ATTORNEY GENERAL – CIVIL AFFAIRS

To the Court of Justice of the European Union

Oslo, 18 November 2015

WRITTEN OBSERVATIONS

BY

THE KINGDOM OF NORWAY

represented by Pål Wennerås and Magnus Schei, advocates at the Attorney General of Civil Affairs, and Christian Rydning, advisor at the Ministry of Foreign Affairs, acting as agents, submitted pursuant to the third paragraph of Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, in

Case C-430/15 Tolley

concerning a request for a preliminary ruling from the Supreme Court of the United Kingdom.

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POSTAL ADRESS:
P.O. BOX 8012 DEP
N-0030 OSLO, NORWAY

TELEPHONE: + 47 22 99 02 00 / + 47 22 99 02 31
TELEFAX: + 47 22 99 02 50
E-MAIL: PW@REGJERINGSADVOKATEN.NO

VISITING ADDRESS:
PILESTREDET 19
OSLO

1 INTRODUCTION

1. This request for a preliminary ruling concerns the interpretation of Regulation 1408/71/EC on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (the Regulation).

2. In the request lodged at the Court of Justice of the European Union (hereinafter 'the Court of Justice' or 'the Court') 5 August 2015, the Supreme Court of the United Kingdom has requested a preliminary ruling on the issue of whether the United Kingdom (hereinafter 'UK') is precluded by the abovementioned Regulation from imposing a requirement of residence in Great Britain as a condition for entitlement for UK's Disability Living Allowance (DLA) and thus deprive a claimant who has gone to live in another Member State of that benefit. The questions read as follows:

> *(1) Is the care component of the United Kingdom's Disability living Allowance properly classified as an invalidity rather than a cash sickness benefit for the purpose of Regulation No 1408/71?*
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> *(2) (i) Does a person who ceases to be entitled to UK Disability Living Allowance as a matter of UK domestic law, because she has moved to live in another member state, and who has ceased all occupational activity before such move, but remains insured against old age under the UK social security system, cease to be subject to the legislation of the UK for the purpose of article 13(2)(f) of Regulation No 1408/71?*
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> *(ii) Does such a person in any event remain subject to the legislation of the UK in the light of Point 19(c) of the United Kingdom's annex VI to the Regulation?*
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> *(iii) If she has ceased to be subject to the legislation of the UK within the meaning of article 13(2)(f), is the UK obliged or merely permitted by virtue of Point 20 of annex VI to apply the provisions of Chapter 1 of Title III to the Regulation to her?*
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> *(3) (i) Does the broad definition of an employed person in Dodl apply for the purposes of articles 19 to 22 of the Regulation, where the person has ceased all occupational activity before moving to another member state, notwithstanding the distinction drawn in Chapter 1 of Title III between, one the one hand, employed and self-employed persons and, on the other hand, unemployed persons?*
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> *(ii) If it does apply, is such a person entitled to export the benefit by virtue of either article 9 or article 22? Does article 22(1)(b) operate to prevent a claimant's entitlement to the care component of DLA being defeated by a residence requirement imposed by national legislation on a transfer of residence to another member state?"*

3. The Norwegian Government welcomes the opportunity to submit observations to questions 1, 2 (i) and 3.

2 QUESTION 1 – CLASSIFICATION OF BENEFIT

4. By its first question, the referring court asks whether the care component of the UK's Disability Living Allowance (DLA) constitutes an invalidity benefit or cash sickness benefit within the meaning of the Regulation.

5. The Norwegian Government observes that the Court of Justice has already stated in Commission v Parliament that a care component like the one in the United Kingdom constitutes a "sickness benefit" for the purpose of Article 4(1)(a) of Regulation 1408/71.[1] As regards the care component of the Swedish DLA, the Court stated 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 Article 4(1)(a) of Regulation No 1408/71."*

6. It may be added in light of the referring court's observations, that the conclusion reached in that judgment is clearly not affected by the general observation in *Da Silva Martins*[2] where the Court held that certain care benefits may display characteristics resembling invalidity and old age benefits, as they cannot be strictly identified with either of them.

7. On this background, the Norwegian Government is of the opinion that the Court of Justice has already clarified that the benefit in question constitutes a "sickness benefit".

3 QUESTION 2 – APPLICABLE LEGISLATION

8. By the first part of its second question, the referring court essentially asks whether the UK social security legislation is still applicable within the meaning of Article 13 of the Regulation to a person who has ceased all occupational activity and thereafter taken up residence in another Member States, as a result of which that person has ceased to be entitled to sickness benefits such as DLA, but remains insured against old age.

9. As for the background of this question, the referring court explains that the person concerned has paid national insurance contributions from 1967 to 1984 and occasionally thereafter, but none since 1993/1994. This may entitle her to a state retirement pension, although there is some uncertainty on this point as the referring court adds that it depends on whether she fulfilled the contribution conditions when reaching state retirement age. As of July 1993, she was awarded the care component of the DLA on an indefinite basis. In sum, it appears that she has been engaged in occupational activity in some form previously, but that she had definitely ceased all occupational activity by July 1993 at the latest. She moved to Spain in 2002, following which the UK national authorities determined that she was consequently no longer entitled to DLA.

10. It may be observed at the outset that as of July 1993, at the latest, Mrs Tolley was not a person employed within the meaning of Article 13(2)(a) of the Regulation. It follows from

[1] Case C-299/05, Commission v Parliament, para 68
[2] Case C-388/09, Da Silva Martins, para 48

settled case law, that workers who have definitively or temporarily ceased all occupational activity fall outside the scope of Article 13(2)(a) of the Regulation.[3]

11. The alternatives in litra (b)-(e) are also not applicable, nor is any other provisions in Title II. It is therefore Article 13(2)(f) which governs the issue at hand. The provision was inserted by Regulation 2195/91, following the judgement in *Ten Holder*,[4] see also recital 7 of the preamble to Regulation 2195/91. Article 13(2)(f) reads as follows:

> *"a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Article 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone."*

12. In para. 26 of its reference for a preliminary ruling, the referring court asks whether the "legislation" ceased to be applicable must refer to "all" social security legislation in the UK or whether it is sufficient that it concerns the specific legislation governing the benefit at issue, i.e. DLA. The Norwegian Government would add that it also seems pertinent to consider what is meant by the notion that the legislation "ceases" to be applicable.

13. At the outset, it should be recalled that the sole purpose of Article 13(2) is to determine the national legislation applicable. It is not intended to lay down the substantive conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme. It is for the legislature of each Member State to lay down those conditions, including those concerning termination of insurance.[5]

14. Furthermore, the provisions of Title II, of which Article 13 forms part, are intended not only to prevent the concurrent application of a number of national legislative systems, see also Article 13(1), but also to ensure that persons covered by that regulation are not left without social security cover because no legislation is applicable to them.[6]

15. According to Article 13(2)(f) the legislation of the Member State of residence only applies if no other legislation is applicable, and only if the legislation to which the person concerned had previously been subject ceases to be applicable to him.

16. It follows from paragraph 32 and 33 of *Kuusijärvi* that the legislation of a Member State can make membership of social security schemes contingent on residence requirements, with the consequence that the legislation ceases to be applicable within the meaning of Article 13(2)(f) where the person concerned takes up residence in another Member State.

17. That judgment does not make it clear, however, whether that presupposes that the residence requirement must entail that all legislation of the Member State ceases to be

[3] E.g. Case C-140/88 Noij, paras 9 and 10; Case C-215/90 Twomey, para 10; and Case C-275/96 Kuusijärvi, paras 39-41
[4] Case 302/84 Ten Holder.
[5] Case C-2/89 Kits van Heijningen, para 19, and Case C-275/96 Kuusijärvi, para 29.
[6] Case C-2/89 Kits van Heijningen, para 12, and Case C-275/96 Kuusijärvi, para 28

applicable or, which is perhaps the most essential point, what is meant by the notion that the legislation "ceases" to be applicable.

18. First, the Norwegian Government will make some observations on the question whether the UK social security legislation has ceased to apply within the meaning of Article 13(2)(f).

19. The referring court observes that Mrs Tolley may be entitled to an old age pension on the basis of previous contributions. As far as the Norwegian Government understands, Mrs Tolley is not covered by any other branches of UK social security legislation. This is a matter for the national court to ascertain. If that is indeed the case, the question is then whether the possible entitlement to an old age pension on the basis of previous contributions entails that the UK social security legislation has not ceased to apply.

20. At the outset, it should be recalled that Article 10b of Regulation No 574/72 states that the date and conditions on which the legislation of a Member State ceases to be applicable to a person referred to in Article 13(2)(f) of Regulation No 1408/71 are to be determined in accordance with that legislation. It also follows from consistent case law that the phrase "ceases to be applicable" constitutes a condition for the application of Article 13(2)(f), and that it is for the legislation of each Member State to lay down the conditions for that legislation to apply.[7] The question whether the legislation has "ceased" to be applicable is therefore essentially a matter of national law.

21. As far as the Government understands, if Mrs Tolley is entitled to an old age pension on the basis of previous contributions, that entitlement has to be regarded as an acquired right. In that regard, it should be recalled that rules which, on the basis of residence in another Member States, prevent persons from retaining benefits earned through previous contributions, are not compatible with EU law, neither Article 10 of Regulation No 1408/71, which prohibits residence requirements as regards inter alia old-age benefits, nor the principle of acquired rights as developed in case-law.

22. Consequently, the fact that Mrs Tolley may retain rights to an old age pension can therefore not in itself rule out that the social security legislation has ceased to be applicable, as this would otherwise render Article 13(2)(f) meaningless.

23. This is also supported by Case C-347/98 *Commission v Belgium*. The Commission claimed that the person in question was exclusively subject to the legislation of the state of residence, and that Belgium accordingly was precluded from levying contributions on pensions in respect of occupational disease. The Belgian Government, on the other hand, emphasised that the person in receipt of the pension was also entitled to other social security benefits, and that the period during which pensions were paid was counted for the purposes of the old-age pension scheme.

24. The Court of Justice dismissed the application by the Commission as unfounded, as the Commission had not at all considered whether the condition of "ceased to apply" in Article 13(2)(f) was fulfilled.[8] In para 69 of his Opinion, Advocate General Alber concluded that the Belgian legislation was indeed applicable. However, he also stated that the Belgian legislation would have ceased to apply if the persons in question had no right to any other

[7] See e.g. case C-266/13, L. Kik v Staatssecretaris van Financiën, para 51; case C-347/98, Commission v Belgium, paras 28-31; and case C-227/03, van Pommeren-Bourgondiën, para. 33.
[8] See e.g. para 31.

benefits under Belgian social security and that periods during which pensions were granted would not be taken into account under the Belgian social security system.

25. A similar line of reasoning may also be applied to the present case; the fact alone that Mrs Tolley may retain rights to an old age pension cannot in itself rule out that UK's social security legislation has ceased to be applicable.

26. Moreover, the Government would point out that a person may have paid contributions to a number of social security schemes, covering the risk against old-age, in several Member States. This fact does not, however, entail that the legislation in each of these Member States is applicable for the purpose of Article 13 (2)(f). As far as the Government can see, that would not have been in line with the basic principle that a person is subject to the legislation of only one Member.

27. The Government is of the opinion that the legislation in a Member State has ceased to apply when the only remaining connection a person has to the social security scheme in that Member State is the fact that he or she has paid contributions to an old age the scheme, and have acquired pension rights under that scheme. Consequently, it is the legislation of the state of residence, that is to say Spain, that is applicable to Mrs. Tolley, cf. Article 13(2)(f).

28. Second, if the Court of Justice were to consider that UK social security legislation has not ceased to apply, contrary to the arguments presented above, the next question is whether the "legislation" ceased to be applicable must refer to "all" social security legislation in the UK or whether it is sufficient that it concerns the specific legislation governing the benefit at issue.

29. As far as the Government understands, it is not disputed that the social security branch containing the sickness benefit in question has ceased to apply to Mrs Tolley as she transferred her residence from UK to Spain. Thus, if "legislation" in Article 13(2)(f) merely refers to the specific legislation governing the benefit at issue, and not all UK social security legislation, UK legislation would be considered to have ceased to apply to Mrs Tolley as regards the sickness benefit in question. In that case, Article 13(2)(f) provides for insurance in that regard in the Member State of residence, i.e. Spain.

30. The Norwegian Government is of the view that "legislation" in Article 13(2)(f) refers to the specific legislation governing the benefit at issue.

31. With respect to the definition in Article 1(j), the Norwegian Government cannot see that it resolves the matter. That provision refers to "statutes, regulations and other provisions" concerning both "the branches and schemes of social security" but it does not determine whether, in the context of Article 13(2)(f), that means all of the said provisions as a whole or merely branches of the social security legislation.

32. The Court of Justice's ruling in Case C-227/03 *van Pommeren-Bourgondiën* seems, however, to support the Norwegian Government's point of view. Although Advocate General Jacobs stated in para. 29 of his Opinion that the notion of "applicable legislation" refers to the legislation in its entirety, it does not seem that the Court of Justice followed that approach. As far as the Government understands, the Court found in para. 35-38 that Article 13(2)(f) was applicable with regard to some branches of the social security

legislation, although apparently the other parts of the social security legislation was not applicable.

33. That "legislation" in Article 13(2)(f) refers to particular branches of a social security system seems to also be the position adopted by Advocate General Alber in Case C-347/98. In para 59 of his Opinion, he stated that although the State of residence may be competent by virtue of Article 13(2)(f), that does not in itself determine "for which branches of social security competence is conferred" and that this "depends more on how the legislation of the Member States is framed".

34. Based on the above, the Norwegian Government submits that "legislation" in Article 13(2)(f) refers to particular branches of a social security system. For the purposes of the present case, this seems to entail that the UK legislation has ceased to be applicable with regard to the benefit in question, i.e. the DLA.

4 QUESTION 3 – ARTICLES 19 AND 22 OF THE REGULATION

35. By the third question, the referring court asks how Article 19 or Article 22 of Title III is to be understood in the present circumstances.

36. The Norwegian Government notes that chapter 1 of Title III concerns special provisions relating to sickness and maternity benefits. In the present case, the Government considers that Article 22 is the applicable provision, as Mrs Tolley seems to have transferred her residence from UK to Spain during sickness after "having become entitled" to the sickness benefit in UK.

37. By the first part of its third question, the referring court asks essentially whether the broad definition of an "employed person" in Case C-543/03 *Dodl* applies for the purposes of Articles 19 to 22 of the Regulation, where the person has ceased all occupational activity before moving to another Member State.

38. First, it should be recalled that the circumstances in *Dodl* are quite different from the ones in the case at hand. As far as the Government understands, the persons concerned in *Dodl* had an employment relationship that was merely suspended during a period of unpaid leave on grounds of childbirth. Even though the compulsory insurance ceased, the persons concerned seems to have been entitled to benefits under the health insurance scheme. In the case at hand, Mrs. Tolley may be entitled only to a deferred old-age pension.

39. More importantly, the Norwegian Government shares the concerns presented by the UK Government that a wide definition of an "employed person" may dilute the differences between the categories of employed and self-employed persons, on the one hand, and unemployed persons, on the other hand.[9]

40. As to the second part of third question, the referring court asks whether the claimant in question may export the benefit, by virtue of either Article 19 or 22, and, in particular, whether article 22(1)(b) precludes the application of a residence requirement imposed by national legislation to the care component of DLA.

[9] See for instance the specific rules in Articles 27 to 34, 25 and 25a on rights to benefits for pensioners, unemployed persons and the members of their families.

41. Mrs Tolley relies in this regard on the affirmative answer provided by Advocate General Jacobs in *Kuusijärvi*. The Norwegian Government is not certain whether those provisions should be interpreted in that manner.

42. First, it should be recalled that the Court of Justice classified the benefit as a family benefit, not a maternity benefit, which in turn entailed that Article 73 was the relevant provision, not Article 22.

43. More importantly, the Court of Justice and AG Jacobs seems to have had different views on the interpretation of the special provisions in Title III and the relationship to the rules on the applicable legislation in Title II. In para 71, the Court stated that Mrs Kuusijärvi did not fulfil the conditions either of Article 73 or of Article 74, inasmuch as neither she nor the members of her family had ever resided in a Member State other than the one whose legislation was applicable to her. Article 73 only precludes the application of a residence requirement in the event that the state of residence is another state than the state whose legislation is applicable. In the circumstances of that case, the applicable legislation had always been the same state as that of residence. Thus, Article 73 did not preclude Sweden from denying entitlement to family benefits on the basis of a residence requirement.

44. The Norwegian Government considers that Article 22 should be interpreted in the same manner.

45. Admittedly, the wording of those provisions differ somewhat. While Article 22 refers to the situation where the person in question "satisfies the conditions of the legislation of the competent State", Article 73 refers to the situation where the person in question is "subject to the legislation of a Member State". The latter phrase refers to the rules determining the applicable legislation. The phrase "competent state" is legally defined in Article 1(q) and (o), from which it follows that the competent State means inter alia the state in which the person concerned "is insured at the time of the application for benefit", or the state from which the person concerned "is entitled or would be entitled to benefits" if he or a member or members of his family "were resident" in that state.

46. The Norwegian Government is of the view that the definition "would be entitled to benefits" if he "were resident" cannot apply unconditionally to any situation. A strictly literal interpretation would suggest that that any person in the EU/EEA could make a state the competent state, if the social security legislation of that state grants persons resident there affiliation to that system. The Government would therefore dispute the approach suggested by AG Jacobs in his Opinion on *Kuusijärvi*.

47. Moreover, according to the Court of Justice in *Kuusijärvi*, only the state whose legislation is applicable is obliged to continue to pay maternity benefits in the case of a transfer of residence to another state. It is not evident why sickness benefits should continue to be paid from a state whose legislation is not applicable in case of such transfer of residence. Nor is it evident why Articles 22, 52 and 55, 69 to 71, and 73, all of which AG Jacobs referred to in his Opinion, would contain different solutions as his approach would suggest.

48. Furthermore, as the Court of Justice also stated in the second sentence of para 74, under Article 13(2)(f), a person in such a situation as in *Kuusijärvi* is subject, after transferring her

residence to another Member State, to the legislation of that Member State. That is also the situation in the present case.

49. Finally, Article 10 of the Regulation provides that certain benefits may not be the subject of any withdrawal by reason of the fact that the recipient resides in the territory of another Member State. That provision, however, only applies to the benefits expressly mentioned therein, which neither includes family benefits nor sickness benefits. This was also emphasised by the Court in para 75 of *Kuusijärvi*. The approach suggested by AG Jacobs seems to render Article 10 with little independent meaning.

50. On the basis of the above, it appears that Article 22 does not prevent UK from applying a residence requirement in a situation such as the present one, where the state of residence, i.e. Spain, is also to be regarded as the state whose legislation is applicable, cf. Article 13(2)(f).

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Oslo, 18 November 2015
THE ATTORNEY GENERAL (CIVIL AFFAIRS)

Pål Wennerås	Magnus Schei	Christian Rydning
Agent	Agent	Agent