IN THE UPPER TRIBUNAL **Case No.** CG/1862/2015
ADMINISTRATIVE APPEALS CHAMBER

1. This is an appeal by the Secretary of State, brought with the permission of the chairman of the First-tier Tribunal, against the decision of a First-tier Tribunal made on 19 March 2015. For the reasons set out below that decision was in my judgment wrong in law and I set it aside. In exercise of the power in s.12 of the Tribunals, Courts and Enforcement Act 2007 I re-make the First-tier Tribunal's decision as follows:

> **The Claimant's appeal against the decision of the Secretary of State, made on 14 March 2013, is dismissed. The Claimant is therefore not entitled to carer's allowance from 22 January 2010 because she was not resident in Great Britain at any material time and the United Kingdom was not the competent state for the purpose of paying carer's allowance to her.**

2. I held an oral hearing of this appeal at which Mr Aiden Crook, of the Government Legal Department, appeared on behalf of the Secretary of State, and the Claimant appeared in person.

The facts

3. The Claimant is now aged 52 and has lived in Portugal since 1999. She worked on a self-employed basis in Portugal from 2003/4 and paid income tax and the equivalent of national insurance contributions there. She has also paid Class 2 national insurance contributions in the UK since 2003. She had worked in the UK, and presumably paid national insurance contributions, for some periods prior to going to Portugal. From 2009 the Claimant provided care to her grandmother in Portugal (who died on 5 March 2013, aged 103). Her grandmother was in receipt of attendance allowance from the UK with effect from 22 January 2010 and on 22 February 2013 the Claimant made a claim for carer's allowance, which had effect from 22 January 2010. The Claimant can for the purposes of this appeal be assumed to have satisfied the conditions for entitlement to carer's allowance other than that of being resident in Great Britain.

4. By a decision made on 14 March 2013 the claim for carer's allowance was refused on the grounds that the Claimant was not resident in Great Britain and was not entitled to 'export' a claim for carer's allowance to Portugal because the UK was not the competent state for the purpose of a claim by the Claimant to that benefit.

5. However, by its decision now under appeal to me the FTT allowed the Claimant's appeal. It decided that the UK was the competent state for the purpose of paying CA to the Claimant because (i) it was held by the ECJ in *Commission of the European Communities v European Parliament* (C-299/05) [2007] ECR I – 8695 ECJ that, like AA, CA is a "sickness benefit", and (ii) the Claimant's claim for CA was for this purpose to be regarded as "bound together" with and inseparable from her grandmother's claim for AA, for which the UK was the competent state.

Legislative background

6. Section 70(4) of the Social Security Contributions and Benefits Act 1992 provides that a person shall not be entitled to CA unless he satisfies prescribed conditions as to residence and presence in Great Britain. Those conditions are set out in reg. 9(1) of the Social Security (Invalid Care Allowance) Regulations 1976, and the Claimant did not satisfy them. However, reg. 9B of those Regulations provides that reg. 9(1)(a) to (c) shall not apply where on any day (a) the claimant is habitually resident in an EEA state other than the UK and (b) Regulation 883/2004 (EC) applies and (c) the claimant can demonstrate a genuine and sufficient link to the UK social security system.

7. Although reg. 9B did not come into force until 8 April 2013, and so was not in force at any time material to this case, it was enacted in order to bring the position into line with the requirements of EU law. It may be that the Claimant can show a "genuine and sufficient link" with the UK social security system. However, with effect from 31 October 2011 s.70(4A) of the Social Security Contributions and Benefits Act 1992 has provided as follows:

> "A person to whom either regulation (EC) No. 1408/71 or Regulation (EC) No 883/2004 applies shall not be entitled to [CA] for a period unless during that period the UK is competent for payment of sickness benefits in cash to the person for the purposes of Chapter I of Title III of the Regulation in question."

8. Although having effect only from 31 October 2011, s.70(4A) was also enacted in order to give effect to the position under EC law, as it was considered by the UK legislature to be.

9. It is necessary, therefore, to have regard to the provisions of Regulation 883/04 in order to determine the competent state for the payment of CA to the Claimant.

10. As I have noted above, the ECJ held in *Commission v Parliament* that AA, the care component of DLA and CA are "sickness benefits", and not "special non-contributory cash benefits" for the purpose of the classification in Articles 3 and 70 of Regulation 883/04. (I refer in this decision only to that Regulation, and not to its predecessor 1408/71; although the latter was not replaced until 1 May 2010, that was only shortly after the beginning of the period material in the present case, and the effect of the provisions of those two EC Regulations was materially the same).

11. The effect of the ECJ's decision was that the UK was not permitted to exclude AA, the care component of DLA, and CA from the general coordination rules in

883/04 and subject them instead to the special provision in Article 70.4 of that Regulation under which benefits are to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation.

12. The Claimant's grandmother was entitled to be paid AA, notwithstanding that she was living in Portugal, under the provisions of Chapter I of Title III to 883/04.

13. Article 11.1, in Title II to 883/04, states the general rule that

> "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."

14. Article 11.3 then sets out some general rules, which apply subject to Articles 12 to 16, which are not material. Materially, Article 11.3 provides that:

> "(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;
>
> ……
>
> (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 benefits under the legislation of one or more other Member States."

15. The Claimant's grandmother fell within 11.3(e), but in her case the provisions of Chapter I of Title III, relating to sickness, maternity and equivalent paternity benefits applied (by virtue of the words "without prejudice to ….." in 11.3(e)), so as to take her outside the general default rule in 11.3(e) that the state of residence is the competent state for payment of those benefits. More particularly, the combined effect of Articles 29 (which relate to cash benefits for pensioners) and 24 and/or 25 (which relate to benefits in kind for pensioners, but the provisions of which are applied by reference into Article 29) was that the UK remained the competent institution for the payment of AA to the Claimant's grandmother, who was in receipt of a state pension from the UK.

16. In the case of the Claimant's entitlement to CA, however, the effect of the provisions of 883/04 is on the face of it different. As a self-employed person in Portugal , she falls within Art. 11.3(a), which is not made subject to the provisions of Chapter I of Title III in relation to sickness benefits. Articles 17 to 22 contain specific provisions in relation to sickness benefits for insured persons and members of their families who are not pensioners. They apply where the insured person is living in a State other than the State which is the competent state under Art 11.3(a), and therefore cannot assist the Claimant. Under Art. 11.3(a) Portugal is therefore on the face of it the competent state for the payment of sickness benefits to her.

The basis on which the Claimant seeks to uphold the FTT's decision

17. The Claimant contends, however, that CA is so intimately bound up with AA that in this special situation the competent state for the payment of CA to her should be the same as the competent state for payment of AA to her grandmother. The purpose of CA, the Claimant argues, is in effect to enable the carer to spend the necessary time caring for the disabled person, and it can therefore in substance be regarded as a benefit to the disabled person. It therefore complements and is inextricably linked with AA, and it must be implicit in 883/04 that the competent state for payment of the two benefits should be the same. It would be illogical, the Claimant argues, to expect Portugal to pay the equivalent of CA (were there such a benefit in Portugal) for the benefit of a person for whose sickness benefits England is responsible.

18. The Claimant relies on recitals (17) and (18) to 883/04 as showing that the rule that the competent state for payment of a claimant's benefits is, in the case of a self-employed person, the state where the work is done, is subject to exceptions:

> "(17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person.
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> (18) In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule."

19. The Claimant contends that she derives support from the following passages in the ECJ's judgment in *Commission v Parliament*:

> "41. As regards the DLA, AA and CA, the Commission takes the view that such benefits are mainly intended to meet the additional expenses which a person may have to bear because of his or her disability with a view to improving his or her state of health and quality of life as a person reliant on care. They serve, as the Court observed in *Jauch*, to supplement sickness insurance benefits.
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> 42. Accordingly, the Commission submits that even if such benefits have their own characteristics, they must be regarded as 'sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71 as amended.
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> ……..
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> 65. As regards, thirdly, the DLA, AA and CA, those benefits are all by nature, although only partially so in the case of the DLA, care allowances.
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> 66. According to the United Kingdom, they are specific benefits whose purpose is to help promote the independence and social integration of the disabled and also, as far as possible, to help them lead a life similar to non-disabled persons. The criterion which determines the entitlement to those benefits is the need for care. Entitlement to the DLA or AA does not depend on being unable to work and the three benefits at issue are granted regardless of the level of income of their recipients, simply at different rates.

> 67. Contrary to what the United Kingdom asserts, only the DLA can be considered to include a social assistance component. The other two benefits at issue have a single purpose which is akin to that of the Swedish disability allowance, namely to help the disabled person to overcome, as far as possible, his or her disability in everyday activities.
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> 68. Accordingly, those three allowances …… must be regarded as sickness benefits, even though the DLA includes a distinct part relating to mobility."

20. The Claimant contends that those passages show that CA was classified by the ECJ as in substance a sickness benefit in favour of the person being cared for. That is the person who is sick and needs care. CA enables the carer to spend the necessary time caring, which without payment of CA the carer might not be able to afford to do. The competent state for payment of CA must therefore be the competent state for payment of sickness benefits to that person, not the competent state for payment of sickness benefits to the Claimant.

Analysis and conclusion

21. I would start be referring again to the terms of s.70(4A) of the Social Security Contributions and Benefits Act 1992, set out in para. 7 above. That provision makes it absolutely clear that it is the competent state for payment of sickness benefits in cash to the claimant (and not the competent state for payment of sickness benefits to the person being cared for) which has to be looked at. That is of course a provision of UK legislation, but it was intended to bring the domestic conditions of entitlement into line with the requirements of EU law, and in particular the provision of the co-ordinating Regulation 883/04. It does not, however, preclude an argument to the effect that in enacting s.70(4A) Parliament misunderstood the potential effect of 883/04 in relation to CA.

22. Whilst the Claimant's argument undoubtedly has some attractions, in my judgment it must fail because it presupposes that the competent state for payment of a cash sickness benefit to a claimant can be decided by reference to what is the competent state for payment of cash sickness benefits to someone other than the claimant. It seems to me, however, that, unless expressly provided, 883/04 requires one to determine the competent state by reference to the claimant's circumstances, and not the circumstances of some other person, even if that other person may benefit, directly or indirectly, from payment of the benefit. Article 11.3(a), in providing that 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, makes that Member State the competent state for payment of social security benefits to that person, whether or not those benefits may also directly or indirectly benefit someone else. There is no exception in respect of a cash sickness benefit where the sick person is someone other than the claimant.

23. For the purpose of deciding whether or not CA is a sickness benefit within the classification in 883/04, the ECJ in *Commission v Parliament* assimilated CA with AA and the care component of DLA in that it regarded all three benefits as being for the purpose of assisting the disabled person in relation to his or her care needs. It seems to me that CA can be regarded as potentially benefiting both the carer and the person being cared for. It may benefit the person being cared for in that, as the

Claimant points out, but for receipt of CA the carer might not be able to afford to spend 35 hours a week caring for the disabled person and therefore might not provide the care. It benefits the carer in that it is a cash benefit. If the carer did not receive CA the carer might or might not still provide the care, and if (s)he did not (s)he might or might not spend the extra time in gainful employment. However that may be, the classification by the ECJ of CA as a sickness benefit does not in my judgment require or justify a departure from the principle in 883/04 that it is the competent state for payment of benefits to the claimant which must be determined, and that in the case of a claimant who is self-employed the competent state is the place where the work is done.

Charles Turnbull
Judge of the Upper Tribunal
17 March 2016