

**IRO: TP (DECEASED)**

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**PERSONAL INDEPENDENCE PAYMENT**

Application by the claimant for leave to appeal  
and appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 17 August 2021

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference DG/3114/19/03/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(a) of the Social Security (NI) Order 1998, and I give the decision that the tribunal should have given.
3. My decision is that the UK is competent for the payment of sickness benefits in cash to the appellant for the purposes of Chapter 1 of Title III of Regulation (EC) 883/2004 of the European Parliament.
4. Therefore, I allow the appeal. I adopt the findings of fact of the Department in relation to the relevant activities for the daily living component. I decide that the late appellant is entitled to the enhanced rate of the daily living component of personal independence payment (PIP) from 6 April 2018 to 3 November 2021.

**REASONS**

**Background**

5. The sole issue in dispute in this case is whether the United Kingdom (the UK) is the competent state for the payment of sickness benefits in cash to the appellant for the purposes of Chapter 1 of Title III of Regulation (EC) 883/2004 of the European Parliament.

6. The appellant is, sadly, deceased. Her claim is continued by her widower (the appointee). What is not in dispute in this case is that the appellant - a UK national - experienced a severe level of disability. She was born with spina bifida and hydrocephalus. In later life she contracted syringomyelia, had a lower limb amputation above the knee and, in addition to physical disabilities, suffered from depression, anxiety and forgetfulness. Arising from the level of disability associated with those conditions, she was previously awarded disability living allowance (DLA) from 6 April 1992. Her most recent award was made at the high rate of the mobility component and the high rate of the care component from and including 18 October 2007.
7. As her award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, she claimed PIP from the Department for Communities (the Department) from 6 April 2018. She was asked to complete a "Genuine and Sufficient Link" (GSL) form by the Department. She returned it on 20 April 2018, stating that she was in receipt of an Invalidity Pension (IP) from the Republic of Ireland. I observe in passing that the appellant previously notified the Department on 21 April 2010 that she was receiving an award of IP, but that it was not considered to affect her entitlement to the DLA care component.
8. The appellant was asked to complete a PIP2 questionnaire to describe the effects of her disability. She returned this to the Department on 21 August 2018 along with further evidence. She asked for evidence relating to her previous DLA claim to be considered. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 30 November 2018. On 14 December 2018 the Department decided that the appellant satisfied the conditions of entitlement to the enhanced rate of the mobility component of PIP from and including 6 April 2018. However, despite assessing that she scored 19 points for relevant daily living activities, the Department further decided that she was not entitled to the daily living component of PIP. This decision was made solely on the basis that the UK was not the competent state for the payment of sickness benefit. The appellant requested a reconsideration of the decision, supported by a solicitor's letter. She was notified that the decision had been reconsidered by the Department but not revised. She appealed, but only after the expiry of the relevant time limit. However, the late appeal was admitted in the interests of justice.
9. The appeal was considered at a hearing on 17 August 2021 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appointee made a setting aside request. This was treated as a request for a statement of reasons for the tribunal's decision, which was issued on 29 December 2021. In the meantime, however, on 4 November 2021, the appellant died. The appointee applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was

refused by a determination issued on 25 May 2022. On 31 May 2022 the appointee applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

10. The appointee essentially submits that the tribunal has erred in law by determining that the UK was not the competent State for payment of sickness benefits in cash to the appellant.
11. The Department was invited to make observations on the appellant's grounds. Mr Y of Decision Making Services (DMS) responded on behalf of the Department. Mr Y submitted that the tribunal had not materially erred in law. He indicated that the Department did not support the application.

### **The tribunal's decision**

12. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the appellant and a consultation report from the HCP. An LQM had requested further explanation of the Department's position, and this was set out in a further submission of 30 December 2019. The appointee attended the hearing and gave oral evidence. The Department was not represented.
13. The tribunal indicated that it had considered the cases of *SSWP v SO* [2019] UKUT 55, *Konevod* [2020] EWCA Civ 809, *Bartlett, Ramos and Taylor v SSWP* [2012] AACR 34, *LD v SSWP* [2017] UKUT 65, *KS v SSWP* [2018] UKUT 121 and Regulation 883/2004. It concluded that the UK was not the competent state for payment of sickness benefits. It therefore disallowed the appeal.

### **Relevant legislation**

14. The provision relied upon by the Department to exclude the late appellant from entitlement to PIP is Article 89 of the Welfare Reform (NI) Order 2015. This reads:

89.—(1) A person to whom a relevant EU Regulation applies is not entitled to the daily living component 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.

(2) Each of the following is a "relevant EU Regulation" for the purposes of this Article—

(a) Council Regulation (EC) No 1408/71 of 14th June 1971 on the application of social security schemes to employed persons, to self-

employed persons and to members of their families moving within the Community;

(b) Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29th April 2004 on the coordination of social security systems.

15. The version of the legislation having application in the present case at 6 April 2018 was subsequently amended by SI 2018/1085 from 15 November 2018, to make clear that the references to these EU Regulations are to the Regulations as amended from time to time. However, that amendment does not affect the reasoning in this case.
16. By way of a gloss, I will add that PIP mobility component is not considered to be a sickness benefit for the reasons set out in *Bartlett, Ramos and Taylor v SSWP* and entitlement to it was not disputed by the Department. I do not need to address the mobility component in this decision.

*Regulation 883/2004 of the European Parliament*

17. Regulation 883/2004 was introduced from 1 May 2010, replacing Regulation 1408/71 in most situations, which in turn had replaced Regulation 3 of 1958. Its legal base is what is now Article 48 of the Treaty on the Functioning of the European Union. This provides:

“The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

- (b) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States.

...”

18. The context for understanding Regulation 883/2004 is therefore the fundamental EU right of freedom of movement of workers.
19. The Preamble to Regulation 883/2004 sets out some important guidance on its application and interpretation. Recital 4 indicates that, “It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination”. Therefore, the

aim of Regulation 883/2004 is not to provide for the harmonisation of different national security systems but for their coordination.

20. Regulation 883/2004 is divided into six Titles. These are I - General provisions, II - Determination of the legislation applicable, III - Special provisions concerning the various categories of benefits, IV - Administrative Commission and Advisory Committee, V - Miscellaneous Provisions and VI - Transitional and final provisions.
21. The personal scope of the Regulations is given by Article 2.1. This provides:

#### **Persons covered**

1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

2. ...

22. Article 3 sets out the material scope of the Regulation. This provides:

#### **Matters covered**

1. This Regulation shall apply to all legislation concerning the following branches of social security:

- (a) sickness benefits;
- (b) maternity and equivalent paternity benefits;
- (c) invalidity benefits;
- (d) old-age benefits;
- (e) survivors benefits;
- (f) benefits in respect of accidents at work and occupational diseases;
- (g) death grants;
- (h) unemployment benefits;
- (i) pre-retirement benefits;
- (j) family benefits.

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

4. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a shipowner's obligations.

5. This Regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences.

23. Article 7 provides:

#### **Waiving of residence rules**

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

24. Article 11 sets out the general rules relating to the determination of applicable national legislation. It provides:

#### **General rules**

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

(b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;

(d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

4....”

25. Title III sets out “special provisions governing the various categories of benefits. It is turn is sub-divided into nine Chapters, of which Chapter 1 concerns sickness, maternity, and equivalent paternity benefits. I will not set these provisions out at this time.

### **Submissions and hearing**

26. In its written submissions to me, the Department did not set out a reasoned case, but essentially relied upon the tribunal’s decision as a correct statement of the law. In order to help me assess the correctness of the tribunal’s position, I held an oral hearing of the application. The appointee attended, accompanied by Mr Hurl. The Department was represented by Mr Y of Decision Making Services.
27. At my invitation, Mr Y set out the facts of the case and explained the Department’s reasoning. He indicated that the appellant had worked in the Republic of Ireland and subsequently been awarded IP by the Republic of Ireland. He submitted that the IP received from the Republic of Ireland was a sickness benefit under EU law, as was PIP daily living component. On this basis, he submitted that there was therefore duplication of benefit payment and PIP was disallowed on that ground.
28. I asked how IP from the Republic of Ireland was considered a sickness benefit. Mr Y referred me to Articles 44 to 49 of the Regulations. I pointed out that this referred to invalidity benefits and asked whether the distinction between sickness benefits and invalidity benefits in Article 3(1) of Regulation 883/2004 meant that they were different types of benefit. He referred me to the original and supplementary written submissions made by the Department to the tribunal.
29. I directed Mr Y to Article 11(3)(e) of Regulation 883/2004, relied upon by the appointee in his submissions. This provided that, in circumstances such as those in the present case, the UK was the competent Member State. Mr Y referred me to the “without prejudice” expression as used in the sub-paragraph and to the Department’s written submissions to the tribunal.
30. Mr Hurl made submissions with particular reference to interim payments of benefit. I also received evidence from the appointee, by way of helping me to understand the general factual background.

31. In order to understand the Department's case more clearly, after the hearing I directed responses to a number of questions. In the written observations, the Department was directed to address:
- (i) Whether the Commissioner is correct in his understanding that Regulation 883/2004 is the relevant EU Regulation for the purposes of this case?
  - (ii) Whether, in addressing the question of whether the United Kingdom is competent for the payment of sickness benefits in cash for the purpose of Chapter 1 of Title III of Regulation 883/2004, it is necessary to first have regard to the system of rules established by Title II of the Regulation?
  - (iii) Whether under Article 11.3(e) of Regulation (EC) 883/2004 the late claimant should be subject to the legislation of the Member State of residence - namely the United Kingdom - and, if not, why not?
  - (iv) In particular, whether any of the provisions of Article 12-16 of Regulation (EC) 883/2004 have application in such a way as to override the effect of Article 11.3(e), and if so, please explain the application of any such provision to that effect?
  - (v) Whether any of the provisions of Title III of Regulation (EC) 883/2004 qualify Article 11.3(e), and have application in such a way as to override the effect of Article 11.3(e), and if so, please explain the application of any such provision to that effect, having particular regard to the wording of Article 11.1 and considering paragraph 8 of *Secretary of State for Work and Pensions v TG* [2019] UKUT 86?
32. The Department, in written submissions from Ms D, confirmed its view that Regulation 883/2004 was applicable and that none of the provisions of Article 12-16 of Regulation (EC) 883/2004 had application. In response to point (iii) the Department submitted, "*When looking at Article 11(3)(e) at first glance the late claimant could be subject to this however the rest of Regulation (EC) 883/2004 must be considered*".
33. Ms D then articulated an argument that was premised on the IP received by the appellant being a "pension". On the basis that she was a pensioner, it set out a route via Article 25, Article 24(2), Article 29 and Article 21 of Title III, Chapter 1 of Regulation 883/2004, leading to the submission that the Republic of Ireland becomes the competent State in order for the claimant to be subject to the legislation of a single State. I found this submission confusing and observed that it was based on no relevant case law authority. It was also not the case presented by Mr Y at hearing, although owing much to the original Departmental submission to the tribunal which Mr Y had also mentioned at hearing.
34. Therefore, I directed further specific enquiries to the Department, aimed at clarifying a number of matters that it argued. I noted the Department's submission, "*When looking at Article 11(3)(e) at first glance the late*



*claimant could be subject to this however the rest of Regulation (EC) 883/2004 must be considered*". I asked:

- Under what specific provision or principle, or on the basis of what other authority, does the Department submit that, when addressing Article 11(3)(e) for the purpose of identifying the competent Member State, "*the rest of Regulation (EC) 883/2004 must be considered*"?
  - In particular, is the Commissioner correct in understanding that the sole provision on which this statement is based is the text which appears in Article 11(3)(e) itself to the effect that the sub-paragraph is "without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States"?
  - If so, will the Department please explain what it understands to be the meaning of the above text in terms of determining which is the competent Member State under Article 11(3)(e) and how it means that "*the rest of Regulation (EC) 883/2004 must be considered*"?
  - If not, and the Department relies on other legislative provisions to the effect that "*the rest of Regulation (EC) 883/2004 must be considered*", please cite those provisions and explain how they qualify the effect of Article 11(3)(e) in determining which is the competent Member State.
  - If it is based on principles derived from jurisprudence, please cite the relevant cases and passages. In particular, does the Department submit that the approach of the Court of Appeal in England and Wales in *Konevod v Secretary of State for Work and Pensions* [2020] EWCA Civ 809 (see discussion at 37-42) was *per incuriam*?
  - The Commissioner further observes that nowhere in its submission has the Department made reference to the jurisprudence of the Court of Justice of the European Union. Does the Commissioner correctly understand this to mean that no such case law supports the Department's case?
35. I further observed the Department's submission, "*[The appellant] was receiving Invalidity Pension from the Republic of Ireland, this falls under Article 44 to 49 of Regulation (EC) 883/2004 meaning that this is a pension paid by the Department of Employment Affairs and Social Protection. Therefore [the appellant] would have fallen under Article 25 of Regulation (EC) 883/2004*".

I asked,

- Generally, in what way would the fact of an award of Invalidity Pension by the Republic of Ireland - which would appear to be guaranteed under Article 7 of the Regulation - affect the basis for

determining that the competent Member State under Article 11(3)(e) is the state of residence, namely the United Kingdom?

- More specifically, to the extent that the Department refers to Articles 44 to 49 of Regulation (EC) 883/2004, appearing in Chapter 4 of Title III of the Regulation under the heading “Invalidity benefits”, is the Commissioner correct in understanding that the Department submits that, by receiving an invalidity benefit entitled “Invalidity Pension” from the approximate age of 28 to age 63, the appellant was receiving a “pension” for the purposes of Articles 25 and 29? If so, on the basis of what legislative definition or jurisprudential authority does the Department submit that the definition of “pension” in Article 1(w) of Regulation 883/2004 extends to the invalidity benefit received by the appellant the present case?
36. The Department duly responded. In those submissions it resiled from its previous submissions and now indicated support for the proposition that the UK was the competent State for payment of sickness benefits.

### **Assessment**

37. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
38. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
39. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
40. I have found the Department’s submissions in this case to be inconsistent, to lack coherence and to lack authoritative legal support for their reasoning. In the light of the inadequacy of the Department’s submissions in this case, I grant leave to appeal.

## *Background*

41. The factual nexus in the present case is not disputed. The appellant was born in Northern Ireland in 1956 and was a UK national. She had congenital spina bifida and hydrocephalus. In spite of her disabilities, she worked in Northern Ireland from the age of 18, including jobs in shops and in a solicitor's office. In 1982, when she was aged around 26, she married the appointee, an Irish national, in the UK. Sometime afterwards, to escape the "Troubles" in Northern Ireland, she and the appointee moved a few miles over the Irish border to Monaghan in the Republic of Ireland. During that period, she worked, I understand, for around 9 months in a grocery shop. However, she stopped work when she acquired bone disease and required an amputation at the ankle. In 1984, the couple returned to the UK to live permanently in Northern Ireland. The appellant later had a leg amputation above the knee. She retained her entitlement to IP, which was payable outside the Republic of Ireland. She subsequently claimed DLA in Northern Ireland and was awarded both care and mobility component from 6 April 1992. The couple were awarded UK child benefit (CHB) for their two children, born in 1982 and 1986, and the appointee had been awarded UK carer's allowance (CA). No records of pre-April 1992 disability benefits are retained by the Department.
42. As indicated, the appellant was awarded IP by the Republic of Ireland. I observe, from consideration of the Social Welfare (Consolidation) Act 1981, the Social Welfare (Consolidation) Act 1993, and the Social Welfare Consolidation Act 2005, that an award of IP in the Republic of Ireland was dependent on the claimant being permanently incapable of work and having satisfied prescribed contribution conditions. Contributions for over 156 weeks were required under the 1981 Act, which would have been operative at the date of claim. In light of her relatively short period of employment in the Republic of Ireland, it is evident that the appellant was awarded IP on the basis of aggregated national insurance (NI) and pay-related social insurance (PRSI) contributions that she had paid in the course of employment in the UK and in the Republic.
43. The dispute about whether the UK is the competent state for the payment of sickness benefits arose for the first time in 2018 when the appellant was notified that her most recent award of DLA from October 2007 was due to terminate and she was advised to claim PIP from the Department.

## *Discussion*

44. The key issue in this case is whether, for the period from the appellant's date of claim, the UK is competent for payment of sickness benefits in cash to her for the purposes of Chapter 1 of Title III of Regulation (EC) No 1408/71 or Regulation 883/2004. The position of the Department was that the UK is not the competent state, but rather that the Republic of Ireland is the competent state. The appointee submitted otherwise.

45. Whereas Regulation 1408/71 was repealed by Article 90 of Regulation 883/2004 for all but a small number of circumstances, and as it appears to me that none of those circumstances are present in the current case, I consider that Regulation 883/2004 has application to the present case, rather than Regulation 1408/71 and the parties agree.
46. The Department submitted that the daily living component of PIP is a “sickness benefit” under Regulation 883/2004. I consider that it is not necessary to determine the question of whether the daily living component of PIP is or is not a sickness benefit. The question in this case is the more general one of whether the UK is competent for the payment of sickness benefits in cash to - whatever those specific benefits may be.
47. The Department originally submitted that the UK was not the competent State for a claim for a sickness benefit in the UK in the circumstances of the present case. This was based entirely upon the award of IP to the appellant by the Republic of Ireland.
48. As observed above, it can be seen from the Preamble that the purpose of Regulation 883/2004 is to coordinate entitlement under national social security schemes. Various definitions and general provisions are then set out in Title I.
49. By Article 2.1, the Regulation applies to “nationals of a Member State ... who are or have been subject to the legislation of one or more Member States...”. The appellant has been subject to the legislation of the UK and the Republic of Ireland, having exercised the right of free movement as a worker within the EU. In particular, it is evident that she had benefited from the aggregation of her NI contributions from the UK with PRSI contributions in the Republic of Ireland in order to be awarded IP by the Republic of Ireland. It is not in dispute that the appellant falls within the personal scope of Regulation 883/2004.
50. Article 3 sets out the material scope of the Regulation. This sets out a list of a number of branches of social security, notably including sickness benefits and invalidity benefits as distinct categories. It excludes social assistance and various types of victim compensation. To the extent that the present case involves sickness benefits and invalidity benefits, it falls within the material scope of the Regulation.
51. Article 7 permits the “exportability” of cash benefits between Member States, without reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary resides in a Member State other than that in which the institution responsible for providing benefits is situated. As it was a cash benefit payable under the legislation of one or more Member States, I consider that this provision has relevance to the appellant’s entitlement to IP from the Republic of Ireland. As her entitlement to it was largely based on her UK national insurance contributions, I also observe that it is generally consistent with the right of

free movement that this provision permitted her to bring it back to the UK with her.

52. By Article 11(1), the persons to whom the Regulation applies shall be subject to the legislation of a single Member State only, to be determined in accordance with Title II. In other words, people who have exercised the right of free movement and who have been subject to the legislation of one or more Member States should be subject to the legislation of only one Member State in matters of social security.
53. By Article 11(2), it is clear that the appellant does not fall to be considered as receiving cash benefits because or as a consequence of their activity as an employed or self-employed person and therefore considered to be pursuing the said activity. This is because this category does not apply to invalidity, old-age or survivors' pensions.
54. Article 11(3) makes provision, subject to Articles 12 to 16, for persons pursuing an activity as an employed or self-employed person in a Member State, civil servants, persons receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence, persons called up or recalled for service in the armed forces or for civilian service in a Member State. The appellant does not fall into any of those categories. It appears to me therefore that she falls into the category in 11(3)(e), namely "any other person to whom subparagraphs (a) to (d) do not apply". Such persons "shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States".
55. The expression "without prejudice to" in the particular context means "without affecting". Thus, the determination under Article 11(3)(e) that an individual shall be subject to the legislation of the Member State of residence does not affect other provisions guaranteeing benefits under the legislation of other Member States.
56. As indicated above, one relevant provision in the present case is Article 7. It is evident that entitlement to IP from the Republic of Ireland was not dependent on any condition of residence and was therefore exportable to another Member State. However, Article 11(3)(e) makes the UK the competent State as the appellant's state of residence. As I understand it, the expression "without prejudice to" provides expressly that this position is not affected by the appellant's entitlement to IP from the Republic of Ireland.
57. While Article 11 appears within Title II of the Regulation, the specific provisions governing sickness benefits appear within Title III at Chapters 1, 2 and 3. In its early submissions to me, the Department had relied on the general assertion that "the rest of Regulation 883/2004 must be considered". In its final submissions to me, having changed its position on this key issue, the Department indicated that it was influenced in its

interpretation by *LD v Secretary of State for Work and Pensions* [2017] UKUT 65. That decision in turn was built on the foundations laid down in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176, both decisions of Upper Tribunal Judge Jacobs in Great Britain. However, in neither case (*IG v SSWP*, paragraph 24; *LD v SSWP*, paragraph 5) was there a dispute about which Member State was competent.

58. There had been suggestions in previous editions of the Sweet & Maxwell commentary on Regulation 883/2004 that Article 11 was qualified not just by the other articles in Title II, but also by the articles in Title III, based on cases such as *SSWP v AK* [2015] UKUT 110. However, Judge Jacobs in paragraph 8 of *Secretary of State for Work and Pensions v TG* [2019] UKUT 86 and in paragraph 7 of *GK v SSWP* [2019] UKUT 87 had departed from that view, saying:

“I have previously suggested that Title II was 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. 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 21 can apply, there must already be a competent State, which will have been identified pursuant to Article 11. Similarly Articles 23 and following link entitlement to sickness benefits to one of the States competent for providing a claimant's pension, consistently with the 'single Member State only' principle in Article 11(1)".

59. This position is supported by the judgment of the Court of Appeal in England and Wales in *Konevod v Secretary of State for Work and Pensions* (upholding Judge Jacobs in *GK v SSWP* [2019] UKUT 87, but for different reasons). The issue was, in circumstances where an attendance allowance claimant had retired to Cyprus, whether her friend in Cyprus could also export carer's allowance from the UK. The Court of Appeal identified the competent Member State as Cyprus, before considering whether Article 21 within Title III could assist the claimant so as to make the UK responsible. However, it found that Cyprus remained the competent State under Article 11.
60. Subsequent to the final submissions in the case I also became aware of the decision of the Court of Appeal in England and Wales in *Harrington v Secretary of State for Work and Pensions* [2023] EWCA Civ 433. That concerned a DLA claim for a British child resident in the UK, whose father was separated from the family and working in Belgium. The Upper Tribunal (again Judge Jacobs in *AH v SSWP* [2020] UKUT 53) had found that Belgium was the competent State for the father under Article 11(3)(a), and the UK the competent State for the mother and child under Article 11(3)(e). The Upper Tribunal held that Article 21 took priority over entitlement under UK legislation meaning that Belgium was the competent State. Overturning that decision, the Court of Appeal in England and Wales found that the wording and purpose of Article 21 do not suggest that the article was intended as a rule of priority unlike other articles of the Regulations, such as Article 32. It found that the child claimant was an "insured person", that the UK was the competent State under Article 11(3)(e) and that there was entitlement to DLA.
61. My own interpretation of Regulation 883/2004, which is supported by the above case law, is that Title II provides the rules identifying the competent Member State. This is without prejudice to entitlement to particular categories of benefit being established separately under the rules of Title III in relevant circumstances, but these provisions do not affect the determination of the identity of the competent Member State. No argument has been presented that would allow me to be satisfied that any such circumstances are established in the present case. The Department resiles from its previous submission to this effect and I do not accept that its original submission was established by any legally authoritative path.

62. By Article 11(3)(e), the state of residence is the competent Member State in this case - namely the UK. Therefore, it appears to me that the UK was competent for the payment of payment of sickness benefits in cash to the appellant for the purposes of Chapter 1 of Title III of Regulation (EC) 883/2004 of the European Parliament.

*Determination*

63. The question before me is whether the tribunal has erred in law. On the basis of my analysis of the relevant legislation and case law above, I find that it has. In particular, I consider that it has not correctly applied the decision of the Court of Appeal in England and Wales in *Konevod*, which was before it. Whereas that decision is not binding on a tribunal in Northern Ireland - or on a Commissioner for that matter - I consider that a tribunal or Commissioner should normally follow the decision of the Court of Appeal in England and Wales, unless there are good reasons for departing from it. Therefore, I allow the appeal and I set aside the decision of the appeal tribunal.
64. As the disability conditions are not in dispute, I consider that this is a case in which I can give the decision that the tribunal should have given. I adopt the findings of fact of the Department in relation to the relevant activities for the daily living component, which leads to an award 19 points to the appellant.
65. I find that the UK is competent for the payment of payment of sickness benefits in cash to the appellant for the purposes of Chapter 1 of Title III of Regulation (EC) 883/2004 of the European Parliament. Therefore, I allow the appeal.
66. I decide that the appellant is entitled to the enhanced rate of the daily living component of personal independence payment (PIP) from 6 April 2018 to 3 November 2021.

(signed): O Stockman

Commissioner

6 July 2023



**RE: TP (DECEASED)**

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**PERSONAL INDEPENDENCE PAYMENT**

**CORRECTION OF ACCIDENTAL ERROR IN DECISION**

1. On 6 July 2023, I made a decision awarding the late appellant personal independence payment (PIP) from 6 April 2018 to 3 November 2021.
2. Having regard to the submissions received from Mr Barker dated 4 August 2023 on behalf of the Department (attached) and having considered the original Departmental submission to the tribunal at paragraph 49, I accept that my decision arguably contains an accidental error. This arises from a failure to address a potential overlap and duplication of PIP and disability living allowance (DLA) entitlement, which is precluded by Regulation 17 of the Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2016 (see Appendix).
3. A submission of fact has been advanced by the Department that the late appellant was in receipt of DLA until 15 January 2019 and so the earliest that PIP could be awarded is 16 January 2019.
4. Evidence in the case had indicated that the decision of 9 June 2010 awarding DLA care component had been superseded by way of a decision notified on 9 October 2018, and that the late appellant had no entitlement to DLA care component from and including 18 October 2007. However, she retained entitlement to the high rate mobility component of DLA.
5. Evidence in the case further indicated that an assessment determination awarding PIP mobility component was made on 14 December 2018 and that the late appellant was notified of this on 17 December 2018. She continued to receive DLA mobility component until the expiry of a period of 28 days to 15 January 2019 (in accordance with regulation 17(1)(b)(ii)).
6. Evidence in the case further indicated that the enhanced rate of PIP mobility component was awarded from 16 January 2019.

7. Having regard to all the evidence, and by a proper application of regulation 17(4)(a), I am satisfied that the earliest date on which the late appellant could have been awarded PIP was 16 January 2019.
8. I must therefore amend my decision awarding the late appellant PIP from 6 April 2018 to 3 November 2021. The only legally correct decision open to me was to award the late appellant PIP from 16 January 2019 to 3 November 2021.
9. **I decide that the late appellant is entitled to the enhanced rate of the daily living component of PIP and the enhanced rate of the mobility component of PIP from 16 January 2019 to 3 November 2021.**
10. Whereas the decision of the Department superseding the late appellant's award of the care component of DLA was not before me in these proceedings, it should be observed that the principles applied in relation to PIP apply equally in relation to DLA. The implication is that she should properly have been awarded DLA care component throughout the period of her claim until 15 January 2019. I am not aware if the appointee has requested a reconsideration of decision removing the late appellant's entitlement to DLA care component. If not, I would hope that the decision notified on 9 October 2018 superseding and removing the late appellant's entitlement to DLA care component from 18 October 2007 would be revisited by the Department of its own motion.

(Signed): O STOCKMAN

COMMISSIONER

27 September 2023

## APPENDIX

### **Regulation 17 of the Personal Independence Payment (Transitional Provisions) (Amendment) Regulations 2016**

#### *Procedure following and consequences of determination of claim for personal independence payment*

17.—(1) Upon an assessment determination being made on a claim by a transfer claimant—

(a) the Department must, as soon as practicable, send the claimant written notification of the outcome of the determination; and

(b) except where regulation 13(2) applies to the claimant, the claimant's entitlement to disability living allowance shall terminate—

(i) where paragraph (3) applies, on the earlier of—

(aa) the last day of the payment period during which the assessment determination is made, or

(bb) the first Tuesday after the making of the assessment determination,

(ii) in any other case, on the last day of the period of 28 days starting with the first pay day after the making of the assessment determination.

(2) In paragraph (1), “payment period” means a period in respect of which disability living allowance is paid to the claimant in accordance with regulation 22 of the 1987 Regulations(a).

(3) This paragraph applies if—

(a) the transfer claimant is terminally ill for the purposes of Article 87 of the 2015 Order;

(b) the outcome of an assessment determination in respect of that claimant is an award of personal independence payment; and

(c) the total weekly rate of personal independence payment payable by virtue of that award is greater than the total weekly rate of disability living allowance payable by virtue of that claimant's existing award of disability living allowance.

(4) Where the outcome of an assessment determination is an award in respect of either or both components of personal independence payment, the claimant's entitlement to personal independence payment starts with effect from the day immediately following—

(a) the day on which the claimant's entitlement to disability living allowance terminates in accordance with paragraph (1)(b); or

(b) where regulation 13(2) applies to the claimant, the day on which the claimant's entitlement to disability living allowance terminated under regulation 13(1).

(5) The notification referred to in paragraph (1) must state—

(a) except where regulation 13(2) applies to the claimant, the day on which the claimant's entitlement to disability living allowance will terminate in accordance with paragraph (1)(b); and

(b) if personal independence payment is awarded, the day on which the claimant's entitlement to personal independence payment starts in accordance with paragraph (4).

(6) This paragraph applies to a person—

(a) whose claim for disability living allowance was refused;

(b) who claimed personal independence payment after that refusal; and

(c) who, as a result of the determination of legal proceedings initiated under the 1998 Order in relation to that refusal, becomes entitled, after the assessment determination, to disability living allowance.

(7) The entitlement of a person to whom paragraph (6) applies to disability living allowance shall terminate—

(a) where personal independence payment is awarded, on the day before that on which the person becomes entitled to personal independence payment; and

(b) where personal independence payment is not awarded, on the last day of the period of 28 days starting with the first pay day after the making of the assessment determination.