

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Manchester First-tier Tribunal dated 2 October 2017 under file reference SC068/17/04705 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

“The Appellant’s appeal is allowed.

The Secretary of State’s decision of 18 October 2016 is revised.

The Secretary of State’s decision that the Appellant was not entitled to Employment and Support Allowance (ESA) for the whole period from 18 May 2014 right through to 21 January 2016, on the basis that this period was more than 3 months prior to the date of claim (being 22 April 2016), was wrong.

The Appellant claimed Spanish invalidity pension on 9 March 2015 and was awarded that pension payable by the Spanish authorities from 24 March 2015. The date of claim in Spain applies also for the purposes of entitlement to ESA in the United Kingdom: see Articles 46, 50 and 81 of Regulation 883/2004 and Article 45 of Regulation 987/2009.

The matter is now remitted to the Secretary of State to make a fresh decision on the Appellant’s entitlement to ESA, including any backdating as appropriate, based on the above findings of fact.”

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The issue in this appeal

1. This appeal concerns the correct date of claim for employment and support allowance (ESA), following a claim for invalidity benefits made in Spain. The solution to the appeal necessarily turns on the complex intersection of domestic law and European Union (EU) law.

The Upper Tribunal’s decision in summary

2. The Appellant’s appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal involves an error on a point of law. I set aside and re-make the Tribunal’s decision. The decision the Tribunal should have made is that the effective date of the Appellant’s claim for ESA was 9 March 2015 (and not, as the Tribunal had found, 22 April 2016).

An outline of the factual background to this appeal to the First-tier Tribunal

3. The Appellant, a British national, was born in 1966. He has lived and worked in both the United Kingdom (UK) and Spain. He paid (or was credited with)

contributions into the UK social security scheme between 1982 and 2015 and into the Spanish scheme between 2005 and 2015. The Appellant unfortunately suffered a stroke on 18 May 2014, the date from which the Spanish authorities accepted that he was unfit for work. On 9 March 2015 he first claimed an invalidity pension from the Spanish social security authorities, which led to an award dated 24 March 2015. According to his wife (who now acts as his appointee), “he was processed through the Spanish system for [an invalidity pension] in Spain which was approved. At no point was he or I ever asked if he had made contributions to any other EU country.”

4. In 2015 the Appellant’s wife unsuccessfully tried to claim personal independence payment (PIP) for him from the UK authorities. After (so it appears) being pushed from pillar to post by the authorities in both Spain and the UK, the Appellant’s wife lodged a further invalidity claim with the Spanish authorities in April 2016, which was this time referred on to the DWP’s International Pension Centre in Wolverhampton. The Department for Work and Pensions (DWP) decision-maker treated the date of submission of the second claim to the Spanish authorities on 22 April 2016 as the date of claim for ESA, and then backdated the ESA claim to January 2016 (i.e. for the maximum three months permitted by domestic law). The Appellant’s wife appealed on his behalf, arguing that entitlement to ESA should have been backdated to March 2015, when the Spanish invalidity pension was first claimed and began in payment. The First-tier Tribunal (FTT) disagreed with her, upholding the decision-maker’s ruling that limited the backdating of the ESA claim to three months as from the date of claim in April 2016.

5. Having provided that overview, it is now important to consider the details of the chronology. I have only included the key events in what has plainly been a long and difficult voyage through two social security regimes.

The chronology in more detail

6. The Appellant had a stroke on 18 May 2014. He claimed a Spanish invalidity pension on 9 March 2015. The Spanish social security authorities started paying him a monthly Spanish invalidity pension from 24 March 2015. The Appellant was initially awarded a *pension total* (an invalidity pension where the recipient is considered able to work, but not in their previous profession). On 23 September 2015 this benefit was upgraded to a *pension absoluta* (based on total incapacity for all work), and this award was backdated to 24 March 2015.

7. On 22 April 2016 the Spanish social security authorities received the Appellant’s E204 claim form for an invalidity pension under the auspices of the Administrative Commission on Social Security for Migrant Workers. The associated medical report confirmed the Appellant had had a stroke and had become unfit for work on 18 May 2014. The claim made on 22 April 2016 to the Spanish authorities was then transferred to the DWP and treated as a claim for ESA.

8. On 23 September 2016 a DWP official decided, in the light of the medical evidence on file, that the Appellant should be treated as having both limited capability for work and limited capability for work-related activity. On 18 October 2016 another DWP decision-maker disallowed the claim for ESA for the period from 18 May 2014 through to 21 January 2016. The justification for this was that the domestic time limit for backdating ESA was a maximum of three months. On 25 October 2016 the DWP sent the Appellant a decision letter confirming payment of ESA at the support group rate from 29 January 2016 (so allowing for the seven ‘waiting days’).

9. On 22 November 2016 the Appellant’s wife sent a detailed letter to the DWP explaining the background to the April 2016 claim and the difficulties she had

encountered since 2015 in her dealings on behalf of her husband with both the Spanish and UK social security authorities. She asked for his ESA entitlement to be backdated to March 2015.

10. On 3 March 2017 the DWP wrote to the Appellant's wife in the following terms:

"We could not consider paying UK ESA from an earlier date than 29/01/2016. This is because the claim was transferred under EU regulations. We therefore use the same date of claim as the relevant member state and use this date to decide the date of entitlement, Under UK law the time limit is three months. This meant that the earliest we could consider entitlement was from 22/01/2016. I understand your husband may have been ill from an earlier date but we have to decide claims using this rule."

11. Finally, on 18 July 2017 the decision of 18 October 2016 and its reasoning was confirmed on mandatory reconsideration. That decision was based purely on provisions of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), with no reference to any relevant EU law. The Appellant's wife lodged an appeal on his behalf.

12. The DWP prepared a written response to the appeal. This response again referred extensively to provisions of UK social security legislation governing the date of claim. It also noted that under EU law a claim made to any member state may be treated as a claim to a benefit in another member state when transferred between the two authorities. In such cases the date of claim in the second member state was said to be defined as being the date on which it was received by the first member state: see Article 81 of Regulation 883/2004.

The decision of the First-tier Tribunal

13. The First-tier Tribunal confirmed the Secretary of State's decision of 18 October 2016, namely that the Appellant was not entitled to ESA for the period from 18 May 2015 (presumably a misprint for 18 May 2014) through to 21 January 2016. The explanation for this decision was set out more fully in the Tribunal's statement of reasons, and summed up in this passage in the concluding paragraph:

"The European dimension allows a claim made in Spain to be treated as claim made in the United Kingdom, but the United Kingdom rules in relation to how a claim is made and the date of claim must still be applied to the claim."

14. The only reference made by the First-tier Tribunal to the relevant EU law in its statement of reasons was to Article 1 (presumably a misprint for Article 81) of Regulation 833/2004, which was the only provision of EU law cited in the Secretary of State's response to the Appellant's appeal. The misprint of 18 May 2015 was also taken directly from the DWP's written response. One moral of this appeal may be not to rely unquestionably on the Secretary of State's response to a claimant's appeal.

15. In her subsequent application to the First-tier Tribunal for permission to appeal, which was refused, the Appellant's wife helpfully explained as follows:

"For clarity, we are not seeking back-payment to May 2014, as stated by both the DWP and [the First-tier Tribunal's] assessment of this case, which is when my husband was taken ill. We are seeking a back-payment to March 2015, when he was awarded a Spanish [Invalidity Pension], and from when, had his application been processed correctly, he would have received Employment and Support Allowance."

The proceedings before the Upper Tribunal

16. The Appellant's wife then renewed her application for permission to appeal to the Upper Tribunal. She set out detailed grounds of appeal, based on the chronology of the case. She did not dispute the limitations on backdating entitlement contained in the domestic law. Rather, her main point was that her husband's ESA claim had been avoidably delayed due to what she described as the DWP's failure to give her correct and timely advice about his rights under EU law. I gave the Appellant permission to appeal, but essentially for two other reasons. The first was that although the Tribunal had referred to the principle in Article 81 of Regulation 883/2004, there had been no consideration of the specific provisions relating to invalidity benefits in that instrument or indeed to those in the implementing instrument, Regulation 987/2009. The second reason was that, on the facts, there was some ambiguity in the details provided on the E204 form as regard the relevant operative dates. In particular, from the evidence on the file that was before the First-tier Tribunal, it seemed that Spanish invalidity benefit may have been in payment since 24 March 2015, although the E204 itself was dated 22 April 2016.

17. Ms A. Myers, who now acts for the Secretary of State in these proceedings, supports the Appellant's appeal to the Upper Tribunal. He invites me to set aside the First-tier Tribunal's decision and if appropriate to re-make the decision under appeal. I deal below with his submissions, as they are not without some difficulty in this admittedly complex area of social security law. The Appellant's wife in turn naturally welcomes this belated acknowledgement on the part of the Department of the merits of her husband's appeal.

The European legislation

18. I start by highlighting three of the recitals to Regulation 987/2009 which the Appellant's wife very properly draws attention to in her reply to Ms Myers's first submission. They are as follows:

Recital (2): "Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions."

Recital (9): "The inherent complexity of the field of social security requires all institutions of the Member States to make a particular effort to support insured persons in order to avoid penalising those who have not submitted their claim or certain information to the institution responsible for processing this application in accordance with the rules and procedures set out in Regulation (EC) No 883/2004 and in this Regulation."

Recital (22): "Informing the persons concerned of their rights and obligations is a crucial component of a relationship of trust with the competent authorities and the Member States' institutions. Information should include guidance on administrative procedures. The persons concerned may include, depending on the situation, the insured persons, their family members and/or their survivors or other persons."

19. Article 81 of Regulation 883/2004 itself provides as follows:

"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.”

20. The 'mechanics' of Regulation 883/2004 are dealt with in Regulation 987/2009. Article 45 makes the following provision in this regard:

“Article 45

Claim for benefits

A. Submission of the claim for benefits under type A legislation under Article 44(2) of the basic Regulation

1. In order to receive benefits under type A legislation under Article 44(2) of the basic Regulation, the claimant shall submit a claim to the institution of the Member State, whose legislation was applicable at the time when the incapacity for work occurred followed by invalidity or the aggravation of such invalidity, or to the institution of the place of residence, which shall forward the claim to the first institution.

2. If sickness benefits in cash have been awarded, the expiry date of the period for awarding these benefits shall, where appropriate, be considered as the date of submission of the pension claim.

3. In the case referred to in Article 47(1) of the basic Regulation, the institution with which the person concerned was last insured shall inform the institution which initially paid the benefits of the amount and the date of commencement of the benefits under the applicable legislation. From that date benefits due before aggravation of the invalidity shall be withdrawn or reduced to the supplement referred to in Article 47(2) of the basic Regulation.

B. Submission of other claims for benefits

4. In situations other than those referred to in paragraph 1, the claimant shall submit a claim to the institution of his place of residence or to the institution of the last Member State whose legislation was applicable. If the person concerned was not, at any time, subject to the legislation applied by the institution of the place of residence, that institution shall forward the claim to the institution of the last Member State whose legislation was applicable.

5. The date of submission of the claim shall apply in all the institutions concerned.

6. By way of derogation from paragraph 5, if the claimant does not, despite having been asked to do so, notify the fact that he has been employed or has resided in other Member States, the date on which the claimant completes his initial claim or submits a new claim for his missing periods of employment or/and residence in a Member State shall be considered as the date of submission of the claim to the institution applying the legislation in question, subject to more favourable provisions of that legislation.”

The Upper Tribunal's analysis

Introduction

21. The parties agree that the First-tier Tribunal erred in law and that the date of claim for the purposes of the Appellant's entitlement to ESA was 9 March 2015, the date from which he first claimed a Spanish invalidity benefit. I am satisfied that the First-tier Tribunal erred in law, if only because it failed to grapple with the EU dimension to this appeal. Additionally, the Tribunal's omission to explore more fully the ambiguity about the respective date(s) of claim in Spain represented a failure to act in an appropriately inquisitorial manner. Those are reasons enough to allow the Appellant's appeal and to set aside the First-tier Tribunal's decision for error of law. I also consider there is now sufficient material before me to re-make the decision myself, rather than remit to a new First-tier Tribunal.

The Secretary of State's initial response: Article 45(6) of Regulation 987/2009

22. Ms Myers, for the Secretary of State, originally submitted that the date of claim in Spain, and so the formal date of submission of Form E204 for UK purposes, was 22 April 2016. In normal circumstances, this would mean that 22 April 2016 would be taken as the relevant date of submission for both the Spanish and UK social security authorities (see Article 45(4) and (5) of Regulation 987/2009). As Article 81 of Regulation 883/04 provides, "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." This was, of course, the approach adopted originally by the DWP and then on appeal by the First-tier Tribunal.

23. However, Ms Myers observed that this general rule is subject to Article 45(6), derogating from that principle, which he argued would allow the date of submission to be in March 2015, rather than the E204 date in April 2016. This would, he argued, be permissible as the general principle was "subject to more favourable provisions of that legislation" (i.e. Spanish legislation). This would then permit the Appellant's entitlement to ESA to run from March 2015 rather than from April 2016. I recognise that the proper interpretation and application of Article 45, and especially Article 45(6), is not without its difficulties, but they need not be explored here.

24. This is because, on having sight of further documentary evidence produced by the Appellant's wife, relating to his Spanish invalidity pension award, Ms Myers resiled from any reliance on Article 45(6) and adopted a different position. Ms Myers accordingly accepted the Appellant's evidence that the first invalidity pension claim had indeed been made to the Spanish authorities on 9 March 2015 (and the Appellant had been duly awarded a Spanish invalidity benefit on 24 March 2015). It appears that at that time in 2015 the Spanish authorities had failed to make any enquiries as to the possibility of a UK dimension to the case and only referred the claim to the UK authorities a year later in April 2016, when the E204 was submitted. The Appellant's wife explains that it was only around that later date that the family's Spanish social worker had alerted them to the potential relevance of EU law, which had led to her returning to the Spanish social security agency and arranging for the E204 to be completed. As she explained in her original letter of appeal:

"I believe that the reason for this error [the failure to explore the EU angle] at the Spanish end was that he was not initially processed via the Social Security Office, but via the Doctor at his Medical Insurance, and from then on was only ever dealt with via Doctors, who are perhaps not aware of this detail. As the initial forms were not processed at the Social Security Office, this error was never picked up ... The Spanish authorities assured us [in April 2016] that the [E204] application would be backdated to March 2015 as the delay was their error, not ours."

The Secretary of State's revised response: Article 50(1) of Regulation 883/2004

25. Having seen the Appellant's further evidence, Ms Myers accepted the broad outline of my proposed analysis, as set out in earlier Observations and Directions, which suggested that the ESA date of claim could properly be regarded as having been in March 2015. This alternative approach was based on the principle in Article 50(1) of Regulation 883/2004 and associated case law. A fuller explanation of that analysis now follows.

26. The starting point is that invalidity pension schemes in EU member states are categorised as either 'Type A' or 'Type B'. The UK operates a Type A scheme, namely a regime "under which the amount of invalidity benefits is independent of the duration of the periods of insurance or residence and which is expressly included by the competent Member State in Annex VI" (see Article 44(1) of Regulation 883/2004). Spain, however, operates a different type of scheme, and so is a Type B arrangement. That being so, as a person "subject either only to type B legislation or to type A and type B legislation", the Appellant was covered by Article 46(1) of Regulation 883/2004. This provides in turn that such a claimant "shall be entitled to benefits under Chapter 5, which shall apply *mutatis mutandis* taking into account paragraph 3" (I simply observe that Article 46(3) is not material to the present appeal).

27. Chapter 5 of Regulation 883/2004 itself makes provision for the rules governing old-age and survivors' pensions. However, it is noteworthy that Article 50(1) – which applies *mutatis mutandis* to Chapter 4 (i.e. with the necessary changes having been made), according to Article 46(1) – provides as follows:

"All the competent institutions shall determine entitlement to benefit, under all the legislations of the Member States to which the person concerned has been subject, when a request for award has been submitted, unless the person concerned expressly requests deferment of the award of old-age benefits under the legislation of one or more Member States."

28. The relevant principles (in the context of earlier EU legislation, Regulations 1408/71 and 574/72 being the predecessors of Regulations 883/2004 and 987/2009 respectively) were analysed by the European Court of Justice in Case C-335/95, *Institut national d'assurances sociales pour travailleurs independants (Inasti) v Picard* [1996] ECR I-5625:

"19. The reference date for the making of awards and apportionments by the institutions of the Member States is the date of submission of the claim to the institution approached by the person concerned, that being apparent, as the French Government rightly points out, from Article 86 of Regulation No 1408/71. According to that provision, 'Any claim, declaration or appeal which should have been submitted, in order to comply with the legislation of one Member State, within a specified period to an authority, institution or tribunal of another 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 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 State shall be considered as the date of their submission to the competent authority, institution, or tribunal.'

20. Regulation No 1408/71 thus unambiguously lays down the principle of the concurrent award of benefits where a claim is submitted to an institution of a Member State, the date of submission of the claim constituting the reference date for the award of the benefits for all the institutions concerned.

21. Forming, as it does, part of an implementing regulation, Article 36 of Regulation No 574/72 is to be interpreted in the light of the basic regulation. It cannot detract from full enjoyment of the rights recognized by Regulation No 1408/71.”

29. It followed that the fact that claimant in that case had not followed the correct process could not “raise any obstacle to the award of the benefits in question, under Article 44(2) of Regulation No 1408/71, with effect from the date on which a claim was submitted to an institution of a Member State” (at paragraph 26). It should be noted in this context that Article 44(2) of Regulation 1408/71 was the immediate predecessor of Article 50 of Regulation 883/2004. As Professor White explains in *EC Social Security Law* (Longman, 1999, p.108), citing *Inasti v Picard*, “A claim for benefit sent to one EEA country is treated as a concurrent claim to the same benefits under the legislation of all the EEA countries to which the claimant has been subject”. In like fashion, and more recently, Judge Rolf Schuler has described Article 50(1) as embodying “the principle of the Europe-wide effects of submitting pension claims [that] is binding on all the competent institutions involved in terms of the time the claim is submitted” (in M. Fuchs and R. Cornellissen, *EU Social Security Law: A Commentary of EU Regulations 883/2004 and 987/2009* (C.H. Beck, Hart, Nomos, 2015, p.344)).

30. The principle is helpfully illustrated by *SP v Secretary of State for Work and Pensions (IB)* [2013] UKUT 475 (AAC), in which a claimant living in Germany had been unfit for work from 25 February 2005. He had claimed a German invalidity pension on 20 December 2006, which the German authorities (DRV-Nord) had rejected on 8 March 2007. That refusal was then challenged, and some three years later DRV-Nord referred the claim to the DWP using form E204. In the course of his decision (at paragraph 4), Upper Tribunal Judge Ward noted that the claim made on 20 December 2006 was also to be taken as the date of claim under UK law for long-term incapacity benefit. It was further held that it was possible to take account of a subsequent award of German invalidity pension to establish entitlement to long-term incapacity benefit from a later date (being 1 May 2008; see further paragraph 36).

31. Turning to Regulation 987/2009, Article 45 is a provision of two halves, Article 45A and Article 45B. As Spain is not a Type A invalidity pension scheme, it is Article 45B (paragraphs (4)-(6)) that necessarily applies here. Article 45B sets out both where the claim is to be made and its effective date. In the present case, the answer to the former question is Spain (Article 45(4)). The answer to the latter question is that, consistent with Article 50 of Regulation 883/2004, “the date of submission of the claim shall apply in all the institutions concerned”. On the facts, there is no need to investigate the possible application of the derogation in Article 45(6), as there is no evidence the claimant was asked (at least in March 2015) to provide information about periods of employment or residence in other Member States. Indeed, all the evidence is to the contrary – he was not requested to provide such details until April 2016, as the Spanish authorities subsequently conceded.

32. I am therefore satisfied that the First-tier Tribunal erred in law for the reasons set out above at paragraph 21. I therefore allow the appeal and set aside the First-tier Tribunal’s decision. There is no merit whatsoever in remitting the Appellant’s original appeal for re-hearing before a new Tribunal. Instead, I can re-make the Tribunal’s

decision on the original appeal as set out at the head of these reasons and below. In doing so I allow the Appellant's original appeal. The date of claim for Spanish invalidity benefits was 9 March 2015 and that date counts as the date of claim for ESA in the UK. The matter is remitted to the Secretary of State to make any necessary consequential decisions on entitlement to ESA.

Conclusion

33. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the Tribunal's decision in the following terms (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii)):

“The Appellant’s appeal is allowed.

The Secretary of State’s decision of 18 October 2016 is revised.

The Secretary of State’s decision that the Appellant was not entitled to Employment and Support Allowance (ESA) for the whole period from 18 May 2014 right through to 21 January 2016, on the basis that this period was more than 3 months prior to the date of claim (being 22 April 2016), was wrong.

The Appellant claimed Spanish invalidity pension on 9 March 2015 and was awarded that pension payable by the Spanish authorities from 24 March 2015. The date of claim in Spain applies also for the purposes of entitlement to ESA in the United Kingdom: see Articles 46, 50 and 81 of Regulation 883/2004 and Article 45 of Regulation 987/2009.

The matter is now remitted to the Secretary of State to make a fresh decision on the Appellant’s entitlement to ESA, including any backdating as appropriate, based on the above findings of fact.”

**Signed on the original
on 23 October 2018**

**Nicholas Wikeley
Judge of the Upper Tribunal**