

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

As the decision of the First-tier Tribunal (made on 1 March 2013 at Blackpool under reference SC064/12/03401) 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's decision on the claimant's entitlement to disability living allowance is confirmed.

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 a claim for a disability living allowance. The care component of the allowance 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 [67]-[68] and *Tolley* at [51] and [55]. It is also a cash benefit. The mobility component of the allowance is not a sickness benefit, but a special non-contributory cash benefit: *Bartlett, Ramos and Taylor v Secretary of State for Work and Pensions* (Case C-537/09 EU:C:2011:278) [2012] AACR 34. Regulation (EC) 883/2004 applies. Regulation (EC) 987/2009 provides for the implementation of the Regulation. The relevant provisions of the Regulations are in Appendices 2 and 3.

B. What's happened

4. The claimant was receiving a pension as a police officer and he had a contributions record that would entitle him to a State pension from 13 November 2016. He moved to Cyprus in 2007 and made a claim for a disability living allowance from there on 27 March 2012. The Secretary of State refused the claim. The First-tier Tribunal allowed the claimant's appeal, but I gave the Secretary of State permission to appeal to the Upper Tribunal.

C. Why Regulation 883/2004 applies

5. The First-tier Tribunal applied Regulation (EEC) 1408/71. That was wrong. The claim was made after Regulation 883/2004 came into force on 1 May 2010. That was the Regulation that applied.

D. The claimant is not entitled to the mobility component of disability living allowance for so long as he is habitually resident outside the United Kingdom

6. The mobility component is, as I have said, a special non-contributory cash benefit, which is governed by Article 70 of, and Annex X to, Regulation 883/2004. Article 70(4) provides that these benefits are only payable in the State where the claimant is habitually resident and in accordance with its legislation. Article 7, which prevents residence clauses blocking entitlement, is expressly excluded for these benefits by Article 70(3). The result is that the claimant is not entitled to the mobility component for so long as he is habitually resident outside the United Kingdom. What follows applies to the care component only.

E. Title II is comprehensive on identifying the applicable legislation

7. The starting point to apply Regulation 883/2004 is Article 11(1), which provides that the 'legislation shall be determined in accordance with this Title.' That means Title II. It provides a comprehensive set of rules.

8. 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

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

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).

F. It does not matter whether the claimant is an insured person in the United Kingdom

9. The Secretary of State conceded in *KR v Secretary of State for Work and Pensions* [2019] UKUT 85 (AAC), like this 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. In order for the concession to work under Article 21, the claimant must be an insured person in accordance with the *Tolley* analysis. 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.

10. Strictly, it is not necessary to decide whether the claimant is an insured person on the *Tolley* reasoning, because the United Kingdom is not the competent State even if he is. As a matter of consistency, I can see no way in which a claimant can be an insured person for an export case, but not for a new claim case. There is no way that the claimant's status can vary depending on the way in which the issue arises.

11. I explained in *JG v Secretary of State for Work and Pensions* [2019] UKUT 83 (AAC) why it was not possible to distinguish export and new claim cases for Regulation 1408/71. That reasoning cannot be read across to Regulation 883/2004, because the definition of 'insured person' is new. Both Regulations refer to insurance, but in Regulation 1408/71 that means insured 'for one or more of the contingencies covered by the branches of social security dealt with in this Regulation'. The language of the definition of insured person in Regulation 883/2004 is different. It is not clear to me whether the person has to be insured generally or merely for one of the benefits covered by Chapters 1 and 3 of Title III. The expression 'right to benefits', which is used throughout the Regulation, is also difficult. It troubled Upper Tribunal Judge Mesher in *JS v Secretary of State for Work and Pensions* [2009] UKUT 81 (AAC), [2012] AACR 7 at [19]-[20].

12. I am going to proceed on the basis that the claimant is an insured person on the ground that this is the only way that I can interpret Article 21 consistently with the Secretary of State's concession, but leave the issue open for further analysis in a case in which it affects the outcome.

G. Article 21 only applies if competent State and State of residence differ

13. Article 21 applies to 'An insured person ... residing ... in a Member State other than the competent Member State'. 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.

H. The applicable legislation is that of Cyprus

14. Article 11 identifies the applicable legislation. It takes a geographical approach by reference to the claimant's place of work or place of habitual residence. Article 11(3)(a) lays down the place of work rule: the applicable legislation is that of the Member State where the claimant 'is pursuing an activity as an employed or self-employed person'. There is no need to resort to Latin to describe this; it adds nothing of value either to the analysis or to the explanation. Article 11(3)(b)-(d) qualify the place of work rule. Article 11(3)(e) lays down the place of residence rule; it applies when the place of work rule does not.

15. The place of work rule can result in a separation of the competent State and the State of residence. Assume that the claimant is working in one State and residing in another. If the claimant wants to claim a sickness benefit, the competent State for the claim will be fixed under the place of work rule in Article 11(3)(a). The claim for sickness benefit is a matter for the competent institution of that State, not the State of residence. Article 21 reinforces this by (a) providing that the claimant is entitled to cash benefits from the competent institution and (b) making provision for payment and calculation of entitlement. This analysis is consistent with Article 28 of Regulation (EC) 987/2009, which provides that claims for long-term care benefits must be made to the competent institution rather than the institution of the place of residence.

16. The claimant here is not 'pursuing an activity as an employed or self-employed person' anywhere. The word 'pursuing' indicates that the person is undertaking that activity rather than having done so in the past. So, the place of work rule does not apply.

17. Usually, if the place of work rule does not apply, the place of residence rule in Article 11(3)(e) does, with the result that there is no separation of competent State and State of residence. There is, however, an exception when Article 21 could still apply. This occurs when the claimant is residing in one State but has

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

an acquired right to a contributory benefit from another State. This is covered by Recital 13. 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 he has no acquired right to a disability living allowance.

18. 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 Cyprus.

I. The institution and competent institution are situated in Cyprus

19. 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 is the Department for Work and Pensions.

20. 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 11; severing that link makes no sense. Here, the institution must be one that applies the legislation of Cyprus.

21. 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 11. And that means, as with institution, that the competent institution must be one that applies the legislation identified under Article 11, which is that of Cyprus.

22. 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

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

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)

23. 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 Cyprus. If the claimant is insured in Cyprus, this head will apply and the institution will be the relevant body in Cyprus. Article 81 imposes a duty on the State to which the claim was submitted to pass it to the competent institution.

Head (ii)

24. 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’.

25. There is no authority on this head. It was discussed by the Advocate General in *Coppola v Insurance Officer* (Case 150/82 EU:C:1983:4) [1983] ECR 43 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, which would probably be overridden by Article 7.

26. Whatever it means and whenever it applies, head (ii) cannot have the effect of making United Kingdom legislation applicable under Article 11, which is the only way that the institution and, therefore, the competent institution would be in the United Kingdom.

Head (iii)

27. That leaves head (iii). There is no evidence of the social security arrangements in Cyprus, but there will be some legislation, some competent authority and some institution to administer the legislation. But, to repeat, whether this head applies or not, it cannot operate to locate the competent institution in the United Kingdom, as the United Kingdom does not apply the legislation of Cyprus.

J. Cyprus is the competent State

28. 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 Cyprus. The institution is the relevant body located there, as is the competent institution, so the competent State is Cyprus.

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

29. The claimant cannot be entitled under domestic law; that possibility is precluded by section 72(7B) of the Social Security Contributions and Benefits Act 1992, which came into effect on 31 October 2011, long before the claim for a disability living allowance in this case. I decided in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176 (AAC), [2016] AACR 41 at [42] that the equivalent provision for attendance allowance was valid and effective. The same reasoning applies to section 72(7B). Accordingly, no issue of overlapping arises.

L. EU law does not impose a duty on the United Kingdom to provide the care component of disability living allowance despite section 72(7B)

30. Regulation 883/2004 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]).

31. 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*:

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.

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

32. 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 exceptions, but only if two conditions are met. They were set out in *Ministerstvo práce a sociálních 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 had left the United Kingdom years before he made his claim for a disability living allowance, so there was, at the time of the claim for a disability living allowance, no connecting factor between the *territory* of the United Kingdom and the claim; any link had been severed by the claimant moving to Cyprus. And accepting such a link would undermine the nature of the coordination arrangements in the Regulation. Exercising freedom of movement cannot guarantee a neutral effect on benefit entitlement and, unless there is a good reason for making provision, requiring a State to do so would introduce an unnecessary and arbitrary element into the coordination system. I can find no good reason in the particular circumstances of this case or in the circumstances that would obtain in cases of this type generally.

**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 (EC) 883/2004

Whereas:

- (4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.
- (13) The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.
- (15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.
- (17a) Once the legislation of a Member State becomes applicable to a person under Title II of this Regulation, the conditions for affiliation and entitlement to benefits should be defined by the legislation of the competent Member State while respecting Community law.
- (18a) The principle of single applicable legislation is of great importance and should be enhanced. This should not mean, however, that the grant of a benefit alone, in accordance with this Regulation and comprising the payment of insurance contributions or insurance coverage for the beneficiary, renders the legislation of the Member State, whose institution has granted that benefit, the applicable legislation for that person.
- (20) In the field of sickness, maternity and equivalent paternity benefits, insured persons, as well as the members of their families, living or staying in a Member State other than the competent Member State, should be afforded protection.
- (21) Provisions on sickness, maternity and equivalent paternity benefits were drawn up in the light of Court of Justice case-law. Provisions on prior authorisation have been improved, taking into account the relevant decisions of the Court of Justice.
- (22) The specific position of pension claimants and pensioners and the members of their families makes it necessary to have provisions governing sickness insurance adapted to this situation.
- (23) In view of the differences between the various national systems, it is appropriate that Member States make provision, where possible, for medical treatment for family members of frontier workers in the Member State where the latter pursue their activity.

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

- (24) It is necessary to establish specific provisions regulating the non-overlapping of sickness benefits in kind and sickness benefits in cash which are of the same nature as those which were the subject of the judgments of the Court of Justice in Case C-215/99 *Jauch* and C-160/96 *Molenaar*, provided that those benefits cover the same risk.

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation:

- (a) ‘activity as an employed person’ means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;
- (b) ‘activity as a self-employed person’ means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;
- (c) ‘insured person’, in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;
- (j) ‘residence’ means the place where a person habitually resides;
- (l) ‘legislation’ means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1); ...
- (m) ‘competent authority’ means, in respect of each Member State, the Minister, Ministers or other equivalent authority responsible for social security schemes throughout or in any part of the Member State in question;
- (p) ‘institution’ means, in respect of each Member State, the body or authority responsible for applying all or part of the legislation;
- (q) ‘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 or would be entitled to benefits if he or a member or members of his family resided in the Member State in which the institution is situated; or
- (iii) the institution designated by the competent authority of the Member State concerned; ...
- (r) ‘institution of the place of residence’ and ‘institution of the place of stay’ mean respectively the institution which is competent to provide benefits in the

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, in accordance with the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State concerned;

(s) 'competent Member State' means the Member State in which the competent institution is situated;

...

Article 3

Matters covered

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

- (a) sickness benefits; ...
- (d) old-age benefits; ...

Article 7

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.

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

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;

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

- (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.

...

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits

SECTION 1

INSURED PERSONS AND MEMBERS OF THEIR FAMILIES, EXCEPT PENSIONERS AND MEMBERS OF THEIR FAMILIES

Article 21

Cash benefits

1. An insured person and members of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.
2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.
3. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

4. Paragraphs 2 and 3 shall apply mutatis mutandis to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States.

SECTION 2

PENSIONERS AND MEMBERS OF THEIR FAMILIES

Article 24

No right to benefits in kind under the legislation of the Member State of residence

1. A person who receives a pension or pensions under the legislation of one or more Member States and who is not entitled to benefits in kind under the legislation of the Member State of residence shall nevertheless receive such benefits for himself and the members of his family, insofar as he would be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of his pensions, if he resided in that Member State. The benefits in kind shall be provided at the expense of the institution referred to in paragraph 2 by the institution of the place of residence, as though the person concerned were entitled to a pension and benefits in kind under the legislation of that Member State.

2. In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined in accordance with the following rules:

- (a) where the pensioner is entitled to benefits in kind under the legislation of a single Member State, the cost shall be borne by the competent institution of that Member State;
- (b) where the pensioner is entitled to benefits in kind under the legislation of two or more Member States, the cost thereof shall be borne by the competent institution of the Member State to whose legislation the person has been subject for the longest period of time; should the application of this rule result in several institutions being responsible for the cost of benefits, the cost shall be borne by the institution applying the legislation to which the pensioner was last subject.

Article 25

Pensions under the legislation of one or more Member States other than the Member State of residence, where there is a right to benefits in kind in the latter Member State

Where the person receiving a pension or pensions under the legislation of one or more Member States resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self-employed person, and no pension is received from that Member State, the cost of benefits in kind provided to him and to members of his

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

family shall be borne by the institution of one of the Member States competent in respect of his pensions determined in accordance with Article 24(2), to the extent that the pensioner and the members of his family would be entitled to such benefits if they resided in that Member State.

Article 29

Cash benefits for pensioners

1. Cash benefits shall be paid to a person receiving a pension or pensions under the legislation of one or more Member States by the competent institution of the Member State in which is situated the competent institution responsible for the cost of benefits in kind provided to the pensioner in his Member State of residence. Article 21 shall apply mutatis mutandis.
2. Paragraph 1 shall also apply to the members of a pensioner's family.

TITLE V

MISCELLANEOUS PROVISIONS

Article 81

Claims, declarations or appeals

Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the 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 Member State either directly or through the competent authorities of the Member States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second Member State shall be considered as the date of their submission to the competent authority, institution or tribunal.

TITLE VI

TRANSITIONAL AND FINAL PROVISIONS

Article 87

Transitional provisions

8. If, as a result of this Regulation, a person is subject to the legislation of a Member State other than the one determined in accordance with Title II of Regulation (EEC) No 1408/71, that legislation shall continue to apply as long as the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation. The request shall be submitted within three months after the date of application of this Regulation to the competent institution of the Member State

SECRETARY OF STATE FOR WORK AND PENSIONS V TG (DLA)
[2019] UKUT 86 (AAC)
UPPER TRIBUNAL CASE NO: CDLA/2590/2013

whose legislation is applicable under this Regulation if the person concerned is to be subject to the legislation of that Member State as of the date of application of this Regulation. If the request is made after the time limit indicated, the changeover shall take place on the first day of the following month.

APPENDIX 3

REGULATION (EC) 987/2009

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits

Article 28

Long-term care benefits in cash in the event of stay or residence in a Member State other than the competent Member State

A. Procedure to be followed by the insured person

1. In order to be entitled to long-term care benefits in cash pursuant to Article 21(1) of the basic Regulation, the insured person shall apply to the competent institution. The competent institution shall, where necessary, inform the institution of the place of residence thereof.

B. Procedure to be followed by the institution of the place of residence

2. At the request of the competent institution, the institution of the place of residence shall examine the condition of the insured person with respect to his need for long-term care. The competent institution shall give the institution of the place of residence all the information necessary for such an examination.

C. Procedure to be followed by the competent institution

3. In order to determine the degree of need for long-term care, the competent institution shall have the right to have the insured person examined by a doctor or any other expert of its choice.

...