

PAST PRESENCE TEST – EFFECT OF CJEU JUDGMENT

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INTRODUCTION

- 1 This Memo describes a decision¹ made on 21.7.11 by the Court of Justice of the European Union (CJEU) and gives guidance on its effect for DMs. The CJEU’s decision is a “relevant determination” for the purposes of the Act².

1 Case C-503/09 LS v Secretary of State for Work and Pensions; 2 SS Act 98, s 27

- 2 Although the case before the CJEU concerned IB(Y), this Memo will concentrate on the effect of the judgment on the application of EU law to the past presence test in

DLA, AA and CA. Further guidance will be issued on the effect of the decision on IB(Y) in due course.

The Past Presence Test

- 3 The past presence test states¹ that, in order to be entitled for any day from the date of claim onwards, the claimant must have been present in GB for 26 weeks (or periods adding up to 26 weeks) in the 52 weeks preceding that day.

1 SS (AA) Regs, reg 2(1); SS (DLA) Regs, reg 2(1); SS (CA) Regs, reg 9(1)

- 4 Prior to the CJEU judgment, where a claim for DLA (care), AA or CA was made by a person resident in another EEA country or Switzerland, the past presence test was only applied on a one-off basis (see DMG Chapter 07 Part 2).

DETAILS OF THE CASE

- 5 The case concerned a British national born in the UK. She moved with her parents to Spain in 2000. DLA (Care) has been paid to her for a period starting in April 1992 and continues to be paid to her in Spain in accordance with the EU coordination rules. As entitlement to DLA (Care) began before 1.6.92 it is treated as an invalidity benefit for the purposes of the EU co-ordination rules under transitional provisions.
- 6 In 2005, the claimant's mother claimed IB(Y) on her behalf. The claim was refused by a DM. The DM's decision was confirmed by a FtT. The mother then appealed to the UT, which referred various questions to the CJEU.

WHAT THE COURT DECIDED ABOUT THE PAST PRESENCE TEST

- 7 The CJEU held that it is a legitimate objective for a Member State to make rules intended to ensure that there is a genuine link between a claimant to a non-contributory benefit and the social security system of the competent state. This legitimate objective is capable of justifying restrictions on freedom of movement and residence under EU law.
- 8 However, the CJEU held, the past presence test
1. is not necessarily representative of the real and effective degree of connection between a claimant and that Member State, **and**
 2. excludes all other relevant representative elements.

Other relevant elements must be sought in the relationship between the claimant and the social security system of the competent Member State.

9 Those other elements would include the following which applied in the claimant's case

1. receipt of a pension as defined in paragraph 15 below (in the circumstances of the case before the CJEU, DLA (Care), which under transitional provisions was an invalidity benefit and thus a pension in terms of the EU co-ordination regulations¹)
2. family circumstances: where the claimant, as here, is dependent on her parents, their circumstances are relevant. The claimant's mother receives UK retirement pension abroad
3. the father and mother both worked in the UK before retiring and the mother has received IB under UK legislation
4. the claimant spent a significant part of her life in the UK.

These factors taken together were capable of demonstrating the existence of a genuine and sufficient connection between the appellant and the competent Member State.

1 1 Reg (EEC) 1408/71 & Reg (EC) 883/04

10 The necessity of establishing a genuine and sufficient connection between the claimant and the competent Member State also enables that State to satisfy itself that the economic cost of paying the benefit does not become unreasonable.

EFFECT OF THE DECISION

11 Except where paragraph 21 below applies, the judgment affects three main situations

1. Where a fresh claim to an affected benefit is made by an EEA or Swiss national who lives in an EEA state other than the UK or in Switzerland ("claims from abroad")
2. Where a fresh claim for an affected benefit is made by an EEA or Swiss national who has entered the UK ("claims by incomers").
3. Where a claimant has already acquired an affected benefit in the UK and who then moves to reside in another EEA country ("exportability")

Claims from Abroad

- 12 Provided the claimant is within the personal scope of the EU co-ordination regulations¹ and provided the UK is the competent state (see DMG 070955 et seq), where a new claim for DLA (Care), AA or CA is made by a person resident in another EEA state or Switzerland in respect of any period on or after 21.7.11, DMs can no longer apply the past presence test.

1 Reg (EEC) 1408/71 & Reg (EC) 883/04

- 13 The DM must determine whether the claimant has a “genuine and sufficient link” with the UK.

- 14 DMs will need to make a balanced judgement based on all the facts of the case. Among the relevant elements that may be considered are

1. **Personal factors** for example whether the claimant is receiving a UK benefit e.g. a pension (see definition in para 15 below) from the UK

Note where the claimant has a spouse's or survivor's pension, that will be a relevant factor but is not sufficient in itself where the claimant has never lived in the UK or been a UK worker

and

2. **Periods of residence or work in the UK** for example

2.1 Whether the claimant has spent a significant part of their life in the UK

2.2 Whether the claimant has worked and paid UK NI contributions as a result of that work

and, if the claimant is a family member (within the meaning given at DMG 070932 i.e. including adult children who are dependent on their parents)

3. **Family factors** for example where the claimant is a dependant child of someone who is receiving a pension from the UK. Where the claimant is the spouse or civil partner of a person with a genuine and sufficient link with the UK then that will be a relevant but not conclusive factor in deciding whether the claimant has a genuine and sufficient link.

Note: This is not a checklist and it will be for the DM to decide how much weight to give to each relevant factor in coming to an overall determination of whether there is a genuine and sufficient link to the UK.

Example 1

Harry moved to Spain in 2005 after having lived and worked all his life in the UK. He receives a full UK state Retirement Pension in Spain. On 12.9.11 he claimed AA. The DM decided that the UK was the competent state for sickness benefits and that Harry had a genuine and sufficient link to the UK

Example 2

Susan, a UK worker retires early and moves to France. She marries her French neighbour, Henri. At 60 she claims her UK pension. Henri does not work due to disability and has no income. He is not yet old enough to receive his French pension and does not meet the conditions for any French benefits. The husband claims DLA (Care). The DM decided that the UK was the competent state for the payment of sickness benefits. However he decided that Henri did not have a genuine and sufficient link to the UK: the only link was that he was married to a UK pensioner. He had never lived nor worked in the UK and had no UK benefits payable to him.

Meaning of “pension”

15 “Pension” in paragraph 14 above means

1. state RP of any category **or**
2. main phase ESA (Cont), long-term IB, SDA, IB(Y) **or**
3. a bereavement benefit, including widow’s benefit and Industrial Injuries Death Benefit (but not a bereavement payment – which, in terms of the EU co-ordination regs, is not a pension but a death grant) **or**
4. a pension for IIDB (including REA and RA) **or**
5. transitionally protected DLA (mobility component) (see DMG 07940 et seq)

However, for SDA and transitionally protected DLA (Mob) to be treated as a pension, the claimant must firstly fall within the personal scope of the EU co-ordination regulations¹.

Note: This definition of pension derives from the EU co-ordination regulations¹.

Claims by Incomers

- 16 The first step is to establish whether the claimant is within the personal scope of the EU co-ordination regulations¹ and whether the UK is the competent state for paying DLA (Care), AA or CA.

1 1 Reg (EEC) 1408/71 & Reg (EC) 883/04

- 17 If the UK is the competent state and the past presence test is satisfied as at the first day of entitlement then it is not necessary to consider whether the claimant has a genuine and sufficient link.
- 18 Where the past presence test is not satisfied, the DM will need to establish whether, as at the first day of potential entitlement, the claimant has established a genuine and sufficient link to the UK. The factors set out in paragraph 14 above should be considered. This may result in the DM deciding that there is no entitlement until the past presence test is satisfied.

Example 1

Louis is a French citizen. He has never worked in France or any other EU member state. Louis moves to live in the UK. He does not work and after two years Louis claims DLA (Care). The DM decides that because the claimant lives here and no other Member State is the competent state, the UK is responsible for sickness benefits. He decides that, as at the date of claim the past presence test is satisfied, it is therefore not necessary to decide if Louis has a genuine and sufficient link.

Example 2

Sophie is a Dutch citizen. She has never worked in the Netherlands nor in any other EU state. On arrival in the UK, Sophie claims DLA (Care). The DM decided that, because no other state's legislation applied, the UK was the competent state for the payment of sickness benefits. However the DM determined that Sophie did not have a genuine and sufficient link to the UK and hence that Sophie was not entitled to DLA (Care). The DM went on to decide that, once the past presence test was satisfied, Sophie would be entitled to DLA (Care). As this would be more than 3 months ahead of the date of claim the DM could not use the advance claim procedures and advised Sophie to claim again at a later date.

Exportability

- 19 “Exportability” refers to the situation where DLA (Care), AA or CA is payable in the UK, the claimant then moves to reside in another EEA state or Switzerland and seeks to take the benefit with them.
- 20 In this situation the DM will first need to decide whether the UK is the competent state for the payment of sickness benefits in the country the claimant has moved to. If the UK is the competent state, the DM should then consider the factors in paragraph 14 and determine whether the claimant has a genuine and sufficient link to the UK. If the claimant does not have a genuine and sufficient link then entitlement to DLA (Care), AA or CA ceases when the claimant leaves the UK.

CERTAIN EMPLOYED AND SELF-EMPLOYED PERSONS

- 21 The following persons who are EEA or Swiss nationals are treated as satisfying the past presence test (DMG 070994), and DMs do not have to consider whether the have a genuine and sufficient link with the UK
1. Persons who are currently employed or self-employed, who pay UK national insurance contributions (and their family members). This includes posted workers (see DMG 070976) and frontier workers (see DMG 070977) **and**
 2. People who are treated as employed or self-employed persons (and their family members) who, although not currently employed, are receiving ESA(Cont) in the assessment phase or JSA(Cont) or MA, or those who continue to be insured for ESA(Cont) after they cease work.

DISABILITY LIVING ALLOWANCE – MOBILITY COMPONENT

- 22 The CJEU has determined¹ that DLA mobility component is a Special Non-Contributory Benefit for the purposes of the EU co-ordination regulations. Therefore it cannot be paid in other EEA states or Switzerland. However the CJEU’s decision does have effect in relation to EEA or Swiss nationals entering the UK from abroad and then claiming DLA mobility component.

1 Bartlett, Gonzales Ramos and Taylor v Secretary of State for Work and Pensions Case C-537/09,

- 23 The guidance DMG 070920 – 070921 no longer applies. DMs should instead apply the guidance in paragraphs 17 (excluding the phrase “If the UK is the competent state and”) and 18 to claims for DLA mobility component from incomers from now on.

DECISION- MAKING

- 24 Any decision made **after 21.7.11** refusing a claim to DLA, AA or CA on the grounds that the past presence test is not satisfied can be revised on the grounds of official error (if the DM determines that the CJEU's decision applies and that there is a genuine and sufficient link to the UK¹). The revision will take effect from the same date as the decision being revised took effect. However section 27 of the Act² requires that the decision of the CJEU should not be applied to any period before 21.7.11. So, if the revised decision covers a period before 21.7.11, the decision should be that, as a result of section 27 of the Act, the period for which there is entitlement to benefit begins on 21.7.11.

1 SS CS (D&A) Regs, reg 3(5)(a); 2 SS Act 98

- 25 Where a claim was refused **before 21.7.11** on the grounds that the past presence test was not satisfied and the claimant applies for this to be changed in light of the CJEU's decision, where the DM determines that the claimant had a genuine and sufficient link to the UK, the DM should supersede the disallowance¹. The effective date of that supersession will be 21.7.11².

1 SS CS (D&A) Regs, reg 6(2)(b); 2 Reg 7(6)

APPEALS

- 26 Where an appeal is made to a FtT on the grounds that, in the light of the CJEU decision, a decision to disallow was wrong in law, the DM should consider, in the usual way, whether he can revise the disallowance.
- 27 If the decision under appeal was made **after 21.7.11** then he should revise in the manner described in paragraph 23 above and lapse the appeal. However, if the decision under appeal was made **before 21.7.11** the DM should not exercise his discretion to revise¹ and should allow the appeal to go forward. This is because a FtT can substitute any decision that the DM could have made at the time it was made. The FtT will not therefore have to apply the restriction in the Act² and will be able to award benefit from the date of claim.

1 SS Act 98, s 27

ANNOTATIONS

The number of this Memo DMG (19/12) should be noted against the following DMG paragraphs-070905 (heading); 070920, 070921; 070950 ; 070953 (heading); 070990 (heading); 070992

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, GS36, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in [Memo DMG 14/11](#) - Obtaining legal advice and guidance on the Law.

DMA Leeds: April 2012