The impact of recent CJEU rulings on the presence and residence rules for United Kingdom disability benefits

Mel Cousins, Glasgow Caledonian University

Available at: https://works.bepress.com/mel_cousins/32/
The impact of recent CJEU rulings on the presence and residence rules for United Kingdom disability benefits

Mel Cousins
School of Law and Social Sciences, Glasgow Caledonian University

Disability benefits; EU law; Free movement of persons; Non-contributory benefits; Presence; Residence

Abstract

This article examines a number of recent decisions of the Court of Justice of the European Union (“CJEU”) and their impact on the presence and residence rules for disability benefits, in particular the disability living allowance (“DLA”). It considers the approach which the courts may take to the export of disability benefits in the light of these recent decisions.

Introduction

This article examines a number of recent decisions of the CJEU and their impact on the presence and residence rules for disability benefits, in particular the DLA. These decisions relate primarily to the relationship between the claimant and the United Kingdom (and the role of residence/presence conditions in this regard) and to the exportability of such benefits. The first part of this article sets out the context including the (tortured) history of the CJEU’s approach to this issue. Part 2 examines the recent Bartlett case, which concerned whether the mobility component of DLA was a social security benefit within the meaning of Reg.1408/71 (now replaced by Reg.883/2004) (and therefore exportable) or whether it was to be categorised as a “special non-contributory benefit” (“SNCB”) (and therefore non-exportable). Part 3 considers the recent Stewart case, which examined the presence and residence rules for incapacity benefit in youth. Both decisions concern disability benefits and (directly or indirectly) issues concerning residence and presence in the United Kingdom and are, therefore, very relevant to the question of entitlement to such benefits. Finally, drawing on this analysis, pt 4 considers the approach which the British and European courts may take to the export of disability benefits in the light of these recent decisions.

1 DLA is a non-means-tested, non-contributory benefit for persons with care and/or mobility needs as a result of a mental or physical disability. DLA is made up of a care component for people who need help with personal care needs and a mobility component for those with a significant restriction of mobility due to disability.
3 Stewart.
The context

Reg.883/2004 covers social security benefits (as defined in art.3(1)), although “social assistance” is excluded from its scope. Hybrid benefits (known as special non-contributory benefits and defined in art.70) fall partially within the scope of the Regulation, but are not exportable. While there are obvious difficulties in categorising benefits from a wide range of Member States in a consistent manner, the Court’s case-law in the area has been marked by an abysmal lack of clarity. In practice, the Court has held that cash benefits relating to care are to be classified as social security, whereas benefits that provide a subsistence income (even if not means-tested) are SNCBs. In its post-2005 form, the latter covers benefits intended to provide either: (i) supplementary, substitute or ancillary cover against the social security risks (set out in art.3(1)), and which guarantee the persons concerned a minimum subsistence income; or (ii) solely specific protection for the disabled.

The distinction between social security and social assistance dates back to Reg.3/58 on social security for migrant workers. At that time there was a very clear difference between the social security and social assistance in the initial six Member States of the European Community (“EC”), most of which had social security systems primarily based on social insurance. Social security was a payment, payable as of right, based on contributions paid by a worker and his or her employer and generally related to previous earnings. In contrast, social assistance was often a local or regional payment, payable in many cases on a somewhat discretionary basis, based on an assessment of need of the person (and his or her wider family or household), and set at a level to provide a minimum income in the particular country or region. In that context, it seemed reasonable, given that the primary purpose of Reg.3/58 was to encourage free movement of workers, to confine portability of entitlements to social security and to exclude social assistance from the scope of the Regulation. This approach was carried over into Reg.1408/71.

However, over time the difference between social security and social assistance became increasingly blurred. A number of countries (such as the United Kingdom, Denmark and Ireland) whose social security systems placed much more emphasis on flat rate and/or non-contributory benefits joined the EC. In addition, in many countries, the legal status of social assistance changed over time becoming payable as of right, and non-contributory but non-means tested payments were introduced. This led to a number of references to the CJEU in which non-contributory benefits, considered by Member States to be social assistance, were argued to fall within the category of social security. In a number of cases, the Court held that such benefits were in fact within the scope of Reg.1408/71, i.e. they fell within the

---

4 Which replaced Reg.1408/71 as and from May 1, 2010.
5 Formerly, art.4(2a) of Reg.1408/71. The precise wording of art.4(2a) changed over time, though the Court has never paid much attention to these changes.
definition of social security for the purposes of the Regulation. The Court held that a benefit fell within the definition of social security where two criteria applied: first, the benefit in question must cover one of the risks specified in art.4 (1) of the Regulation (the classic social security risks such as old age, sickness and unemployment), and, secondly, the benefit must place claimants in a legally defined position as a result of which they have a right to benefit. The result of these decision was that such benefits were exportable—an outcome which concerned several Member States due to its possible financial implications.

Arising from this case-law, Reg.1408/71 was amended in 1992 to introduce a new concept of “special non-contributory benefit” (as discussed above). These were initially defined as benefits which were intended to provide “supplementary, substitute or ancillary cover” against general social security risks (as listed in the Regulation) or “solely as specific protection for the disabled”. Member States were required to list the SNCBs in an annex to the Regulation. Such benefits fell within the scope of Reg.1408/71 (so that, for example, the general principles in relation to non-discrimination on grounds of nationality applied) but were not exportable. This amendment addressed the main concerns of Member States in that it removed exportability of such non-contributory benefits. And they are the matter rested for a number of years.

In 1996 the first cases concerning the impact of the 1992 amendment came before the Court. In the (pre-1992) Newton case the Court had held that the UK mobility allowance was a social security benefit. However, following the 1992 amendment, the United Kingdom had listed mobility allowance as a SNCB. Subsequently, mobility allowance was replaced by DLA (also listed as a SNCB). A Social Security Commissioner referred a question to the CJEU as to whether the effect of the 1992 amendment was to remove from the scope of art.4(1) of Reg.1408/71 a benefit which prior to June 1, 1992 would have been considered as social security with the consequence that a person who after June 1, 1992 becomes entitled to such a benefit was not entitled to export it to another Member State. The referring court further asked whether, if so, Reg.1247/92 was compatible with the Treaty of Rome.

The CJEU held that “it is clear that the intention of the legislature was to provide a specific system of coordination taking account of the special characteristics of certain benefits falling simultaneously within the categories of both social security and social assistance and treated, according to the Court’s case-law, as social security benefits in regard to workers already covered by the social security scheme of the State whose legislation is relied on.”

10 Therefore a general minimum income payment does not fall within the scope of the Regulation: Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn (249/83) [1985] E.C.R. 973.
12 Article 10a(1) of Reg.1408/71.
13 Snares v Adjudication Officer (C-20/96) [1997] E.C.R. I-6057.
15 Snares (C-20/96) [1997] E.C.R. I-6057 at [35].
Without really considering the details of the benefit in question, the Court held that

“a benefit such as DLA must, by reason of the fact that it is listed in Annex IIa, be regarded as being exclusively governed by the coordination rules of Article 10a and, consequently, as being a special non-contributory benefit within the meaning of Article 4(2a).”

The Court also held that the 1992 Regulation was not invalid under the Treaty provisions. It pointed out that it had, in the past, accepted that the grant of benefits closely tied to the social environment might be made subject to a condition of residence. In addition, the Court argued that the system established by Reg.1247/92 was intended to protect the interests of migrant workers in accordance with the provisions of the Treaty.

Subsequently, the Court addressed the question of the relationship between social security and SNCB in a number of cases without greatly clarifying the approach(es) to be adopted or the rationale for its approaches. The Court has adopted two different approaches to this issue. In Hosse, the grand chamber examined the care benefit in issue in that case to see if it satisfied the criteria to be a social security benefit and stated that if it was social security it could not be a SNCB (the concepts were “mutually exclusive”). However, in a series of cases involving “minimum income” benefits the Court looked at whether the benefit in question was “special” and “non-contributory” and held that a benefit previously held to be social security must now be categorised as an SNCB.

Commission v Parliament and Council involved a further attempt to clarify the definition of the concept of SNCBs. The inability of the Commission and three Member States (Finland, Sweden and the United Kingdom) to agree on the categorisation of certain benefits (including the care component of DLA) led to this case whereby the Commission sought annulment of part of a Council Regulation. In this case, the Court held, first, that the benefits at issue did not have that sole function of “specific protection for the disabled” as required by the then wording of Reg.1408/71. Although, it accepted that the benefits “unquestionably promote the independence of the persons who receive them and protect the disabled in their national social context”, the Court found that they were “also intended to ensure the necessary care and the supervision of those persons, where it is essential, in their family or a specialized institution” and they could not, therefore, be classified as special benefits. Secondly, the Court held that the benefits, in any case, fell within the definition of social security rather than of SNCBs.

In the case of the Swedish disability allowance, the Court held that it was

---

16 Snares (C-20/96) [1997] E.C.R. I-6057 at [34]. This approach was confirmed in Partridge v Adjudication Officer (C-297/96) [1998] E.C.R. I-3467 and was also followed in Swaddling v Adjudication Officer (C-90/97) [1999] E.C.R. I-1075.
18 Hosse (C-286/03) [2006] E.C.R. I-177.
21 At [55].
“intended to finance the care of a third person or to allow the disabled person to bear the costs caused by his or her disability and to improve that person’s state of health and quality of life, as a person reliant on care … .”

It also held that benefits granted objectively on the basis of a statutorily defined position and which are intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must be regarded as “sickness benefits” for the purpose of art.4(1)(a) of Reg.1408/71. The Court extended this approach in the case of the (care component of disability living allowance and attendance allowance which it held had a single purpose “namely to help the disabled person to overcome, as far as possible, his or her disability in everyday activities”. The Court held that such benefits (with the exception of the mobility component of DLA which the Commission had accepted was a SNCB) must be categorised as sickness benefits even though, unlike the Swedish benefit they did not have the essential purpose of supplementing sickness insurance benefits.

The Court’s broad-brush approach to a range of quite different benefits still left questions to answer. The judgment blurred the distinction between a disability payment which falls within the definition of a sickness benefit (i.e. as social security) and one which is “solely specific protection for the disabled”. One might assume that the Court’s categorisation of the care component of DLA as a sickness benefit was on the basis that it was essentially a care benefit (the approach adopted by the Advocate General) but it would be helpful if it had said so. In the case of the mobility component of DLA, the Commission had accepted that it would constitute a SNCB and so it was not in issue before the Court.

The Court in this case confirmed the Hosse statement that social security and SNCBs are mutually exclusive. It also approved the Perez-Naranjo line of authority that what falls within the definition of social security has been altered by the 1992–2005 amendments concerning SNCBs. Finally, it continued to use the pre-1992 case-based definition of social security. Thus it remained unclear what the essential difference between the two concepts (social security and SNCB) were since many benefits do satisfy both the Court’s definition of social security and the Regulation’s definition of SNCB although they cannot be both. The Court’s failure to resolve this issue meant that it would continue to be faced with having to categorise benefits on a case-by-case basis.

**DLA mobility component**

As we have seen, before the 2007 proceedings reached the Court, the Commission and the UK Government had agreed that the mobility component was a SNCB and this was accepted by the Advocate General and the Court, without detailed consideration. This outcome seemed questionable in the light of the Court’s approach, and cases were brought before the UK tribunals by persons entitled to

---

22 At [60]-[61].
23 Both the Court and the Advocate General treated the carer’s allowance as an adjunct of the other UK benefits and, without much discussion, categorised it as a sickness benefit. The categorisation of the carer’s allowance as having the sole purpose of helping a disabled person to overcome his or her disability in everyday activities seems somewhat doubtful.
24 At [51].
the mobility component of DLA, arguing that it was, in fact, a social security benefit. Ultimately, one case reached the Upper Tribunal, where it was considered by Mesher J. In a thorough and thoughtful consideration of the issues, Mesher J. decided to refer a series of questions to the Court of Justice. Primarily on the ground that the mobility component did not have the essential characteristic of social assistance, Mesher J. would have decided that the care component of DLA was not a SNCB. However, given the ruling in Commission v Council, he felt unable to decide this without a further reference to the Court. The Court, without waiting for a written opinion from the Advocate General, ruled shortly that the mobility component was a SNCB. The Court appeared to base its decision on the following reasons:

1. the mobility component sought to provide specific protection for disabled people within the meaning of art 4(2a);
2. the amount of mobility component was closely linked to the social environment of a person in the United Kingdom; and
3. it was awarded in the “overwhelming majority” of cases to persons who cannot work because of their disability (the implication appearing to be that although not means-tested, it was in some way a minimum income payment or involved a social assistance element).

On the first point, Mesher J. had expressed doubts as to whether the mobility component “solely” provided specific protection for disabled persons, arguing that its purpose was analogous to that of allowing a disabled person to bear the costs of disability and to improve his or her health and quality of life, like the Swedish disability allowance held to be social security in Commission v Council. On the second, point, I am unaware of any social security benefit where the social security authorities have argued (or the Court has found) that it was not closely linked to the national social environment. On the third point, Mesher J. had stated that the mobility component did “not guarantee a minimum subsistence income” and that the amount of benefit was not “linked to any notion of guaranteeing a minimum subsistence income or even to the claimant’s individual mobility-related expenses”. He had argued that:

“The argument that was accepted in the circumstances of Kersbergen-Lap as showing sufficient elements of social assistance, that the majority of disabled young people (identified by the degree of incapacity and not having the insurance record for general incapacity benefit) would not otherwise have sufficient means of subsistence, does not work in relation to mobility component.”

28 The Court also stated that its earlier decision (Commission v Council) had already held that it was “not in dispute” that the mobility component was a SNCB (at [24]-[25]) but this was precisely what was in dispute.
29 At [27]-[29].
31 Commission v Council [2009] UKUT 286 at [28] and [34].

The Court’s decision at least clarifies the position concerning the mobility component of DLA. However, its ongoing failure to resolve the conceptual issues concerning the differences between social security and SNCBs mean that each case must be resolved on a once-off basis. Even given that, the Court’s decision in Bartlett is a particularly poor example of decision-making and generally lacking in any compelling rationale.

Presence and residence

The Stewart case concerns a rather unusual social security benefit: the incapacity benefit in youth (“IB(Y)”). Incapacity benefit is a straightforward contribution-based benefit payable in the event of short-term incapacity. IB(Y)—which is not, in fact, a separate benefit—involves derogation from the contribution rules in the case of persons born with or acquiring a serious disability in youth and is based on the assumption that such persons are unlikely to be able to work in insurable employment so as to qualify for “ordinary” incapacity benefit. Therefore, the IB(Y) replaced the general contribution requirements with a residence/presence requirement. Thus the benefit may be seen as a policy measure to ensure equality for persons with severe disability in the sense of treating unalike persons unalike. In order to satisfy this condition, the claimant must be “ordinarily resident” in Great Britain, present in Great Britain on the date of claim, and present in Great Britain for not less than 26 weeks in the 52 weeks immediately preceding the relevant day. Ms Stewart was born in 1989 had Down’s Syndrome and had never worked. In 2000 she moved with her parents to Spain. In 2005 she claimed IB(Y) but this was refused on the grounds that she did not satisfy the presence requirement.

Advocate General Cruz Villalón accepted that, on the basis of the Court’s normal approach, the use of residence clauses was not possible in relation to social security benefits under Reg.1408/71 and it was not disputed that IB(Y) was a social security benefit. However, he argued that the case-law concerned situations where the residence requirement operated “essentially as ‘additional’ or complementary conditions to the conditions for entitlement to social benefits”. In this case, in contrast, the residence requirement operated as a “criterion of connection” to the British social security system. The Advocate General argued that were such a connection not allowed (in the absence of contribution requirements) any national

---

33 “Residence” is defined in Regulation 883/2004 as “habitual residence” (art.1(h)). In Swaddling (C-90/97) [1999] E.C.R. I-1075, the CJU stated that this was “where the habitual centre of their interests is to be found”. The Court also stated that “[a]ccount should be taken in particular of the employed person’s family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances” (at [28]). “Presence” is a national law concept involving actual presence in the United Kingdom.

34 Any consideration of issues concerning equality or disability is, however, noticeably lacking from the Court’s judgement (and indeed at all judicial levels).

35 She fell within the scope of the Regulation only as a family member.


37 Paid under a transitional provision of Regulation 1408/71 (apparently as her receipt of the payment pre-dated the introduction of Regulation 1247/92 classifying DLA as a SNCB).

38 The same general issues would apply to Northern Ireland although the laws and guidance have a different basis.

39 Opinion, 36–48. The referring court did ask whether it should be classified as an invalidity or sickness benefit. The Court held that it was an invalidity benefit (judgment at [29]–[54]).

40 Ibid [51].
of a Member State in the same situation as Ms Stewart would be able to obtain IB(Y) without ever having been affiliated to the UK social security system.\footnote{41} He asked whether:

“EU law is to be interpreted in such a way that it can constrain a Member State to choose between the withdrawal of a social benefit so conceived, the conditions of entitlement to which go beyond what is reasonable, and altering that social benefit in such a way that it may be treated, in accordance with the case-law of the Court of Justice, as a special non-contributory benefit.”\footnote{42}

He considered that Reg.1408/71 did not absolutely prohibit residence from forming such a criterion of connection as evidenced by art.18 of Reg.1408/71 which referred to national legislatures making “the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance, employment or residence”. More broadly, the CJEU has accepted that while residence conditions are generally regarded to be regarded as restrictions on freedom of movement under art.21 Treaty on the Functioning of the European Union ("TFEU"), they may be justified if they are based on objective considerations of public interest independent of the nationality of the persons concerned and are proportionate to the legitimate objective of the national rules.

The Advocate General took the view that the residence conditions in this case could be justified

“only on the dual condition that it serves to provide a connection and that it only comes into play in the absence of any other connection”.\footnote{43}

The Advocate General speculated as to whether Ms Stewart could rely on her status as a member of the family of a person entitled to a pension within the scope of art.28 of Reg.No.1408/71 in order to provide such “other connection” but did not provide any clear answer to this question.\footnote{44} In addition, he argued that a residence condition could not be used to exclude a person who is already entitled to benefit.\footnote{45} It is perhaps worth quoting \textit{in extenso} the Advocate General’s view on the relationship between the residence and presence conditions. He said:

“I must, however, insist that the two conditions relating to presence make sense, within the system as a whole, only in relation to the condition of residence. Indeed, I find it impossible to imagine that the national legislature could have envisaged the award of short-term incapacity benefit in youth solely on the basis of past and/or actual presence of the claimant, that is to say, in a case where the claimant, whilst not being ordinarily resident in the territory of the Member State, satisfies the other two conditions. That amounts to saying that, whilst it may be argued that the condition of past presence is compatible with EU law, by excluding consistently that the condition of ordinary residence is, in any event, not compatible with it, it is

\footnote{41} At [49].\footnote{42} As discussed below, this seems to ignore the issue of that fact that the United Kingdom was the competent state.\footnote{43} At [67].\footnote{44} At [75].\footnote{45} At [70].

clear that the condition of past presence has, within the general scheme of short-term incapacity benefit in youth, no chance of existing independently.”

In summary, he concluded that the EU law did not prohibit making the award of a social benefit subject to a condition of residence provided that such condition (replacing a contribution condition) served only to provide a connection between the claimant and the UK social security scheme and, secondly, was unenforceable against persons having a comparable connection. It was for the Upper Tribunal to determine whether Ms Stewart’s situation and in particular her status as a member of the family of a pensioner could support the conclusion that there is a connection sufficient to preclude that condition of residence from being enforceable against her. It seems unlikely that art.28 would have given rise to a right to benefit and the real issue to be considered would have been whether the fact a person is a member of the family of people affiliated to the social security system of the Member State in question and is dependent upon them formed a sufficient connection.

The Court came to somewhat similar conclusions as the Advocate General but by a different route. Ignoring the Advocate General’s argument that an alternative approach be taken to residence conditions which constituted a “connection” to the social security system, the Court held that

“the purpose of Article 10 of Regulation 1408/71 is to protect the persons concerned against any adverse effects that might arise from the transfer of their residence from one Member State to another. It follows from that principle not only that the person concerned retains the right to receive benefits referred to in that provision acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that the acquisition of such entitlement may not be refused on the sole ground that he or she does not reside in the Member State in which the institution responsible for payment is situated.”

Thus neither the acquisition nor the retention of entitlement to the benefits could be denied on the grounds of non-residence.

However, unlike the Advocate General, the Court ruled that the past presence requirement was “not necessarily a ‘residence clause’ within the meaning of … Article 10(1) of Regulation No 1408/71”. The Court accepted that the past presence condition constituted a restriction on free movement which required to be justified. The Court held that it was legitimate for a Member State to award benefit only where there was a genuine link between the claimant and the competent State. It ruled that such a link could be established by a finding that the person had been actually present in that Member State for a reasonable period. The Court concluded that the UK rules in question (requiring 26 weeks presence in a period of 52 weeks) were not unreasonable but it held that such a condition was “too

---

46 Opinion, 34.
49 Judgment at [61].
51 Judgment, at [74].
52 Judgment, at [86]-[87].

exclusive in nature”.\textsuperscript{53} This was on the basis that by requiring specific periods of past presence in the United Kingdom, the past presence requirement unduly favoured an element which was “not necessarily representative of the real and effective degree of connection” between the claimant and the United Kingdom and went beyond what was necessary to attain the objective pursued.\textsuperscript{54}

The Court, therefore, considered whether such a connection could be established from other representative elements. It suggested a number of such possible connections. First, Ms Stewart was already entitled, under UK legislation, to disability living allowance (a social security benefit under Reg.1408). Secondly, under UK law, she is credited with UK national insurance contributions. Thirdly, the Court referred to family circumstances, i.e. her dependency on her parents both of whom were in receipt of UK pensions. Finally, the Court pointed out that Ms Stewart had passed a significant part of her life in the United Kingdom. The Court concluded that these elements “appear to be capable of demonstrating the existence of a genuine and sufficient connection between the appellant and the competent Member State.”\textsuperscript{55}

Therefore, the Court ruled that art.10(1) of Reg.1408/71 precluded a condition of ordinary residence while art.21(1) TFEU precludes a Member State from making the award of an IB(Y) benefit subject to a condition of past presence of the claimant in that state \textit{to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, or to a condition of presence of the claimant in that state on the date on which the claim is made.}\textsuperscript{56}

\section*{Discussion}

First, it is clear in the light of Bartlett that the mobility component of DLA is to be treated as a SNCB and is, therefore, not exportable\textsuperscript{57} while the care component is social security and is exportable \textit{where the United Kingdom is the competent state.}\textsuperscript{58} IB(Y) is also a social security benefit (an invalidity benefit) and is also exportable where the United Kingdom is the competent state.

The question now arises as to when benefits such as the care component of DLA and IB(Y) will be exportable.\textsuperscript{59} In order to be entitled to benefits, a person must fall within the personal scope of the Regulation and the United Kingdom must be

\textsuperscript{53} Paragraph 95.  
\textsuperscript{54} Unsurprisingly the Court ruled that presence on the date of claim could not be an appropriate means of establishing a genuine link (at [105]–[109]).  
\textsuperscript{55} At [97]-[102].  
\textsuperscript{56} Operative part, author’s emphasis.  
\textsuperscript{57} Unless the person concerned is “transitionally protected”, i.e. continuously entitled to DLA since before June 1, 1992 (see Memo DMG 14/08, [6]).  
\textsuperscript{58} Note that at the time of writing, a DLA case has been listed for hearing by a three judge panel of the Upper Tribunal (CDLA/735/2009). The case concerns whether DLA is a sickness benefit or an invalidity benefit (the CJEU having assumed in C-299/05 that DLA would be a sickness benefit).  
\textsuperscript{59} I do not address here the transitional issues concerning the date from which DLA may be considered to be a social security benefit and the treatment of persons who had lost entitlement to DLA having left the United Kingdom. The DWP, having initially taken the view that DLA was only to be treated as social security from October 2007, the date of the judgement in Commission v Parliament and Council, subsequently accepted that this should be backdated to March 8, 2001 (the date of the decision in Jauch).
the competent state. With effect from October 31, 2011, the Social Security (Contributions and Benefits) Act has been amended so as to confirm that, under British law, European Economic Area (“EEA”) citizens who have moved within the EEA are only entitled to DLA care component (and also to attendance allowance and carer’s allowance) in Britain where the United Kingdom is the competent state for the payment of sickness benefits in cash to those persons under EU law. The rules in relation to the exportability of DLA are currently set out in Department of Work and Pensions (“DWP”) decisions makers guides (“DMG”). DMG 14/08, which aims to apply EU law on this issue, states that Great Britain will be the competent state (subject to certain exceptions set out below) to pay a sickness benefit for the following main groups:

1. claimants in receipt of a pension from GB (receiving a long-term contributory benefit …)
2. those covered by GB contributions in the relevant income tax years (RITY) that would enable them to claim short-term incapacity benefit or healthcare cover from GB …
3. claimants who are family members of those in group 2 ….

Where Great Britain is the competent state, the decision maker is required to establish whether the past presence test (but not the residence or presence requirements) is satisfied at the date that entitlement to benefit can first be established. In the case of claims from abroad, the past presence test does not have to be satisfied on an ongoing basis as required for claimants in Great Britain. The reasons why the DWP consider that it should continue to apply the past presence rule are not specified in the DMGs. However, it appears to be on the basis that EU law simply provides that

60 On the question of personal scope in a case involving export of DLA, see JS v Secretary of State for Work and Pensions [2009] UKUT 81 (AAC).
61 Sections 65(7), 70(4A) and 72(7B).
63 Article 11 of Reg.883/2004 (although the DMG refers to art.14 of Regulation 1408/71 the provisions of which are somewhat different). Article 11 of Reg.883/2004 which concerns applicable legislation provides:

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 arts 12 to 16:
   (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
   (b) [concerns civil servants];
   (c) [concerns unemployment benefits];
   (d) [concerns the armed forces or civilian service];
   (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/her benefits under the legislation of one or more other Member State.”
64 DMG 17/09, [15]. In JS v Secretary of State for Work and Pensions [2009] UKUT 81 (AAC), Judge Mesher ruled that DLA was payable in the case of a pensioner who, having been in receipt of DLA, had moved to Germany once the United Kingdom was the competent state (at [26]). However, in that case, the claimant had been in receipt of DLA prior to leaving the United Kingdom and, presumably, satisfied the residence and presence tests at the time of his initial claim.
“the claimant is entitled to receive the benefit ‘in accordance with the legislation which it [the competent State] administers.’ In this case, that legislation requires the claimant to satisfy the presence conditions, which operate as initial connecting factors with this country.”

This, of course, begs the question as to whether such a connecting factor is allowed under EU law. In *Stewart*, the Court, although proceeding on the assumption that the United Kingdom was the competent state, rather ignored the implications of that finding for the case before it. The outcome of its decision leaves a rather complicated position. On the one hand, it appears that the DWP may continue to apply the past presence rule. On the other hand, it must also consider whether other factors constitute an alternative “genuine link”. Given that all such persons will have to show that Great Britain is the competent state, it seems likely that many such persons will be able to show such an alternative link. Arguably, the Court might have rejected the past presence requirement given that persons already have to be linked to a Member State *qua* competent state which would have led to a simpler outcome all round.

### Conclusion

The Court’s ruling that “past presence” is not (necessarily) a residence condition is arguably neither logical nor consistent with its own case-law. The Court itself explicitly accepted that such a rule

> “could be equivalent, in practice, to a habitual residence clause, if, in particular, such condition requires long periods of presence in the Member State concerned … ”

In *Swaddling* the Court had specifically ruled that

> “the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Article 10a of Regulation 1408/71.”

In that case, the UK authorities had required a period of at least *eight* weeks to elapse before a person could be considered to be habitually resident, but this was rejected by the Court. So it appears that “residence” for eight weeks cannot be required but “presence” for six months is acceptable. Indeed a simple time period would seem much easier for claimants to understand and social security authorities to implement than the complexities of habitual residence. However, the Court’s misguided attempt to distinguish between residence and presence simplify confuses matters further (even if, as suggested above, it may have limited impact in practice if the courts accept that a person for whom the United Kingdom is the competent state can ipso facto show a genuine link to that state). It seems likely that these issues will need to be further litigated at least at the national level.

---

65 *LS v Secretary of State for Work and Pensions* [2010] UKUT 35 (AAC) at [31].
66 The Advocate General also appears to have disregarded the implications of the competent state issue.
67 Of course, in *Stewart* itself the Court suggested that the links to the UK social security system were sufficient to constitute such a link.
68 *Stewart* at [73].