the MS of residence. The reasoning in Tolley[1] was that benefits claimed in the

UK are treated like acquired rights. The judgment of KR[2] confirms the SoS view that Article 7 permits the export of cash sickness benefits where the claimant becomes habitually resident in an EU MS.

1 Tolley Judgement (C-430/15), 2 KR v SSWP [2019] AACR 22

18. In the case of SSWP v MC[1], which fell under Regulation (EC) 1408/1971, the UT decided that when a claimant commenced work then the competent institution changed, even in the case of export. The SoS agreed that this would also be the case under Reg 883 **and** where the family member of an economically inactive claimant who was exporting benefit commenced work under either regulation.

1 SSWP v MC [2019] UKUT 84 (AAC)

19. However, that view has now been revised and the judgment in MC only applies when it is the exporting **claimant** who commences employment in another MS.

Example

Michael, who was in receipt of PIP (Daily Living Component) moved with his mother, Maria, on whom he is dependent, to Spain in 2019. His mother was his carer and was economically inactive both before and after the move. Michael's father, Gabriel, remained resident in the UK, where he was working. Michael was covered by the EU regulations and can export his award of PIP (Daily Living Component) under Article 7 of Reg 883. In May 2023, Maria commenced work in Spain. However, this did not disrupt Michael's individual rights under Article 11(3)(e) and his export of benefit under Article 7 was not altered. Under the EUWA, this payment can continue post-TP for as long as Michael remains in scope.

However, if Michael commences work in Spain, then Spain will become competent for payments of cash sickness benefits to him as he would then fall under Article 11(3)(a) and this displaces his Article 7 right to continue to receive his benefit when the only change of circumstance was his place of residence.

20. In conclusion, the AH Judgment also applies to export cases covered by the EUWA, where:

20.1 a claimant received a cash sickness benefit from their MS of residence either because Article11(3)(e) of Reg EU 883 due to the exercise of an EU treaty right or because domestic legislation applied to them as a national of that MS,

20.2 they moved to another MS along with a family member or parent and Article 7 allowed them to export the cash sickness benefit, and

20.3 that family member or parent then takes up work.

Post AH, the competent state **does not** change to the MS where a family member or parent is

economically active if that differs from the claimant's current competent state. Much like in a domestic situation as per the judgment, the parent or family member taking up work has no impact on the competent state for the claimant due to the CoA decision that Article 21 does not displace the default under Article 11(3)(e).

Action for DMs

21. Where cases have had decision making stayed, pending the outcome of the CoA case those cases can now be processed in line with the judgment.
22. DMs should cease to follow the priority list that is contained within ADM Memo 17/20
23. Where DMs are unsure as to whether a case is covered by the AH Judgment, they should contact DMA Leeds for guidance.

Annotations

The number of this memo should be annotated against the following ADM Chapters;

C2098, C2110, C2111, C2119, C2123, 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 **4/19** Requesting case guidance from DMA Leeds for all benefits.

DMA Leeds: July 2024