[2016] AACR 41

(IG v Secretary of State for Work and Pensions (AA)
[2016] UKUT 176 (AAC))

Judge Jacobs **CA/3858/2014**
8 April 2016

European Union law – Regulation (EC) 883/2004 – approach in *Hudziński* does not apply to sickness benefits

The claimant, a Lithuanian national, received a retirement pension from Lithuania and a state pension credit as a dependent relative of her son, who had a right to reside in Great Britain. Her claim for attendance allowance (AA) was refused by the Secretary of State under section 65(7) of the Social Security Contributions and Benefits Act 1992, on the basis that Lithuania was the competent State to pay sickness benefit for the purposes of Regulation (EC) 883/2004. The First-tier Tribunal (F-tT) allowed the claimant's appeal but set aside its decision and referred the case to the Upper Tribunal (UT) for decision. Among the issues before the UT was the proper application of Regulation (EC) 883/2004, the decisions of the Court of Justice of the European Union and the effect of section 65(7).

Held, confirming the Secretary of State's decision, that:

1. Regulation (EC) 883/2004 has to be interpreted in accordance with general principles of law including the principle of certainty and the requirement that there must be no disproportionate effect on the predictability and effectiveness of the Regulation: *Hudziński v Agentur für Arbeit Wesel-Familienkasse,* C-611 and 612/10, EU:C:2012:339, [2012] 3 CMLR 23. It was designed to provide generally for the law of a single State to govern entitlement to a particular class of benefits, subject to coordination (not harmonisation), and there was no obligation on States to make any particular level of provision for a given class of benefit (paragraphs 29 to 31);

2. States may choose to make provision when they are not the competent State but this was conditional on the additional provision not being inconsistent with the coordination principle on which Regulation (EC) 883/2004 was based. It followed that payment by non-competent States must not disproportionately affect the predictability and effectiveness of the coordination rules before any possibility of overriding a provision like section 65(7) arose (paragraphs 33 to 34);

3. attendance allowance, being a sickness benefit, was generally subject to the rule against overlapping in Article 10: see Article 54. Limiting the application of the *Hudziński* approach to cases in which Regulation (EC) 883/2004 anticipates that overlapping may be appropriate reflected the current state of the case law, and provided a rational basis to distinguish the cases where it applied from those where it did not, it respected the scope and structure of the Regulation, and it prevented a drift into harmonisation. In these circumstances, Great Britain was not precluded from making provision in the form of section 65(7) (paragraph 42).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007:

> On her claim for attendance allowance made on 23 July 2012 and refused on 15 October 2012, the claimant is not entitled to an award on the ground that, being a sickness benefit, Lithuania was the competent State for the purposes of Regulation (EC) 883/2004.

REASONS FOR DECISION

A. The issue

1. The Upper Tribunal is currently dealing with a number of difficult issues on the application of Regulation (EC) 883/2004. This is the lead case on the application of the decision of the Court of Justice of the European Union in *Hudziński v Agentur für Arbeit Wesel-Familienkasse,* C-611

and 612/10, EU:C:2012:339, [2012] 3 CMLR 23. I have to decide whether section 65(7) of the Social Security Contributions and Benefits Act 1992 is effective to achieve its apparent purpose of preventing a claimant becoming entitled to attendance allowance when this country is not the competent State under the Regulation for the purpose of sickness benefits. My decision is that it is effective.

B. How the case came before the Upper Tribunal

2. This case comes before me on reference from the First-tier Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007. That tribunal had allowed the claimant's appeal against the Secretary of State's decision, but it set that decision aside and referred the case to the Upper Tribunal for decision. The effect is that I do not have to decide whether the First-tier Tribunal's decision was made in error of law, but whether the Secretary of State was right to refuse the claim.

C. The oral hearing

3. As the case raised a complicated issue of EU law, I directed an oral hearing, which took place on 24 March 2016. Alistair Mills of counsel represented the claimant and Zoe Leventhal of counsel represented the Secretary of State. I wish to record my gratitude to the Free Representation Unit for arranging Mr Mills' involvement. The Unit is one of the organisations that assists claimants and the Upper Tribunal by providing representation in complex cases. The Administrative Appeals Chamber very much appreciates that assistance.

D. The relevant facts

4. These are not in dispute and few in number. The claimant is Lithuanian and was born on 12 June 1942. She first came to this country on 9 August 2011, following her husband's death. She came to join her son who would care for her; I have been told that she has Alzheimer's. She receives a pension from Lithuania of somewhere between £80 and £100 a month, but does not receive a retirement pension from Great Britain. She was awarded a state pension credit as a dependent relative of her son who has a right to reside here. She claimed an attendance allowance on 23 July 2012, but the Secretary of State refused her claim on 15 October 2012 on the ground that, it being a sickness benefit, Lithuania was the competent State for the purposes of Regulation (EC) 883/2004. In those circumstances, the Secretary of State did not have to investigate and decide on the nature and extent of the claimant's disablement.

5. Ms Leventhal provided me with a copy of a letter dated 4 February 2016 in which the Social Assistance Division of the Social Affairs Department of the Klaipeda City Municipal Administration certified that the claimant was receiving sickness benefits. That letter was, of course, written after the date of the Secretary of State's decision that is under appeal before me and, I assume, refers to an award made after that date.

E. Attendance allowance

6. Attendance allowance is governed by the Social Security Contributions and Benefits Act 1992. Section 64 deals with the disability conditions that must be satisfied, whilst section 65 deals with the period and rate of the award.

7. The relevant provisions of section 64 read:

"**Entitlement**

64.–(1) A person shall be entitled to an attendance allowance if he has attained pensionable age, he is not entitled to an allowance within subsection (1A) [a personal independence payment or the care component of a disability living allowance] and he satisfies either –

(a) the condition specified in subsection (2) below ('the day attendance condition'), or

(b) the condition specified in subsection (3) below ('the night attendance condition'),

and prescribed conditions as to residence and presence in Great Britain.

…

(2) A person satisfies the day attendance condition if he is so severely disabled physically or mentally that, by day, he requires from another person either –

(a) frequent attention throughout the day in connection with his bodily functions, or

(b) continual supervision throughout the day in order to avoid substantial danger to himself or others.

(3) A person satisfies the night attendance condition if he is so severely disabled physically or mentally that, at night, –

(a) he requires from another person prolonged or repeated attention in connection with his bodily functions, or

(b) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him."

8. The relevant provisions of section 65 read:

"**Period and rate of allowance**

65.–(1) Subject to the following provisions of this Act, the period for which a person is entitled to an attendance allowance shall be **–**

(a) a period throughout which he has satisfied or is likely to satisfy the day or the night attendance condition or both; and

(b) a period preceded immediately, or within such period as may be prescribed, by one of not less than 6 months throughout which he satisfied, or is likely to satisfy, one or both of those conditions.

…

(7) A person to whom either Regulation (EC) No 1408/71 or Regulation (EC) No 883/2004 applies shall not be entitled to an attendance allowance for a period unless during that period the United Kingdom is competent for payment of sickness benefits in cash to the person for the purposes of Chapter 1 of Title III of the Regulation in question."

9. As I explained in *Secretary of State for Work and Pensions v AK (AA)* [2015] UKUT 110 (AAC); [2015] AACR 27 [15]:

"Section 65(7) was inserted by regulation 5(3) of the Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) Regulations 2011 (SI No 2426) to take account of the effect of the decision of the Court of Justice of the European Union in *Commission of the European Communities v European Parliament and Council of the European Union* Case C-299/05, EU:C:2007:608."

In that case, the Court of Justice of the European Union decided that the care component of disability living allowance was a sickness benefit, which could potentially be exported, and not a special non-contributory benefit, which could not be exported. The Government amended the law relating to disability living allowance and the similar attendance allowance. I went on to say:

> "It also prevents the attendance allowance provisions being interpreted to allow an award to be made even if the United Kingdom was not the competent State, a possibility recognised by the Court of Justice of the European Union in *Bosmann (social security for migrant workers)* C-352/06, EU:C:2008:290 and *Hudziński (social security)* C-611 and 612/10, EU:C:2012:339."

I now have to decide if that sentence was correct.

F. EU legislation

The Treaty on the Functioning of the European Union

10. The relevant provisions of this Treaty:

"TITLE IV

FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1

WORKERS

Article 45

(ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 48

(ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or

(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted."

Regulation (EC) 883/2004

11. This case arises under this Regulation. Some of the cases that I analyse were decided under its predecessor Regulation (EEC) 1408/71. The relevant provisions of each Regulation are not materially different. I now set out the relevant parts of Regulation (EC) 883/2004.

"**REGULATION (EC) No 883/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

of 29 April 2004

on the coordination of social security systems

Whereas:

(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

(8) The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.

(15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.

(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.

(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.

(18) In specific situations which justify other criteria of applicability, it is necessary to derogate from that general rule.

(27) It is necessary to devise a system for the award of old-age benefits and survivors' benefits where the person concerned has been subject to the legislation of one or more Member States.

(34) Since family benefits have a very broad scope, affording protection in situations which could be described as classic as well as in others which are specific in nature, with the latter type of benefit having been the subject of the judgments of the Court of Justice in Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* and in Case C-275/96 *Kuusijärvi*, it is necessary to regulate all such benefits.

(35) In order to avoid unwarranted overlapping of benefits, there is a need to lay down rules of priority in the case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of the members of the family.

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation:

(c) ‘insured person’, in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

(j) ‘residence’ means the place where a person habitually resides;

(q) ‘competent institution’ means:

(i) the institution with which the person concerned is insured at the time of the application for benefit; or

(ii) the institution from which the person concerned is or would be entitled to benefits if he or a member or members of his family resided in the Member State in which the institution is situated; or

(iii) the institution designated by the competent authority of the Member State concerned; or

(iv) in the case of a scheme relating to an employer's obligations in respect of the benefits set out in Article 3(1), either the employer or the insurer involved or, in default thereof, the body or authority designated by the competent authority of the Member State concerned; …

Article 4

Equality of treatment

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

Article 10

Prevention of overlapping of benefits

Unless otherwise specified, this Regulation shall neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance.

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

General rules

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 Articles 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) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;

(d) a person called up or recalled for service in the armed forces or for civilian service 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.

4. For the purposes of this Title, an activity as an employed or self-employed person normally pursued on board a vessel at sea flying the flag of a Member State shall be deemed to be an activity pursued in the said Member State. However, a person employed on board a vessel flying the flag of a Member State and remunerated for such activity by an undertaking or a person whose registered office or place of business is in another Member State shall be subject to the legislation of the latter Member State if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for the purposes of the said legislation.

TITLE III

SPECIAL PROVISIONS

CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits

Section 2

Pensioners and members of their families

Article 25

Pensions under the legislation of one or more Member States other than the Member State of residence, where there is a right to benefits in kind in the latter Member State

Where the person receiving a pension or pensions under the legislation of one or more Member States resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self-employed person, and no pension is received from that Member State, the cost of benefits in kind provided to him and to members of his family shall be borne by the institution of one of the Member States competent in respect of his pensions determined in accordance with Article 24(2), to the extent that the pensioner and the members of his family would be entitled to such benefits if they resided in that Member State.

Article 29

Cash benefits for pensioners

1. Cash benefits shall be paid to a person receiving a pension or pensions under the legislation of one or more Member States by the competent institution of the Member State in which is situated the competent institution responsible for the cost of benefits in kind provided to the pensioner in his Member State of residence. Article 21 shall apply mutatis mutandis.

2. Paragraph 1 shall also apply to the members of a pensioner's family.

Section 3

Common provisions

Article 34

Overlapping of long-term care benefits

1. If a recipient of long-term care benefits in cash, which have to be treated as sickness benefits and are therefore provided by the Member State competent for cash benefits under Articles 21 or 29, is, at the same time and under this Chapter, entitled to claim benefits in kind intended for the same purpose from the institution of the place of residence or stay in another Member State, and an institution in the first Member State is also required to reimburse the cost of these benefits in kind under Article 35, the general provision on prevention of overlapping of benefits laid down in Article 10 shall be applicable, with the following restriction only: if the person concerned claims and receives the benefit in kind, the amount of the benefit in cash shall be reduced by the amount of the benefit in kind which is or could be claimed from the institution of the first Member State required to reimburse the cost.

2. The Administrative Commission shall draw up the list of the cash benefits and benefits in kind covered by paragraph 1.

3. Two or more Member States, or their competent authorities, may agree on other or supplementary measures which shall not be less advantageous for the persons concerned than the principles laid down in paragraph 1.

CHAPTER 5

Old-age and survivors' pensions

Article 53

Rules to prevent overlapping

1. Any overlapping of invalidity, old-age and survivors' benefits calculated or provided on the basis of periods of insurance and/or residence completed by the same person shall be considered to be overlapping of benefits of the same kind.

2. Overlapping of benefits which cannot be considered to be of the same kind within the meaning of paragraph 1 shall be considered to be overlapping of benefits of a different kind.

3. The following provisions shall be applicable for the purposes of rules to prevent overlapping laid down by the legislation of a Member State in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with other income:

(a) the competent institution shall take into account the benefits or incomes acquired in another Member State only where the legislation it applies provides for benefits or income acquired abroad to be taken into account;

(b) the competent institution shall take into account the amount of benefits to be paid by another Member State before deduction of tax, social security contributions and other individual levies or deductions, unless the legislation it applies provides for the application of rules to prevent overlapping after such deductions, under the conditions and the procedures laid down in the Implementing Regulation;

(c) the competent institution shall not take into account the amount of benefits acquired under the legislation of another Member State on the basis of voluntary insurance or continued optional insurance;

(d) if a single Member State applies rules to prevent overlapping because the person concerned receives benefits of the same or of a different kind under the legislation of other Member States or income acquired in other Member States, the benefit due may be reduced solely by the amount of such benefits or such income.

CHAPTER 8

Family benefits

Article 68

Priority rules in the event of overlapping

1. Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:

(a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an

activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;

(b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:

(i) in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;

(ii) in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;

(iii) in the case of rights available on the basis of residence: the place of residence of the children.

2. In the case of overlapping entitlements, family benefits shall be provided in accordance with the legislation designated as having priority in accordance with paragraph 1. Entitlements to family benefits by virtue of other conflicting legislation or legislations shall be suspended up to the amount provided for by the first legislation and a differential supplement shall be provided, if necessary, for the sum which exceeds this amount. However, such a differential supplement does not need to be provided for children residing in another Member State when entitlement to the benefit in question is based on residence only.

3. If, under Article 67, an application for family benefits is submitted to the competent institution of a Member State whose legislation is applicable, but not by priority right in accordance with paragraphs 1 and 2 of this Article:

(a) that institution shall forward the application without delay to the competent institution of the Member State whose legislation is applicable by priority, inform the person concerned and, without prejudice to the provisions of the Implementing Regulation concerning the provisional award of benefits, provide, if necessary, the differential supplement mentioned in paragraph 2;

(b) the competent institution of the Member State whose legislation is applicable by priority shall deal with this application as though it were submitted directly to itself, and the date on which such an application was submitted to the first institution shall be considered as the date of its claim to the institution with priority."

G. The EU case law

Bosmann v Bundesagentur für Arbeit-Familienkasse Aachen, C-352/06, EU:C:2008:290, [2008] ECR I-3827

12. This case concerned Regulation (EEC) 1408/71. Mrs Bosmann lived in Germany and worked in the Netherlands. As her place of employment, the Netherlands was the competent State for her family benefits. But in view of the age of her children, she was not entitled to child benefit there, although she might have been in Germany.

13. The Court of Justice of the European Union reasoned as follows.

14. The Regulation determined the competent State for the payment of a particular benefit in order to ensure that, in principle, only one State's legislation was applicable to that benefit. The overlapping provisions did not apply, as Mrs Bosmann had no entitlement in the Netherlands. Accordingly, EU law did not require Germany to make child benefit available to her.

15. The Regulation must be interpreted in the light of the right to freedom of movement, which entailed that migrant workers should not lose their social security benefits or have them reduced on account of exercising freedom of movement. And the Regulation should contribute to the improvement of standards of living and conditions of employment. So the State of residence could not be deprived of the right to award child benefit to persons in Mrs Bosmann's position, since the purpose of the Regulation was not to prevent a State from doing so.

da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse, C-388/09, EU:C:2011:439, [2011] ECR I-5737

16. This case concerned Regulation (EEC) 1408/71. The claimant was Portuguese, but had spent his working life in Germany. He received pensions from both countries. On his return to Portugal, he retained optional affiliation to the German care allowance scheme. On the basis that Portugal had no equivalent scheme, the Court of Justice of the European Union decided that he could retain his entitlement under the German scheme, despite Germany not being the competent State. If that assumption was wrong and there was entitlement in Portugal, the Court said that he was entitled to the difference between the amounts awarded in each State. It reasoned that there was no guarantee that freedom of movement would be neutral in terms of entitlement, especially where sickness benefits were concerned, and that this was compatible in principle with the requirements of EU law on free movement. However, it was only compatible to the extent that the person was not put at a disadvantage compared to those who had not exercised their freedom of movement and did not result in the payment of benefits with no return.

Hudziński v Agentur für Arbeit Wesel-Familienkasse, C-611 and 612/10, EU:C:2012:339, [2012] 3 CMLR 23

17. This case concerned Regulation (EEC) 1408/71. It involved two Polish men, one employed, the other self-employed. They both worked in Poland and had families there. For part of the year, they worked in Germany. Poland was the competent State under the Regulation for payment of their child benefit and both were entitled to benefit there. Under German domestic law, they were entitled to child benefit as they were subject to unlimited income tax liability. However, German law also provided that child benefit should not be paid to anyone who was entitled to child benefit in another State. As far as the report discloses, this applied to any other State, not just another Member State. There was provision for paying the amount by which German benefit exceeded the benefit payable in another State, but this did not apply to child benefit.

18. The Court of Justice of the European Union reasoned as follows.

19. The Regulation determined the competent State for the payment of a particular benefit in order to ensure that, in principle, only one State's legislation was applicable to that benefit. As it provided only for coordination, and not for harmonisation, each State retained power over its own legislation. There was no guarantee that moving from one State to another would be neutral in terms of social security entitlement. Nevertheless, the purpose of the Regulation was not to prevent a non-competent State conferring entitlement to a benefit, especially as the purpose of Article 48 was to contribute to the freedom of movement and to seek to contribute to the improvement of the standard of living and the conditions of employment for migrant workers.

Accordingly, Germany had power to make provision for entitlement to child benefit in addition to that of Poland, the competent State. It was irrelevant that the men were not being disadvantaged by the loss of benefit in Poland, or that they were habitually resident in Poland and not in Germany and that the children were not in Germany with their fathers. There was a precise criterion connecting the men with Germany in that they were subject to unlimited income tax liability there and that the child benefit was financed from tax revenue. Accordingly, the additional right to child benefit in Germany would not affect disproportionately the predictability and effectiveness of the Regulation, which are requirements of legal certainty that protect the interests of migrant workers through the single competent State principle.

20. Although Germany had the power to provide for entitlement even if it was not the competent State, it was not under a duty to do so. It must also in principle have the right to decide how to take account of the fact that there is entitlement in the competent State, provided that it does not infringe EU law in doing so. The overlapping provisions of Article 76 did not apply, as Poland was both the State of residence and of employment. However, exclusion from benefit as German law provided, as opposed to its reduction to take account of entitlement elsewhere, constituted a substantial disadvantage for migrant, as opposed to settled, workers by depriving them of entitlement to benefit given under the law of a Member State and by treating them less favourably than someone who had not exercised the freedom of movement.

Ministerstvo práce a sociálních věcí v B, C-394/13, EU:C:2014:2199

21. This case concerned both Regulation (EEC) 1408/71 and Regulation (EC) 883/2004. Mrs B was Czech. She and her husband lived and worked in France, although they had a home in the Czech Republic and were registered as being permanently resident there. The issue for the Court of Justice of the European Union was whether the Czech Republic was entitled to award her a child benefit when the benefit she was receiving in France ran out. The Court's decision was the same under both Regulations. It decided that she was habitually resident in France and that the Czech Republic could only award her benefit if there were specific and particularly close connecting factors with its territory and if doing so would not disproportionately affect the predictability and effectiveness of the application of the Regulation. The latter was a matter for the national court, but the Court's language at [29] suggests that the necessary close connecting factors were absent.

Franzen v Raad van bestuur van de Sociale verzekeringsbank C-382/13, EU:C:2015:261, [2015] PTSR 1163

22. This case concerned Regulation (EEC) 1408/71. The parties in this case were nationals of, and habitually resident in, the Netherlands. They worked in Germany under on-call contracts, which provided work for them on several days a month. Family benefits, wife's allowance and old-age pension could not be paid under the Dutch legislation as it provided that it did not apply if the legislation of another State applied by virtue of a treaty or convention. Equivalent benefits could not be paid under the German legislation on account of the low wages.

23. The Court of Justice of the European Union first decided that German legislation applied as that was the State of employment both on working days and on non-working days. It then noted that, as there was no entitlement under German law, the overlapping provisions did not apply. Accordingly, the Regulation did not preclude the Netherlands from awarding benefits. That left it to the national court to decide whether the express exclusion of entitlement under Dutch law was effective.

H. Analysis

The competent State

24. There was no dispute that for the purposes of Regulation (EC) 883/2004 Lithuania is the competent State for the payment of sickness benefits to the claimant. She received a pension from Lithuania.

25. The claimant received a state pension credit in this country, but that is not a pension. It is a special non-contributory cash benefit and, as such, is only payable in the State of residence: see Article 70 of, and Annex X to, Regulation (EC) 883/2004 and *EC v Secretary of State for Work and Pensions (SPC)* [2010] UKUT 95 (AAC), [2010] AACR 39.

British legislation

26. As a matter of interpretation of the British legislation, the claimant is not entitled to an attendance allowance. Section 65(7) could not be clearer. The fact that the provision is not included in section 64, which deals with entitlement, is no objection. The identification of a period is essential to an award and the location of the exclusion in section 65, which deals with periods, realistically reflects that the identity of the competent State may change from time to time, as for example when a person acquires a pension. See *AK* at [18].

EU law – analysis and application

27. Put shortly and broadly, Ms Leventhal emphasised the conditions laid down in the case law and the limited circumstances in which the Court of Justice of the European Union had not only allowed a State other than the competent State to give entitlement under its legislation, but had prevented it from depriving the claimant of entitlement that was otherwise available. Mr Mills, in contrast, emphasised the broad principles on which the Court had reasoned, especially its references to freedom of movement, and the need to ensure equal treatment.

28. The starting point for any analysis is the Treaty and, in particular, Articles 45 and 48. The former makes general provision for freedom of movement for workers. The latter makes specific provision for the impact of social security on freedom of movement of workers by requiring the European Parliament and the Council to adopt such measures are necessary to provide for freedom of movement.

29. Regulation (EC) 883/2004, like Regulation (EEC) 1408/71, was made under that provision. It represents the legislation made in fulfilment of the duty under Article 48. As such, it should be treated with respect and not bypassed too readily. It must also be interpreted in accordance with general principles of law. In particular, this means in accordance with the principle of certainty. Both those features are present in the reasoning of the Court of Justice of the European Union. The former appears in the requirement that there must be no disproportionate effect on the predictability and effectiveness of the Regulation, with the latter rating an express mention: *Hudziński* at [67].

30. The cases show that it is also necessary to take account of the purpose of the Regulation. It is designed to provide generally for the law of a single State to govern entitlement to a particular class of benefits, subject to coordination to ensure that, for example, contributions paid in one State are not ignored in another. It follows that there is no guarantee that exercising the freedom of movement will be neutral in its effect: *da Silva Martins* at [72].

31. It is, however, not the purpose of the Regulation to harmonise social security legislation across the EU; the title of, and recital (4) to, Regulation (EC) 883/2004 emphasise that it is

concerned only with coordination. This means that there is no obligation on States to make any particular level of provision for a given class of benefit.

32. Nor is its purpose to deprive a person (a) of any entitlement at all to a class of benefit or (b) of entitlement that has been paid for by contributions or taxation, as would have been the case in *Bosmann*, *da Silva Martins* and *Franzen*. See *Hudziński* at [46]. In this case, the claimant has not been deprived of sickness benefit, as we now know that Lithuania has accepted that it is the competent State and made an award. Nor has she been deprived of a benefit for which she has paid. Attendance allowance is not a contributory benefit and she has not, as far as I am aware, contributed indirectly through general taxation.

33. States may choose to make provision when they are not the competent State. The Court of Justice of the European Union has only approved this in cases "if there are specific and particularly close connecting factors between the territory of that State and the situation at issue": *B* at [28]. Habitual residence has been accepted as a sufficient connection, as in *Bosmann*, although mere registration as being permanently resident is probably not sufficient (*B* at [29]). In this case, the claimant was habitually resident in this country by the time she made her claim for an attendance allowance. I accept that as a sufficient connection.

34. However, this is conditional on the additional provision not being "liable to affect disproportionately the predictability and effectiveness of the application of the coordination rules" in Regulation (EC) 883/2004: *Hudziński* at [67]. I come back to this later.

35. The case law shows that the Court of Justice of the European Union has prevented States from making different provision for migrant and settled workers, at least when it takes the form of refusing all entitlement rather than limiting entitlement to a top-up payment. The Court reasoned in *Hudziński* at [76] that "the application of such a rule of national law against overlapping … insofar as it appears to require … exclusion from that benefit, is such as to constitute a substantial disadvantage affecting in reality a greater number of migrant workers than settled workers who have worked exclusively in the Member State concerned, this being a matter for the national court to ascertain." In this way, the Court has balanced the improvement of standards of living and conditions of employment (recital (1) and *Bosmann* at [30]) with the coordinating effect of the Regulation.

36. In prohibiting exclusion of entitlement, the Court has, as Mr Mills pointed out, referred to the freedom of movement of workers. The flaw in his reliance on this general principle is that it proves too much by removing the statements that he cites from their context. It is beyond argument that freedom of movement is a fundamental principle of EU law and that it must not be restricted unduly. But that does not mean that it can be applied in every context and without regard to its effect on EU legislation. Mr Mills did not limit or qualify his argument by reference to any conditions other than to rely on the claimant being resident in this country as the dependent of her son who was exercising his freedom of movement as a worker. I reject that argument as presented.

37. Unlimited resort to general principles of freedom of movement, non-discrimination and equal treatment would allow the Court of Justice of the European Union and any national court applying EU law to rewrite any EU subordinate legislation to the extent that it might hamper freedom of movement. Mr Mills argued that in this case it would be an impediment to the claimant's son exercising that freedom if the claimant could not, when she joined him in her retirement, obtain social security for her care needs at a rate appropriate to the living conditions in this country. But where would this argument end? Resort to this basic principle could rewrite vast tracts of Directive 2004/38 and undermine the principle of coordination that is the stated purpose of Regulation 883/2004. The ultimate logic of the argument is to lead to increasing harmonisation of social security benefits across the EU. That is not the purpose of the

Regulation, as the Court has regularly stated. It would also allow, or even encourage, forum shopping when claimants or their families have connections with a number of States. That would be inconsistent with the coordination principle on which the Regulation is based.

38. Mr Mills argued by reference to the structure of the questions referred in *Hudziński* that the Court relied on general principles only when considering whether a State could limit entitlement to cases in which it was competent for that benefit. That cannot be right. The Court's reasoning on that issue builds on and assumes that the State has the power to make different provision. If the conditions that apply for the existence of that power do not apply, no question of different treatment arises. The Court's reasoning cannot be split as Mr Mills sought; it is cumulative. It follows that payments by States other than the competent State must not disproportionately affect the predictability and effectiveness of the coordination rules before any possibility of overriding a provision like section 65(7) arises.

39. Moreover, Mr Mills' argument is contrary to the structure of the Court's analysis. It repeats that there is no guarantee of neutrality of effect and has said that this is so "in particular where sickness benefits are concerned": *da Silva Martins* at [72]. It repeats that the State must have the power to provide for entitlement before coming to consider whether a duty is imposed to avoid different treatment. These stages would be redundant if the Court was merely concerned to apply basic principles of freedom of movement and equality of treatment.

40. Although I have rejected Mr Mills' argument as present, it is still necessary to decide in what circumstances and subject to what limitations the approach in cases like *Hudziński* applies. I broadly accept Ms Leventhal's approach, which emphasised the circumstances of the cases in which a State had been prevented from limiting entitlement if another State was competent for that class of benefit.

41. It is wise to tread carefully in this area, as it depends on the interrelation of basic principles of EU law and specific legislation, and I cannot be sure that the case law has reached its final stage of development. The cases fall into two categories. One category consists of those cases in which the application of Regulation (EC) 883/2004 would deprive the claimant of any entitlement or of entitlement that has been bought by contributions or taxes. In terms of the purpose of the Regulation, these cases are outside the scope of its coordination function. In terms of general principles, the effect of applying the Regulation would clearly constitute a significant impediment to freedom of movement and, being outside its scope, an illegitimate one. The case before me is not in this category. The other category consists of those cases in which there is potentially dual entitlement under the competent State and another State. The case before me is in this category. Dual entitlement is in principle consistent with the purpose of the Regulation, subject to sufficient connecting factors and not affecting its operation disproportionately. In terms of general principles, these come into consideration to ensure that migrant workers are not treated differently from settled workers, most of whom will be nationals. So far, these principles have only operated in cases in this category in respect of types of benefit where the Regulation envisages overlapping. In *Bosmann*, *Hudziński* and *Franzen*, the Court noted that the cases were outside the overlapping provisions. No doubt, that was part of showing that the predictability and effectiveness of the coordination rules would not be affected disproportionately. But it also serves to emphasise that the cases involved benefits where overlapping of benefits was generally anticipated. It is in that context that the Court has relied on basic principles to prevent States restricting their responsibility to cases where they are competent.

42. On the basis that attendance allowance is a sickness benefit, it is generally subject to the rule against overlapping in Article 10: see Article 54. I was not referred to any case in the second category of dual entitlement that involved sickness benefit. *Da Silva Martins* involved sickness benefit, but that was in the first category of no entitlement. Moreover, the Court emphasised in

that case that neutrality of effect cannot in particular be guaranteed for this type of benefit. Limiting the application of the *Hudziński* approach to cases in which Regulation (EC) 883/2004 anticipates that overlapping may be appropriate reflects the current state of the case law, it provides a rational basis to distinguish the cases where it applies from those where it does not, it respects the scope and structure of the Regulation, and it prevents a drift into harmonisation. In those circumstances, I do not consider that this country is precluded from making provision in the form of section 65(7). Accordingly, I confirm the Secretary of State's decision that the claimant is precluded from entitlement by virtue of section 65(7).