

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

As the decision of the First-tier Tribunal (made on 2 June 2016 at Leicester under reference SC314/16/00144) 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 decision of the Secretary of State under appeal to the First-tier Tribunal was correct and is confirmed.

**REASONS FOR DECISION**

1. I must begin by apologising for the time it has taken for me to make this decision. The claimant was entitled to a decision sooner and I am sorry she did not receive one.

**A. History and background**

2. The claimant is Dutch and was born on 10 November 1976. She lived in Holland from 1994 to 2004 and worked there between 1997 and 2000, when she had an accident that left her with permanent disabilities. She was awarded a invalidity benefit in Holland, based on her earnings before the accident. She came to the United Kingdom on 26 April 2004.

3. The claimant received a disability living allowance consisting of the mobility component at the higher rate and the care component at the lowest rate from the initial effective date of 19 October 2006. When it came to light that she was receiving a benefit from Holland, the Secretary of State made two decisions. The first of 20 May 2015 terminated the award of the care component from 19 October 2006 on the ground that Holland was the competent State for payment of sickness benefits. The second decision of 15 June 2015 decided that the claimant was liable to repay the benefit she had been paid in error from 3 July 2003; she had not made a misrepresentation before that date. The mobility component was not affected, as that is a special non-contributory cash benefit for which this country as the State of residence was the competent State.

**B. The First-tier Tribunal allowed the appeal**

4. On appeal, the First-tier Tribunal decided that there was a difference of views between Holland and this country on which State was competent. That meant that the claimant was entitled to the care component on a provisional basis until the difference of view was resolved. In making that decision, the tribunal relied on my decision in *Secretary of State for Work and Pensions v HR* [2014] UKUT 571 (AAC).

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**C. The appeal to the Upper Tribunal**

5. I gave the Secretary of State permission to appeal to the Upper Tribunal, but stayed the proceedings pending the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Fileccia* [2017] EWCA Civ 1907, which dealt with the difference of views issue.

**D. There was no difference of view**

6. Regulation (EC) 883/2004 is the EU social security co-ordination legislation. It identifies the State which is competent in particular circumstances for specific classes of benefit. It is supplemented by Regulation (EC) 987/2009, which makes provision for its implementation. Article 6 provides for the possibility that States may express different views on which of them is competent for a particular claim. Article 6(2) provides:

2. Where there is a difference of views between the institutions or authorities of two or more Member States about which institution should provide the benefits in cash or in kind, the person concerned who could claim benefits if there was no dispute shall be entitled, on a provisional basis, to the benefits provided for by the legislation applied by the institution of his place of residence or, if that person does not reside on the territory of one of the Member States concerned, to the benefits provided for by the legislation applied by the institution to which the request was first submitted.

The First-tier Tribunal decided that there was a difference of view. That was wrong.

7. This issue has to be decided on the circumstances obtaining at the time of the Secretary of State's decision: section 12(8)(b) of the Social Security Act 1998. On the evidence before the tribunal at its hearing, it was not entitled to find that there was a difference of view. It certainly did not analyse the claimant's evidence in order to find that whatever Holland had said amounted to a difference of view on competence, rather than a difference of view on whether (a) there was any domestic benefit and, (b) if there was, whether the claimant would qualify. Statements from other countries often do not make it clear whether they are referring to competence or to potential entitlement. For that reason, I must set the First-tier Tribunal's decision aside.

8. This issue is no longer a live one as Holland has accepted expressly that it is competent for cash sickness benefits under Article 29. An advisor in international affairs from the Dutch institution has written: 'the Netherlands are competent under Article 29.' That could not be clearer. It may be that there is some doubt about what Dutch benefits, if any, the claimant may be entitled, and there may be problems establishing that entitlement, but those are matters for the Dutch authority.

**E. The claimant is not a pensioner in the United Kingdom**

9. The claimant has a contribution record in this country and an award of the mobility component of disability living allowance. Neither of those makes her a pensioner.

10. I accept that the claimant has a contribution record in this country and that, when she receives the benefit of those contributions, she will become a pensioner in this country. But that is not the position at the moment. Articles 23, 24 and 25 of Regulation 883/2004 all refer to a person ‘who receives a pension’ or ‘receiving a pension’. This differs from the language of similar provisions in Regulation 1408/71, which referred to a pensioner ‘who is entitled to draw pensions’ or ‘is entitled to a pension’. The change must be significant; the language of Regulation 883/2004 puts beyond doubt that the pension must be in payment. It is not, so the claimant is not a pensioner in the United Kingdom.

11. The claimant is receiving the mobility component of disability living allowance, but that is not a pension and receiving it does not make her a pensioner. Pensions are treated as accrued rights that claimants can receive in any State. That is reinforced by the protection against residence clauses provided by Article 7, as explained in Recital 13. The Recital reads:

(13) The coordination rules must guarantee that persons moving with the Community and their dependants and survivors retain the rights and advantages acquired and in the course of being acquired.

And Article 7 provides:

*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.

In contrast, the mobility component is a special non-contributory cash benefit. The European Court of Justice so decided in *Bartlett, Ramos and Taylor v Secretary of State for Work and Pensions* (Case C-537/09) [2012] AACR 34. That case was decided under Regulation 1408/71, but its reasoning applies equally to Regulation 883/2004. The nature of these benefits is that they are not subject to the prohibition on residence clauses in Article 7 (Article 70(3)); and they are payable only in the State where the claimant is habitually resident (Article 70(4)). Those features are inconsistent with the provisions that apply to pensions.

12. I have already decided that the care component of disability living allowance is not a pension: *LD v Secretary of State for Work and Pensions* [2017] UKUT 65 (AAC) at [12]-[14].

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**F. Holland is the competent State for sickness benefits in cash**

13. The claimant's representative has now raised the issue that the United Kingdom may be the competent State by virtue of Article 24(2)(b). I reject that argument, for the reasons given by the Secretary of State. For completeness, I will deal with Articles 23, 24 and 25.

- Article 23 does not apply. It only applies if the claimant is receiving a pension from her State of residence. She lives in the United Kingdom and does not receive a pension here.
- Article 24 does not apply. It only applies if the claimant is not entitled to benefits in kind in her State of residence. She lives in the United Kingdom and is entitled to benefits in kind here.
- Article 25 does not apply. If it applies, it provides for the costs of benefits in kind to be met by States competent in respect of her pensions. The United Kingdom is not competent in that regard.

**G. Regulation 883/2004 applies**

14. At the last moment, the claimant's representative has argued that this case is governed by Regulation 1408/71 rather than Regulation 883/2004 on the ground that the claim for disability living allowance was made in 2006. I do not accept that. It is right that the original claim was made in 2006, but there was a 'renewal' claim made with effect from 19 October 2010, which was after the date when Regulation 883/2004 came into force.

15. Article 87 of Regulation 883/2004 provides for the transition from Regulation 1408/71:

*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 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.

16. The European Court of Justice has decided that it is for domestic law to decide whether the relevant situation remains unchanged: *Jeltes, Peeters and*

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*Arnold v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (Case C-443/11):

59. In that regard, it should be noted that the concept of ‘unchanged situation’ is not defined by Regulation No 883/2004. However, as the regulation is not a measure harmonising national social security systems but an enactment intended to coordinate those systems, each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions pursuant to which benefits may be granted under a social security scheme (see, to that effect, Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012] ECR I-0000, paragraph 42). The concept of ‘unchanged situation’ within the meaning of Article 87(8) of that regulation must, consequently, be interpreted by reference to the definition given by national social security legislation (see, by analogy, with regard to the term ‘employment’ within the meaning of Article 71(1) of Regulation No 1408/71, Case C-372/02 *Adanez-Vega* [2004] ECR I-10761, paragraph 33).

17. I consider that the situation changed when the claimant’s entitlement under her first award of disability living allowance came to an end. Thereafter, her entitlement depended on the outcome of a 'renewal' claim that took effect after Regulation 883/2004 came into force. There was in one sense a continuity in the claimant’s entitlement, but from a legal point of view there was a break with a new claim. And that claim was decided afresh; 'renewal' claims are not merely a rubber stamp to continue previous entitlement.

18. My decision that Regulation 883/2004 applies does not have any practical effect on the claimant’s liability for overpayment of benefit, as this did not arise until 2013, long after Regulation 883/2004 came into force.

**H. There is no need for the Secretary of State to refer the claim to Holland**

19. The claimant’s representative has complained that the Secretary of State did not refer the disability living allowance claim to Holland when her entitlement was ended, as required by Article 81 of Regulation 883/2004. That point might have some merit were it not for the fact that, as the representative reports, the claimant is in regular contact with the Dutch authorities who have told her that there is no Dutch benefit that she is entitled to without residing in Holland.

Signed on original  
on 13 February 2019

Edward Jacobs  
Upper Tribunal Judge