08-26: PIP (Daily Living) & ESA (New Style) - Competent State for Cash Sickness Benefits of Pensioners and their Family Members

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Introduction

1. The judgment in SE v SSWP[1] (the Judgment) was made by the UT on 5.12.24 and is a relevant determination[2]. The decision applies from that date forwards.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

2 Social Security Act 1998

2. The purpose of this memo is to

1. inform DMs about the Judgment[1] which deals with how to determine competency for cash sickness benefits of pensioners and their family members within scope of the EU-UK-WA[2] who are resident in the UK and economically inactive;

2. inform DMs how to address the 'reverse scenario' where the economically inactive pensioner or their economically inactive family member is resident in, and has exported their benefit to, another EU Member State;

3. instruct DMs how to proceed with affected cases;

4. instruct DMs how the FtT should deal with lookalike cases where a DM's decision has already been made and an appeal is received.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

NOTE: References to EEA nationals in this guidance includes Swiss or EFTA country nationals. Likewise, where EU Member States are mentioned, this includes Switzerland, Iceland, Liechtenstein and Norway.

3. The Judgment[1] clarifies how to determine the competent state for payment of cash sickness benefits to UK residents when

1. an economically inactive claimant receives a pension from an EU Member State **or**

2. is the family member of such a person.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

The UT Judgment

4. The Judgment[1] decided

1. the competent state for payment of cash sickness benefits to pensioners and their family members is their state of residence[2] **and**

2. if the claimant has no entitlement to benefits under the legislation of their state of residence, they could be entitled to benefits under the legislation of the pension paying state if they meet the domestic eligibility criteria of that state[3].

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

2 Regulation (EC) No 883/2004 Article 11(3)(e)

3 Council Regulation (EC) No 1408/71 Article 28, Regulation (EC) No 883/2004 ril 2004 Articles 24, 25 and 29

Affected Claims

5. Claimants must be

1. resident in the UK and claiming a cash sickness benefit **and**

2. in scope of the EU-UK-WA[1], the EEA EFTA Separation Agreement[2] or the Swiss Citizens Rights Agreement[3] **and**

3. an economically inactive adult (who is not employed or self-employed) in the UK **and**

4. receiving a pension from one or more EU Member States, EEA-EFTA States, Switzerland, or be the family member of such a person.

1 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

2 UK-EEA EFTA Separation Agreement

3 Swiss Citizens Rights Agreement

6. Where the conditions of paragraph 5 are met, the UK is competent for the claimant's cash sickness benefits.

7. The domestic conditions of entitlement for the cash sickness benefits will need to be satisfied.

Example 1

Olivia is a French citizen who lived and worked in the UK from 2015 to 2021. She has settled status under the EUSS and continues to reside in the UK. She has received a retirement pension from France since 2022. She made a claim to PIP on 17.12.25. Olivia is within the personal scope of the UK-EU-WA under Article 30(1)(a) as she was subject to the legislation of the UK on 31.12.20 and continues to be so. In this circumstance the Judgment[1] applies and the competent state for Olivia's cash sickness benefits is determined under Article 11 of Regulation (EC) 883/2004. As she is resident in the UK, Article 11(3)(e)

applies so that the UK is the competent state.

Example 2

Christoph is a German national and has lived in the UK since 2015. He is economically inactive and has received a pension from Germany since 2019. He makes a claim to PIP (daily living) in October 2023. This is before the date of the Judgment[1]. Under the UK's position prior to the Judgment[1], as Christoph was in receipt of a German pension which was the result of work and contributions to the German social security system, it was determined that Germany was the competent state for the payment of cash sickness benefits to him. The decision was made that he was not entitled to PIP (daily living). The Judgment[1] does not work to reverse this decision as it was made before the date of the relevant determination – 5.12.24.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

Reverse Scenarios

8. Claimants who are UK/EEA nationals, resident in an EU Member State, Switzerland, or an EFTA country, and who are in scope of the EU-UK-WA, the EEA EFTA Separation Agreement or the Swiss Citizens Rights Agreement, are said to be in a reverse scenario.

Export Cases

9. Legislation allows for

1. acquired rights to continue to be paid when the only change to a claimant's circumstances is the Member State of residence[1,3];

2. benefits claimed in the UK to be treated like acquired rights[2];

3. the export of cash sickness benefits where the claimant becomes habitually resident in an EU Member State[3].

1 [2019] UKUT 85 (AAC): [2019] AACR 22

2 [2017] AACR 40, C-430/15

3 Regulation (EC) No 883/2004, Article 7

10. Where a claimant, or their family member, has exported a cash sickness benefit from the UK to an EU Member State and

1. is economically inactive **and**

2. starts to receive a pension from the UK,

the cash sickness benefit award continues for so long as the conditions of entitlement are satisfied[1].

1 KR v Secretary of State for Work and Pensions (DLA) : [2019] UKUT 85 (AAC): [2019] AACR 22

11. Where a claimant, or their family member, has exported a cash sickness benefit from the UK to an EU Member State and

1. is economically inactive **and**

2. starts to receive a pension from any EU Member State,

the EU Member State of residence becomes the competent state[1], unless the individual does not meet the domestic eligibility, in which case, the UK will remain the competent state.

1 Regulation (EC) No 883/2004 Article 11(3)(e)

Example

Amelia is an EEA national who has been in receipt of PIP since 2023. Amelia moved to Germany in 2024 and exports her PIP under Article 7 of Reg 883/2004. She is economically inactive and starts to receive a pension from Germany in 2025 and notifies the UK of a change of circumstances. From the date that Amelia started to receive their German pension the UK will no longer be the competent state to pay the claimant's cash sickness benefits, unless Amelia does not meet the German domestic eligibility criteria for the German equivalent of PIP.

First Claim from Abroad

12. Where an individual has permanently relocated to an EU Member State, Switzerland or an EEA-EFTA country, the country of residence is the competent state for new claims, where residency is the determining factor[1].

1 JG v Secretary of State for Work and Pensions [2019] UKUT 83 (AAC) , GK v Secretary of State for Work and Pensions [2019] UKUT 87 (AAC), Secretary of State for Work and Pensions v TG [2019] UKUT

86 (AAC).

13. However, where a claimant residing in an EU Member State

1. receives a pension from the UK, or is the family member of someone who receives a pension from the UK, **and**

2. there is not an equivalent cash sickness benefit **or**

3. the claimant does not satisfy the conditions of entitlement in their state of residence;

the UK will become the competent state[1,2].

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

2 Regulation (EC) No 883/2004 Articles 24,25,29

Example 1

Rose is a UK national who moved to France in 2019 with her partner. She is economically inactive. Her partner is retired and in receipt of a pension from the UK. She makes a first claim from abroad for PIP (daily living) in October 2026. Rose does not meet the domestic criteria for France's equivalent of PIP. The UK is therefore the competent state to pay Rose's cash sickness benefits.

Example 2

Sam is a UK national who moved to the Netherlands in 2021 with his EEA national partner. Sam is in scope of the EU-UK-WA through his partner. He is economically inactive. His partner is retired and has received a pension from the UK since 2019. He makes a first claim from abroad for PIP (daily living) in March 2026. Sam notifies the DWP that he meets the domestic criteria for the Dutch equivalent of PIP. The Netherlands is therefore the competent state to pay Sam's cash sickness benefits.

NOTE: The Judgment[1] does not replace or alter the existing guidance where a cash sickness benefit has been refused by an EU Member State because it is believed that the UK is the competent state such that there is a difference of view.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

Cases Not in Scope

14. The Judgment[1] cannot be applied to decisions, made on or after 5.12.24, about a claimant's entitlement before 5.12.24[2] (but see paragraph 20).

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

2 s27 of the Social Security Act 1998

15. Cases falling under the Trade and Cooperation Agreement[1], the UK/Switzerland Convention on Social Security[2] or the Convention on Social Security between Iceland, Norway, Liechtenstein and the UK[3] are not affected by the Judgment due to PIP and ESA (New Style) not being in scope of those agreements.

1 UK/EU and EAEC: Trade and Cooperation Agreement [TS No.8/2021] - GOV.UK

2 The Social Security (Switzerland) Order 2021

3 The Social Security (Iceland) (Liechtenstein) (Norway) Order 2023

Action for DMs

16. All cases with an outstanding initial decision can now be processed in accordance with the Judgment[1] and the restrictions set out within Section 27 of the Social Security Act 1998[2] (see paragraphs 18-19). Cases where there has been a change of circumstances, effective from before 5.12.24, or a request for reconsideration made on a decision that predates 5.12.24, yet to be dealt with, can now also be processed (see paragraphs 20-21). Please also see specific Operational Instructions.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

2 Section 27, SS Act 98

17. Where the date of claim is before 5.12.24, but the initial decision is not being made until after this date, and an EU Member State pension is in payment, the UK is determined to be the competent state from 5.12.24.

18. Where the date of claim is on or after 5.12.24, and an EU Member State pension is in payment, the UK

is determined to be the competent state from the date of claim.

19. Where a claim was determined before 5.12.24 on the basis that the UK was the competent state because no EU Member State pension was in payment, and it is later identified post 5.12.24 that, under the DWP position prior to the Judgment[1], the UK would not have been regarded as the competent state (either from the date of claim or from a subsequent date), DMs should not revise or supersede the original decision. There are no grounds to revise or supersede the original decision as it is consistent with the new case law.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

Example

Sebastian made a claim for PIP in March 2023. The UK was determined to be the competent state to pay his cash sickness benefits at the time, and a decision was made to award PIP (the original decision). The DM later found (after the date of the relevant determination on 5.12.24) that the claimant had been in receipt of a pension from an EU member state since 2022. No revision of the original decision is required, as to do so would be inconsistent with the Judgment[1].

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

20. Where a claim was determined, revised or superseded:

1. prior to 5.12.24, on the basis that there was an EU Member State pension in payment, and the claimant requests a reconsideration of that decision, the DM can supersede the applicable decision from 5.12.24 on the ground of 'error of law'[1] **or**

2. on or after 5.12.24, on the basis that there was an EU Member State pension in payment, and the claimant requests a reconsideration of that decision, the DM can revise the applicable decision from its outset on the ground of 'official error'[2].

1 UC, PIP, JSA & ESA (D&A) Regs 2013, reg 24(a) & 35(5)

2 UC, PIP, JSA & ESA (D&A) Regs 2013, reg 9(a)

Example

Susanna is a Polish national who has been in receipt of PIP since 2020. The UK was determined to be the competent state to pay Susanna's cash sickness benefits at the time. However, in 2023 the DM determined the UK was not the competent state as the claimant receives a pension from an EU member state and had done so from the beginning of the claim. The DM revised the original decision as the UK is not the competent state. Susanna made an application for the decision to be reconsidered following the SE judgment. The DM can supersede the original decision, as revised, on the ground of 'error of law'. The supersession is effective 5.12.24.

21. For appeals where the decision under appeal is before 5.12.24 (see para 1), DMs should add the following to their submission:

> The SoS accepts the judgment of the Upper Tribunal in the case of SE v SSWP made on 5/12/24. We request that the judgment be taken into account when considering the issue of competency in the instant case.

22. Where a DM is unsure how a case that is in scope of the Judgment[1] should be treated, the details of the case should be referred to DMA through the normal specific case guidance referral route.

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

23. A Legal Entitlements and Administrative Practice (LEAP) exercise will be carried out to identify and review all cases affected by the Judgment[1].

1 SE v Secretary of State for Work and Pensions: [2024] UKUT 405 (AAC)

Annotations

The number of this memo should be annotated against the following ADM Chapters; C2110, C2123, C2126, C2128

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.

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