Testing past presence rules

Desmond Rutledge considers the past presence test as it applies to claimants arriving from other states in the European Economic Area

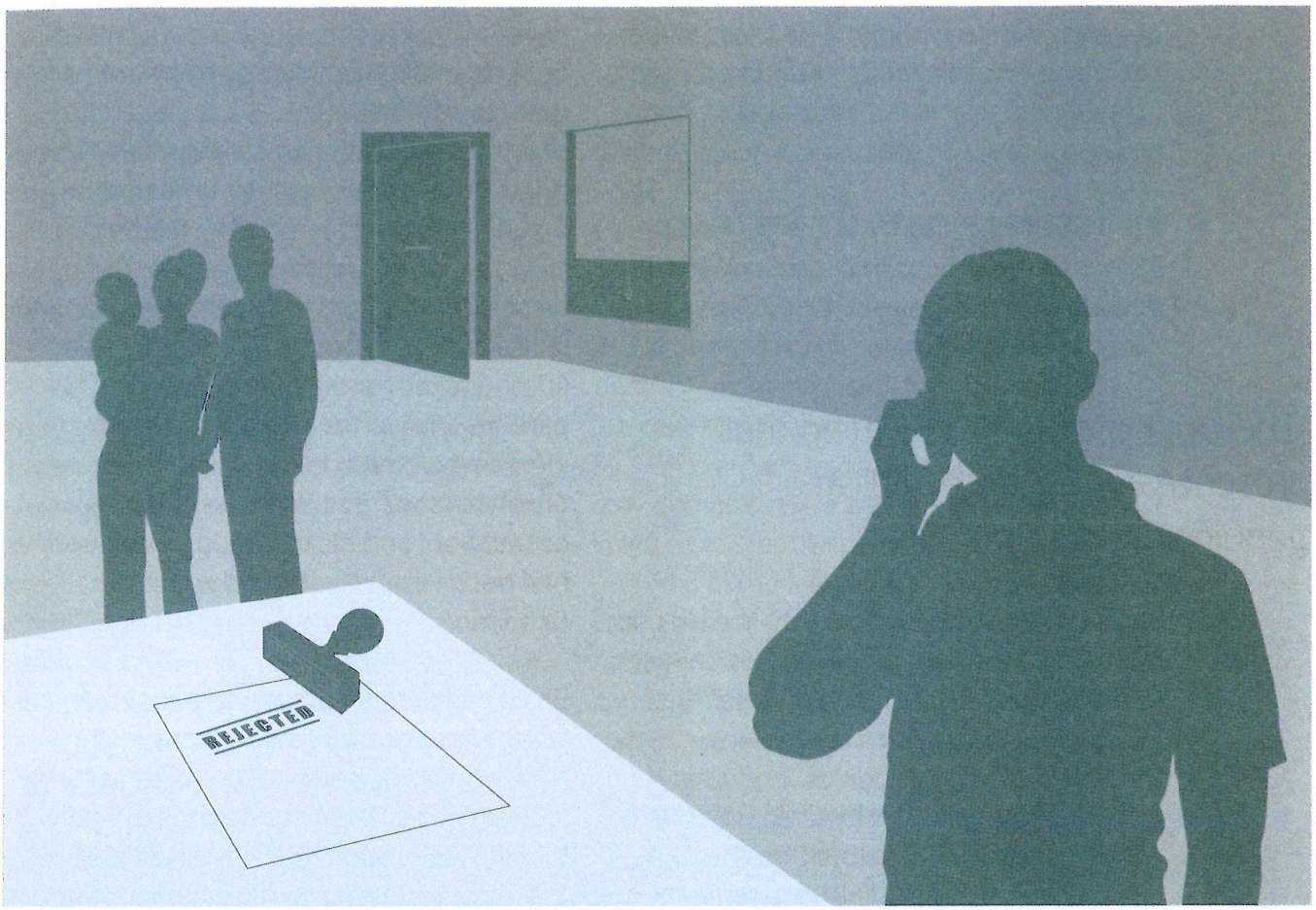
One of the conditions that must be satisfied in order to qualify for the main non-contributory disability benefits – Attendance Allowance (AA), Carer's Allowance (CA), Disability Living Allowance (DLA) and Personal Independence Payments (PIP) – is the past presence test (PPT). This is the requirement that the claimant has been actually present in Great Britain for a period of 104 out of the past 156 weeks[1]. This article considers the exemption from the PPT for those claimants who are covered by the European Economic Area (EEA) coordination rules. This exemption can take two forms.

First, the domestic legislation provides that the PPT 'shall not apply' where a relevant EU regulation (Regulation 883/2004) applies, and the person can demonstrate a 'genuine and sufficient link to the United Kingdom social security system' [2]. The genuine and sufficient link test has its origins in Stewart v Secretary of State for Work and Pensions (C-503/09)[3], in which the Court of Justice of the EU (CJEU) decided that the PPT was disproportionate in so far as it was based exclusively on an EEA national's actual presence in the UK to the exclusion of other factors. The court said that a test that does not allow an EU citizen to rely on other factors which could show that s/he had a 'genuine link' with the UK was unlawful. It found that the test went beyond what is necessary to protect the integrity of that state's social security system and amounted to an unjustified restriction on the freedoms guaranteed by Article 21(1) of the Treaty on the Functioning of the European Union on the right to move and reside freely within the territory of another member state.

Second, it would be possible to satisfy the two-year rule under the PPT by reference to the principle of aggregation. Article 6 of Regulation 883/2004 guarantees that previous periods of insurance, work or residence in other countries will be taken into account in the calculation of benefits. In the past, it had been assumed that this principle was confined to those who worked and paid into the social security system of another EEA state.

However, following the coming into force of Regulation 883/2004, some commentators have argued that the change in language means that 'residence' now has a broader

Desmond Rutledge works for Citizens Advice as part of the Expert Advice Team



meaning, one that covers those who are not economically active[4]. This article considers both of these routes by reference to recent decisions of the Upper Tribunal (UT). Note that if the UK is not the Competent State for the payment of AA, CA, the care component of DLA and the daily living element of PIP as 'sickness benefits', then these benefits will not be paid regardless of the PPT[5].

PB v SSWP [20016] UKUT 280 (AAC)

In PB v SSWP[6], a Czech national who was 13 years of age made a claim for DLA shortly after his arrival in the UK in March 2014. He had ADHD, autism and a learning disability. He had come to the UK with his mother to live with his sister. The sister had been living and working in the UK for six years. The claim for DLA was refused on the mistaken basis that the claimant had arrived in the UK accompanied by his mother and his sister. In the UT, the Secretary of State conceded the appeal on the basis that the claimant had a 'genuine and sufficient link' with the UK social security system through his sister. UT Judge Wright commented that while the First-tier Tribunal (FtT) had been correct to hold that the sister did not come within the definition of 'member of a family' in Article 1(i) of Regulation 883/2004, it should have had regard to the sister's ties with the UK (in terms of her working here and paying tax and national insurance for some five years, ›

providing care and support for the claimant and being in receipt of Child Tax Credit and Child Benefit for him) when assessing her brother's links with the UK.

BK v SSWP [2016] UKUT 547 (AAC)

BK was a child and an Irish citizen. While in Ireland, BK had received a Domiciliary Care Allowance and his mother had received a Carer's Allowance. They came to the UK and, two days after arriving, the mother claimed DLA for him. This was refused under the PPT and an FtT refused the appeal.

"The Upper Tribunal also ruled that presence alone may establish a 'genuine and sufficient link'"

BK, who is represented by Child Poverty Action Group (CPAG), submitted that the genuine and sufficient link requirement was to the country as a whole, not just to its social security system, and that BK had a genuine and sufficient link to the UK due to his mother's British citizenship, personal history and connection with the UK's social security system. Judge Jacobs agreed that it was enough to have a link with the UK as it was clear from the Stewart judgment that the receipt of benefits was not the only way a claimant could establish a relevant connection to a member state. Other links were potentially relevant; for example, dependence on a family member who has lived and worked in the member state. The judge held that the words 'social security system' should be disregarded so that all relevant links to the UK can be taken into account, not just links to the social security system. The judge commented that if decision-makers apply the approach set out in the official guidance[7], this would allow them to comply with Stewart, despite the shortcomings in the legislation. The UT also ruled that presence alone may establish a 'genuine and sufficient link' (see below). However, on the facts of the case, the UT decided that BK did not have a genuine and sufficient link to the UK. The judge said the FtT had taken account of both BK and his parent's links to the UK, but the connections identified with this country 'essentially rely on inheritance' and BK himself had no connection, and his mother's connection had been relatively minor throughout BK's life.

BK also argued that residence alone in another EEA state (without the need to have worked or paid into the social security system) was sufficient to pass (or disapply) the PPT. Regulation 883/2004 indicates that a person's links with a member state can be based on residence alone, as Article 11(3) simply provides that the person is 'subject to the legislation of the Member State of residence'. On this basis, residing in another member state prior to coming to the UK should be sufficient to fulfil the past presence test, given that Article 6 refers to previous periods of 'residence completed under the legislation of any other Member State'. Against this background, CPAG submitted that BK's residence in Ireland, where he qualified for Domiciliary Care Allowance, constituted 'residence completed under the legislation' of Ireland and therefore it could be aggregated with residence in the UK for the purpose of the PPT.

Judge Jacobs rejected this interpretation of Article 6. First, the judge said he could

not see how someone could accumulate residence under legislation that was not insurance based or contribution based. Second, and more fundamentally, the judge said that this interpretation of Article 6 effectively ignored the CJEU's analysis in Stewart, which the judge saw as key to a proper understanding of the role played by the PPT in protecting these non-contributory benefits from benefit tourism: 'It is not possible to magic away the domestic conditions of entitlement as irrelevant, because the use of presence or residence conditions form the background against which the Court reasoned in Stewart ... The Court accepted ... that a reasonable period of presence could provide a link, but went on to say that it could not be used exclusively in the case of EU citizens. It said ... that the link 'could be established from other representative elements' ... If Article 6 is allowed to operate in a way that will satisfy the presence test without reference to any other element that will bypass the role that other elements play under Stewart and by virtue of Article 21(1)' (para 19).

Judge Jacobs said the issues raised by the case merited the attention of the Court of Appeal and said he would grant permission if the parties applied for it. CPAG is appealing the decision to the Court of Appeal (Kavanagh v SSWP, C3/2017/1058) in relation to the aggregation element and the factual finding on the genuine and sufficient link requirement. The SSWP has cross-appealed against the UT's ruling that the requirement that the genuine and sufficient link is to the member state rather than the country's social security system. This means that claimants who are seeking to rely on the aggregation of residence argument in BK v SSWP are likely to find that their appeals will be stayed pending the outcome of the Court of Appeal case, which is currently due to be heard in March 2018.

Presence alone may establish a genuine and sufficient link

In the course of his decision, Judge Jacobs made the following general observations on the genuine and sufficient link test:
'I accept Mr O'Callaghan's [counsel instructed by CPAG] argument that presence alone may demonstrate a genuine and sufficient link. The longer the period of past presence required in the legislation, the more likely that a case might occur in which a claimant has spent a relatively long period in a country. The past period required in Stewart was 26 weeks, which the Court described at paragraph 95 as 'not ... unreasonable'. The period required for Disability Living Allowance and Attendance Allowance is four times as long. There may be an argument that such a period would be unreasonable. That does not arise here, because both claimants had only just arrived in this country at the time of their claims. It is also doubtful whether that argument is the correct approach. It only arises because the domestic legislation treats the past presence period and the genuine and sufficient link as separate. That is not how Stewart analysed it. The Court said that States were entitled to require a link, that presence for a reasonable period would establish a link, but that other elements had to be considered to prevent an impediment to the freedom of movement. In other words, presence was merely one way of establishing the necessary connection. It might be sufficient on its own (see paragraph 93 of the judgment) or as one of a number of elements (see paragraph 101). The

domestic legislation can be reconciled with Stewart in its application if decision-makers and tribunals attach greater significance to presence in this country the closer the period comes to satisfying the past presence test' (para 32).

This passage is significant as it makes it clear that Stewart has effectively introduced an individual assessment into the PPT in order to render it proportionate. While

"Plainly, in cases where 'other factors' show that the claimant has a genuine and sufficient link to the UK, the PPT should be disapplied"

it is legitimate to insist that a claimant shows they have a link with a member state, particularly when claiming non-contributory benefits, the CJEU rejected the UK Government's submission that the condition for Incapacity for Youth could be regarded as proportionate to this aim as it only required 'a short period' of 26 weeks in the UK (the period required under the PPT in force at the time) before entitlement to a claim could be established (Stewart, para 91).

The passage also shows that the Stewart test for establishing that link does not amount to an 'all or nothing' choice in every case; for example, complete exemption or the need to wait the whole of the prescribed period. EU law requires a more nuanced approach and the assessment could produce a partial exemption in an appropriate case; for example, where someone does not claim the disability benefit (or submits a new claim) after they have been present in the UK for a significant period, but for less than 104 weeks. If the claimant can point to 'other elements' that have arisen since their arrival which show they have established a genuine but not a sufficient link to the UK, this would produce a partial exemption such that they should not be required to wait for the whole 104 weeks before they can be said to satisfy the PPT.

Summary of the principles established in case law

The principles established by case law on the claims made by those covered by the EU rules on coordination for AA, CA, DLA or PIP in the UK can be summarised as follows:

(i) Stewart held that the requirement in the PPT to be present in the UK for a fixed period in order to access a non-contributory benefit went beyond what was necessary, and that a claimant covered by EU law should be allowed to point to 'other elements' capable of demonstrating that s/he had a genuine connection with the UK.

(ii) The PPT must be disapplied if the claimant can show they have a genuine and sufficient link with the UK as set out in Stewart.

(iii) A decision-maker (and an FtT on appeal) is required to carry out an individual assessment of the claimant's links to the UK so as to ensure that the test is rendered proportionate under EU law – see the 'Decision Makers' Guide' (DMG, Vol 2, Ch 7, Part 2, para 071787)[7], which refers to the need to make a balanced judgment based on all the facts of the case.

(iv) The claimant's actual presence in the UK is to be given greater significance the closer the claimant comes to satisfying the 104 weeks laid down in the test.

(v) The broad nature of the test adopted in Stewart is clear from the fact that the 'other elements' can include family factors, such as the claimant's dependency on her parents due to her disability (Down's syndrome), and in PB v SSWP where the claimant was able to establish a sufficient link through his sister.

(vi) The question of whether a claimant can rely upon the aggregation of residence alone in another EEA state under Article 6 of Regulation 883/2004 as an alternative method of satisfying the PPT has been rejected by the UT, but the matter is due to be revisited by the Court of Appeal in Kavanagh v SSWP.

Conclusion

These principles can be used by advisers as a checklist when assisting claimants who need to disapply the PPT based on the EU coordination rules. Plainly, in cases where 'other factors' show that the claimant has a genuine and sufficient link to the UK, the PPT should be disapplied. However, in other cases, the decision-makers should have regard to the claimant's actual presence in the UK (either on its own or in combination with 'other factors') when deciding if and when the PPT should be disapplied, bearing in mind that greater significance is to be given to the claimant's actual presence in the UK the closer the claimant comes to satisfying the 104 weeks laid down in the PPT. In short, EU case law has introduced a degree of flexibility into when the PPT should be disapplied, and this should be reflected in how decision-makers and FtTs on appeal deal with claims from those coming to the UK from the EEA area.

Endnotes

1. SS (AA) Regs SI 1991/2740, reg 2(1); SS (DLA) Regs SI 1991/2890, reg 2(1); SS (ICA) Regs SI 1976/409, reg 9(1); SS(PIP) Regs SI 2013/377, reg 16.
2. Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Amendment) Regs 2013, SI 2013/389 amending SS (AA) Regs, reg 2A; SS (DLA) Regs, reg 2A; SS (ICA) Regs, reg 9A; SS(PIP) Regs SI 2013, reg 22 as provided for by s84(2) of the Welfare Reform Act 2012.
3. CIB/3071/2007, [2012] AARC 8.
4. Pamela Fitzpatrick, 'New EU social security coordination rules', 'Welfare Rights Bulletin', Issue 217 (August 2010).
5. SS 65(7), 70(4A) and 2(7B) SSCBA 1992 for AA, CA and DLA respectively and by s84 Welfare Reform Act 2012 for PIP.
6. This was heard with the linked case of SSWP v MM, which concerned a German national who claimed AA within a month of her arrival in the UK.
7. 'Decision Makers' Guide', Vol 2, Ch 7, Part 2, para 071787, www.gov.uk/government/publications/decision-makers-guide-vol-2-international-subjects-staff-guide.