[2017] AACR 7

**(Secretary of State for Work and Pensions v GS (PC)
[2016] UKUT 394 (AAC))**

Judge Ward **CPC/2676/2014**
16 August 2016

European Union law – free movement of workers – whether European Health Insurance Card provides comprehensive sickness insurance for purposes of self-sufficiency under Directive 2004/38/EC

In 2004 the claimant, an Italian national, returned to the UK to live, having previously worked here as well as in Italy, Switzerland and Spain. Initially he lived off his savings and stayed with his son, who had dual British and Italian nationality, before successfully claiming jobseeker's allowance in 2009. In 2012 he successfully appealed against the Secretary of State's refusal of his claim for state pension credit, the First-tier Tribunal (F-tT) holding that he had a right of permanent residence under Article 16 of Directive 2004/38/EC based upon his residence since 2004, and that he satisfied the requirement for comprehensive sickness insurance cover under Article 7 by his possession of a European Health Insurance Card (EHIC). The Secretary of State appealed against that decision to the Upper Tribunal and among the issues before it were whether the claimant was habitually resident in the UK (or here only to "stay"), whether an EHIC satisfied the requirement for comprehensive sickness insurance cover, and which Member State was the competent state.

Held, allowing the appeal, that:

1. as the claimant's habitual centre of interests had become the UK, he had therefore become habitually resident in it. It followed that the UK was not the temporary centre of his interests, and he was not engaged in a "stay": *I v Health Service Executive,* C-255/13, EU:C:2014:1291 applied. The Italian authorities would have been justified under Article 22 in refusing any claim for the reimbursement of his medical costs on the basis of his EHIC (paragraphs 32 to 33);

2. at the date of his claim for state pension credit the claimant did not satisfy the requirement for comprehensive sickness insurance cover to a sufficient extent to establish a permanent right of residence under Article 16 of the Directive. It did not follow that there were no circumstances in which an EHIC could satisfy that requirement but the conditions governing the scope of the coverage must be considered and applied to the circumstances of the particular case (paragraphs 38 to 40);

3. enforcement of the comprehensive sickness insurance cover requirement was not disproportionate (paragraphs 42 to 46);

4. there was insufficient evidence of dependency by the claimant on his son for the requisite five years and nor was there evidence of such dependence at the date of claim for state pension credit (paragraphs 48 to 56);

5. any rights that might be conferred upon the claimant because of his Swiss retirement pension could not help him (paragraphs 58 to 59);

6. the claimant's right to reside immediately before his claim for state pension credit was solely as a jobseeker and the claimant no longer had any scope for requiring a personalised assessment of his circumstances to be carried out: *Alimanovic*, C-67/14, EU:C:2015:597 (paragraph 60).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Mr S Cooper, solicitor, appeared for the appellant.

Mrs B King, Islington Law Centre, appeared for the respondent.

Decision: The appeal by the Secretary of State is allowed. The decision of the First-tier Tribunal sitting at Fox Court on 24 July 2013 under reference SC242/13/02281 involved the making of an error of law and is set aside.

Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I re-make the decision as follows:

The claimant's appeal against the decision dated 20 December 2012 refusing him state pension credit on the ground that he lacked the right to reside is dismissed.

REASONS FOR DECISION

1. This decision explores issues concerning how the requirement for comprehensive sickness insurance cover ("CSIC") may be satisfied, in order to demonstrate that a claimant is self-sufficient for the purposes of Article 7(1)(b) of Directive 2004/38/EC ("the Directive"). In particular, while *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988 provides binding authority that the ability to access NHS treatment does not of itself amount to CSIC, the present case examines whether, and if so when, it may make a difference that the person reliant on the NHS is the holder of a European Health Insurance Card ("EHIC").

2. Article 7 provides, so far as material:

> "1. All Union citizens shall have the right to residence on the territory of another Member State for a period of longer than three months if they:
>
> > (a) …; or
> >
> > (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
> >
> > (c) …; or
> >
> > (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

3. By Article 2(2)(d), the expression "family member" includes "the dependent direct relatives in the ascending line".

4. The claimant, an Italian national, was born on 16 October 1947. He had lived in the UK between 1970 and 1984, but left when he separated from his wife. At various points in his career he had also worked in Spain, Switzerland and Italy. He returned to the UK in or around January 2004 with savings of around £20,000. He had an EHIC, issued by the Italian authorities. He stayed initially with his son. He hoped to set up a coffee shop but there is no evidence going to the efforts made to do so: in any event, it did not come to fruition. In 2009 he claimed state pension credit; it appears the claim was unsuccessful and it is said that he then withdrew an appeal on advice from the Department for Work and Pensions (DWP). Instead he claimed jobseeker's allowance, successfully, until 16 October 2012, when he turned 65. He then claimed state pension credit. On the relevant form he indicated he planned to stay in the UK "indefinitely".

5. In the UK the claimant has a son, who is a British/Italian dual national, and grandchildren. His ex-wife is also in the UK.

6. His claim was rejected on 20 December 2012. On 24 July 2013 the First-tier Tribunal allowed his appeal. It held that he had acquired a right or permanent residence (ie under Article 16 of the Directive), based on a period of 4 years 10 months from January 2004 of residing as a self-sufficient person and a further 2 months of residing as a jobseeker. As regards the requirement for CSIC, the tribunal relied on his possession of the EHIC.

7. On 28 May 2014 the Secretary of State, having been granted permission to appeal by the First-tier Tribunal, lodged notice of appeal, challenging (in particular) the reliance on the EHIC, though it is clear that he also does not accept that the tribunal was entitled to find that the claimant had sufficient resources to meet that limb of the requirements of Article 7(1)(b) either.

8. In parallel with the appeal process in the Upper Tribunal, efforts were made by both parties to establish whether the claimant had any pension rights from his former employments in Switzerland, Spain and/or Italy. He does in any event have a (partial) UK retirement pension (initially of £72.30 weekly) from his work in the UK, which has been payable to him from 16 October 2012. On 18 August 2015 the Swiss authorities awarded him a partial Swiss retirement pension (initially of SFr75 monthly) backdated to 1 November 2012. After a prolonged period, no replies had been received from the Italian or Spanish authorities and I indicated (without disagreement from either party) that the case was to proceed on the footing that no response of substance from those two countries would be forthcoming. Those advising the claimant have suggested that pension contributions made by him in those countries may have ended up not being credited to him.

9. I directed that the Upper Tribunal proceedings would first focus on whether the tribunal had been right to conclude that the EHIC represented CSIC. If it did not do so, then an essential requirement under Article 7(1)(b) was not met and whether or not the tribunal had been entitled to conclude that he had had sufficient resources in the period 2004–2009 would not need to be examined.

10. The case for the claimant was (in barest outline):

(a) the tribunal had correctly held that reliance on an EHIC constituted CSIC;

(b) if that was wrong, it was in any event disproportionate to enforce the requirement for CSIC against the claimant so as to deprive him of a right of permanent residence;

(c) during the 2004–09 period he had in the alternative been self-employed while trying to set up a coffee shop; and

(d) (as reformulated) during that period he was alternatively dependent on his son.

11. To that I additionally invited Mr Cooper to address whether following the decisions of the CJEU in *Dano,* C-333/13, EU:C:2014:2358 and *Alimanovic*, C-67/14, EU:C:2015:597 and that of the Supreme Court in *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1; [2016] AACR 26 there remained any scope for a case by case examination of a claimant's circumstances, as indicated in *Brey,* C-140/12, EU:C:2013:565; and if so, given that until shortly before his claim for state pension credit the claimant had had a right to reside, albeit as a jobseeker, the situation was such as to attract an obligation to carry out such an assessment.

12. I deal with these various points in turn, considering the relevant law under the section to which it relates.

Could reliance on an EHIC constitute CSIC in the circumstances of this case?

13. Regulation 1408/71 and the implementing Regulation 574/72 (together "the First Regulations") applied until 30 April 2009. Thereafter Regulation 883/2004 and its implementing Regulation 987/2009 (together the "Second Regulations") applied. For the period January 2004–January 2009 which was relied upon, it was accordingly the First Regulations which were relevant. In any event, substantially equivalent provisions can be found in the Second Regulations.

14. Article 22[1] (as amended by regulation 631/2004/EC) provided (emphasis added):

> "1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:
>
> (a) whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State, taking into account the nature of the benefits and the expected length of the stay;
>
> (b) and (c): [not material]
>
> shall be entitled:
>
> > (i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;
> >
> > (ii) [not material]
>
> …"

15. Article 1(i)[2] indicated that "*stay* means temporary residence".

16. Article 36[3] dealt with reimbursement between institutions, as follows:

> "1. Benefits in kind provided pursuant to this Chapter by the institution of one Member State on behalf of the institution of another Member State shall be fully refunded.
>
> 2. The refunds referred to in paragraph 1 shall be determined and made in accordance with the procedure provided for by the implementing regulation referred to in Article 98, either on production of proof of actual expenditure or on the basis of lump-sum payments.
> In the latter case, the lump-sum payments shall be such as to ensure that the refund is as close as possible to actual expenditure.

[1] In Regulation 883/04 the equivalent is Article 19
[2] To like effect, Article 1(k) of Regulation 883/04
[3] In Regulation 883/04, see Article 35.

> 3. Two or more Member States, or the competent authorities of those States, may provide for other methods of reimbursement or may waive all reimbursement between institutions under their jurisdiction."

17. Further provision as to the operation of Article 22 was made by Articles 21–24 of Regulation 574/72.

> "Article 21
>
> Benefits in kind in the case of a stay in a Member State other than the competent State
>
> 1. In order to receive benefits in kind under Article 22(1)(a)(i) of the Regulation, an employed or self-employed person shall submit to the care provider a document issued by the competent institution certifying that he is entitled to benefits in kind. That document shall be drawn up in accordance with Article 2. If the person concerned is not able to submit that document, he shall contact the institution of the place of stay which shall request from the competent institution a certified statement testifying that the person concerned is entitled to benefits in kind.
>
> A document issued by the competent institution for entitlement to benefits in accordance with Article 22(1)(a)(i) of the Regulation, in each individual case concerned, shall have the same effect with regard to the care provider as national evidence of the entitlements of the person insured with the institution of the place of stay."

Paragraph 2 allows two Member States or their competent authorities to agree on other implementing provisions.

18. That regulation also provided at Article 114 a dispute mechanism:

> "In the case of a dispute between the institutions or competent authorities of two or more Member States, either as to which legislation should apply under Title II of the Regulation, or as to which institution should provide the benefits, the person concerned who could claim benefits if there were no dispute shall provisionally receive the benefits provided for by the legislation administered by the institution of the place of residence or, if the person concerned does not reside in the territory of one of the Member States concerned, the benefits provided for by the legislation administered by the institution to which his claim was submitted in the first instance."

19. There were additionally bilateral agreements between the UK and Italy, the last of which expired in 2010 (ie part way through the period with which we are concerned). It is not directly in evidence but has been described by the Secretary of State as making provision for reimbursement to be calculated using an agreed formula. This is consistent with its description in Annex 1 of Regulation 987/2009 as:

> "The Arrangement … establishing other methods of reimbursement of the costs of benefits in kind provided under this Regulation by both countries with effect from 1 January 2005."

20. Provision as to the legislation to which a person was subject was made by Article 13(2) of Regulation 1408/71 (as amended by Regulation 1606/98/EC):

> "1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.
>
> 2. Subject to Articles 14 to 17:
>
> (a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;
>
> (b)–(e) [not applicable]
>
> (f) 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 Articles 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."

21. In the case of the UK, this was subject to Annex VI, paragraph 18(a[4]) of which provided:

> "A period of subjection to United Kingdom legislation in accordance with Article 13(2)(f) of the Regulation may not:
>
> > (a) be taken into account under that provision as a period of subjection to United Kingdom legislation for the purposes of Title III of the Regulation,
> > … ."

22. It has for some time been accepted by the Secretary of State that if the UK has a right to recharge the cost of healthcare to another Member State, that satisfies the requirement for CSIC. That concession was made by the Secretary of State, and accepted by me, in *SG v Tameside Metropolitan Borough Council* [2010] UKUT 243 (AAC). Accordingly, in the first instance it was necessary to establish whether this could be achieved via the EHIC.

The "competent state" issue

23. The Secretary of State submits that the claimant had long since ceased to fulfil the requirements of Article 13(2)(a) and that, instead of Italy being the "competent state" through that provision, the UK had become the competent state through Article 13(2)(f). That meant there was no other Member State to whom the UK could look to foot the bill for any treatment the claimant might have required and thus, in the absence of a suggestion that he had CSIC on any other basis, that he had no CSIC and his claim to self-sufficiency must fail.

24. I raised the question of paragraph 18(a) of Annex VI. To that the Secretary of State indicates that his position is that the provision:

> "means that periods where the UK (as the state of residence) is competent as a result of the 'catch all provision' found in Article 13(2)(f), and the person in question is not making National Insurance contributions, will not be taken into account in relation to

[4] The provision is variously described in the sources as "18(a)" and "18(i)": nothing turns on the distinction

> accrual of pension or invalidity benefit entitlement. So in the event that the person became incapacitated or reached pension age, the periods of time where the UK was competent under Article 13(2)(f) are not considered to be 'insured residence' for the purpose of calculating pro-rata entitlement to a pension or invalidity benefit. However during those periods the UK would remain competent for healthcare and cash sickness benefit."

Therefore, it is said, the provision has no effect on the Secretary of State's submission in [23] because the competence referred to within that submission is in relation to healthcare, the UK remains the competent state, there is no scope to send Italy a bill for the claimant's healthcare and the claimant lacks CSIC.

25. I have been offered no explanation of why the Secretary of State's position should be limited as set out in [24], although I can see that if it is not, a wide interpretation might lead to some anomalous results. On the language of paragraph 18, however, while I can see that the position propounded by the Secretary of State might amount to one instance falling within paragraph 18 (for instance when responsibility for pensions is being determined under Article 40), Article 22 does also fall within Title III and at first glance the wording of paragraph 18 of Annex VI would appear wide enough to cover it. My own researches suggest that paragraph 18 was added by Article 1(12)(f)(vi) of Regulation 2195/91. The recitals to that regulation record that Article 13(2)(f) was introduced following the decision of the Court of Justice in *Ten Holder,* C-302/84, EU:C:1986:242 and that Annex VI was to be amended *(inter alia* by the introduction of paragraph 18) "to clarify the implementation of this new provision". None of this sheds much light and no other material is available to me.

26. I only need to rule on the correctness of the Secretary of State's submission if on the assumption that Italy is indeed the "competent state", that would avail the claimant by enabling the UK to make a successful claim to Italy for the cost of any treatment provided to him.

A "stay" for Article 22 purposes?

27. The claimant relies on *I v Health Service Executive,* C-255/13, EU:C:2014:1291. In that case the late Mr I, an Irish national, had been taken very seriously ill when on holiday in Germany. He was effectively compelled by his condition to remain in Germany, though his desire was to return to Ireland. He had limited connections with Germany. He had no bank account there, nor owned any property. He received no allowance or benefit there. His bank account was with an Irish bank; he remained in regular contact with his two children both of whom lived in Ireland; he spoke no German and had made no effort to integrate in Germany. On 25 November 2011 (and so when the Second Regulations were in force) he was, after some 11 years, refused a certificate in Form E112 by the Irish authorities. That form was not the predecessor to the EHIC, which was Form E111, but the form applicable to obtaining (by then under Article 20 of Regulation 883/2004) medical treatment outside the Member State of residence from "the institution of the place of stay". The interplay between "residence" and "stay" therefore arose in that case as it does in the present, even though the legislative context was different.

28. The Court held:

> "42. The system introduced by Regulation No 1408/71 used the residence of the person concerned as one of the connecting factors for the determination of the legislation

applicable (see, to that effect, *Wencel*, EU:C:2013:303, paragraph 48). The same applies as regards Regulation No 883/2004.

43. According to Article 1(j) of Regulation No 883/2004, the term 'residence' refers to the place where a person habitually resides. That term has an autonomous meaning specific to EU law (see, by analogy, Case C-90/07 *Swaddling* EU:C:1999:96, paragraph 28).

44. As the Court has held in relation to Regulation No 1408/71, where a connection may be established between a person's legal situation and the legislation of a number of Member States, the concept of the Member State in which a person resides refers to the State in which that person habitually resides and where the habitual centre of his interests is to be found (see Case 13/73 *Hakenberg* EU:C:1973:92, paragraph 32; *Swaddling* EU:C:1999:96, paragraph 29; and *Wencel* EU:C:2013:303, paragraph 49).

45. In that context, account should be taken in particular of the family situation of the person concerned; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances (see, to that effect, Case C-102/91 *Knoch* EU:C:1992:303, paragraph 23, and *Swaddling* EU:C:1999:96, paragraph 29).

46. The list of factors to be taken into account in determining a person's place of residence, as developed by case-law, is now codified in Article 11 of Regulation No 987/2009. As the Advocate General observed at point 32 of his Opinion, that list, which is not exhaustive, does not establish any order of precedence for the various criteria set out in Article 11(1).

47. It is apparent from the foregoing that, for the purposes of the application of Regulation No 883/2004, a person cannot have simultaneously two habitual residences in two different Member States (see, to that effect, *Wencel* EU:C:2013:303, paragraph 51), given that, under that regulation, an insured person's place of residence is necessarily different from his place of stay.

48. In that regard, since the determination of the place of residence of a person who is covered by insurance for social security purposes must be based on a whole range of factors, the simple fact that such a person has remained in a Member State, even continuously over a long period, does not necessarily mean that he resides in that State within the meaning of Article 1(j) of Regulation No 883/2004.

49. Indeed, the length of residence in the Member State in which payment of a benefit is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Regulation No 1408/71 (see, to that effect, *Swaddling* EU:C:1999:96, paragraph 30).

50. It is true that Article 1(k) of Regulation No 883/2004 defines 'stay' as 'temporary' residence. However, as observed by the Advocate General at points 43 to 46 of his Opinion, such a 'stay' does not necessarily involve a visit of short duration.

51. First, as is apparent from the wording of Article 1(va)(i) of Regulation No 883/2004, Articles 19 and 20 of that regulation are applicable to benefits in kind, including 'long-

> term care' benefits in kind. Consequently, a person may be regarded as staying in another Member State even if he is in receipt of benefits over a long period.
>
> 52. Second, whereas Article 22(1)(i) of Regulation No 1408/71 provided that the length of the period during which benefits were provided was to be governed by the legislation of the competent State, that rule no longer appears in Article 19(1) or Article 20(1) and (2) of Regulation No 883/2004, which have essentially replaced Article 22(1)(a) to (i) of Regulation No 1408/71.
>
> 53. The mere fact that I stayed in Germany for 11 years is not therefore sufficient in itself alone for him to be regarded as having been resident in that Member State.
>
> 54. For the purpose of determining I's habitual centre of interests, the national court must take account of all the relevant criteria, in particular those identified in Article 11(1) of Regulation No 987/2009, as well as, in accordance with Article 11(2) of that regulation, the intention of the person concerned as to his actual place of residence. That intention must be assessed in the light of the objective facts and circumstances of the case in the main proceedings; a mere declaration of intention to reside in a particular place is not, in itself, sufficient for the purpose of the application of Article 11(2)."

29. In the present case, when the claimant came to the UK in 2004 he said his stay was "indefinite". The more natural meaning in its context is that it was intended to continue without any intended limitation of time, not that it was for a limited period but one whose actual extent was unknown. He had lived in the UK for 14 years previously and had worked enough to become entitled to a state retirement pension. He has a national insurance number and will have been subject to UK tax. He was registered with a doctor. He had come back in his late 50s to the UK where his son, whom he had been in the habit of visiting in the years prior to 2004, and grandchildren were. He had intended to open a coffee shop, something which would require the investment of both time and money and which he would have been unlikely to have undertaken had his residence merely been intended to be temporary. While he does not own any property in the UK, he does not own any elsewhere either. While in the period 2004–2008 he had travelled abroad on occasions and stayed in Italy for a month or so and a few weeks in the USA, he maintained his home in the UK. When abroad, he stayed with friends as their guest but his family was in the UK and that was where he considered his home to be.

30. Mrs King suggested in earlier written submissions that the residence of a person who does not have a permanent right to reside must necessarily be "temporary". That would be to apply the wrong legal test to the question of habitual residence: see C-255/13 at [43].

31. She sought in oral submissions, somewhat faintly, in seeking to maintain the position that what was involved was a "stay", to rely on evidence that the claimant regarded the UK "as his second home". It seems to me that in its context the expression is at least as consistent, if not more so, with regarding the UK as a home from home in which to stay indefinitely as it is with the view that Italy was his place of habitual residence and the United Kingdom an ancillary place of stay (in the sense in which, for instance, those fortunate enough to own a holiday home might refer to it).

32. In my view, the claimant's habitual centre of interests had become the UK (as indeed Mrs King in paragraph 27 of her skeleton argument had previously accepted) and so he had become habitually resident in the UK. It follows, applying C-255/13 (and see also paragraph 41 of the

Opinion of the Advocate General EU:C:2014:178, whose conclusions on the point were essentially followed by the Court) that it was not the temporary centre of the claimant's interests, and so he was not engaged in a "stay" in the UK.

33. I conclude therefore that the Italian authorities would have been justified under Article 22 in refusing any claim made to them to reimburse the cost of the claimant's health treatment relying on his EHIC. That conclusion is unaffected by the bilateral agreements in force for part of the time, which on the available material deal with the calculation of the basis of reimbursement rather than creating a right to reimbursement where there would otherwise be none.

Reliance on the EHIC: conclusions

34. Paragraph 18 of Annex VI does not say that a person who otherwise be considered resident under Article 13(2)(f) is not so resident. Rather, it provides that such residence is not to be taken into account for certain purposes.

35. If paragraph 18 does operate so as to exclude residence in the UK from being taken into account under Article 13(2)(f) for present purposes, I do not see how it could create responsibility in Italy under Article 13(2)(a) where otherwise there would be none. In any event, even if Italy somehow was the competent state, the UK could not successfully have made a claim to Italy relying on the EHIC in this case because the claimant was not engaged in a "stay".

36. If paragraph 18 of Annex VI does not have such a wide effect, but the narrower one submitted by the Secretary of State, then Italy was no longer the competent state and the EHIC it had previously issued would not have given the UK a right of reimbursement under Article 22.

37. There is a decision of the Administrative Commission[5] (S1 of 12 June 2009), paragraph 12 of which suggests that even if an EHIC has not expired, its continuing use may be inappropriate where there has been a change in responsibility between Member States for a person's sickness benefits. The Secretary of State submits that this is the case here and that the decision provides a further indication that this is how the system is intended to operate. I agree. It also serves to indicate that the issue of an EHIC is not conclusive in fixing liability on the State which has issued it.

38. Consequently, the claimant was unable to satisfy the requirement for CSIC to a sufficient extent in respect of the period relied upon in order to establish a permanent right of residence under Article 16 of the Directive at the date of his claim for state pension credit.

39. It follows that the First-tier Tribunal erred in law by failing to consider the legislative regime applicable to the EHIC at the material time, without which it was unable to determine in a legally correct way whether it could assist the claimant. As we have seen, when that is done, it is evident that it cannot.

40. It does not however follow from what I have said that there are no circumstances in which reliance could be placed on an EHIC as amounting to CSIC. The conditions governing the scope of the coverage must be considered and applied to the circumstances of the case. While, as

[5] As to the Administrative Commission, see Regulation 1408/71, Articles 80 and 81 and Regulation 883/04, Articles 71 and 72

C-255/13 – with its exceptional facts – demonstrates, very lengthy periods would not necessarily always be precluded from constituting a "stay", it will be for temporary – and so, in practice though not as a matter of law, probably shorter – periods that such reliance is most likely to be possible.

41. To deal briefly with points regarding the requirement for CSIC which have arisen in passing, I should add here that it is not relevant whether the claimant did or did not actually require healthcare during the period 2004–2009: the question is whether the UK was adequately protected against the risk of a claim arising : see *W(China) and X (China) v* the Secretary of State for the Home Department [2006] EWCA Civ 1494 at [10]; *FK (Kenya) v* the Secretary of State for the Home Department [2010] EWCA Civ 1302 at [15] and *Ahmad v* the Secretary of State for the Home Department [2014] EWCA Civ 988 at [52]. Mrs King argued that under the NHS charging regime, the claimant would be exempt from charges for treatment: however, that still leaves the cost burden on the host Member State, precisely what the CSIC requirement seeks to avoid. She further suggests that the line of cases culminating in *Ahmad i*s distinguishable, but the basis on which she does so is that in the present case the claimant was subject to the EU regulations regarding co-ordination of social security (ie the First Regulations) and so – even though access to NHS treatment is of itself insufficient to amount to CSIC – possession of an EHIC should be accepted as sufficient. That is essentially a reiteration, differently expressed, of the point which I have considered, and rejected, above.

Disproportionate to enforce against the claimant the requirement for CSIC so as to deprive him of right of permanent residence

42. Conceptually this is possible, as *Baumbast,* C-413/99, EU:C:2002:493 tells us. However, it has become increasingly clear that the window through which a claimant has to squeeze is a very narrow one. Thus in *Mirga*, Lord Neuberger, giving the judgment of the Supreme Court, observed:

> "69. Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked."

43. In the circumstances where the UK cannot claim against Italy, either because the UK, not Italy, is the competent state, or because the claimant's residence in the UK from 2004 was not temporary, or both, he effectively had no sickness insurance cover at all. This may be contrasted with Mr Baumbast, who had very extensive cover which was however, deficient in one particular respect.

44. Lord Neuberger further noted that Mr Baumbast was not seeking social assistance. If that be a further factor, the present claimant is doing so, though that factor would not materially affect my conclusion.

45. While the facts of every case are different and it would not be right to dwell unduly on the specific detail of *Baumbast*, it can be seen that the order of magnitude of the departure from

the CSIC requirement is radically different. The CSIC requirement fulfils a very real purpose in protecting the budget of Member States and, as *Mirga* makes clear, must not lightly be undermined through the use of proportionality. True it is, that the claimant has worked for many years in the UK and then has exercised his rights of freedom of movement in the EU and the EEA, entirely consistently with the aims of the EU Treaties, but the rights conferred by the Treaties in this area are, as Article 21 TFEU makes clear, "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect," of which the requirement for CSIC is one.

46. While it is very unfortunate if it is indeed the case that the claimant's insurance contributions in Italy and Spain were not credited to him in those countries, resulting in his not having pensions from those countries to which he would otherwise be entitled, it does not follow that it is proportionate for the protection afforded to the UK by the CSIC requirement to be waived to alleviate hardship the claimant may have experienced in consequence of actions taken or not taken in those other countries.

Self-employed trying to set up a coffee shop

47. I refused to allow Mrs King to pursue this point. It had not been raised below. No evidence had been led going to it. She was still without any real instructions as to what it was the claimant said he had been doing for the five year period concerned. It seemed to me that the claimant was likely to face insurmountable obstacles in arguing that he had been self-employed for such a long period attempting unsuccessfully to set up a business.

Dependency on his son

48. As presented to me, the argument was that the claimant should be allowed an "any time" revision, on the grounds that the DWP had been in official error, of the decision which had refused an earlier claim for state pension credit made in April 2009. Such a revision was sought on the basis that the claimant had been a dependent family member of an EU national. I have no power to do that. The 2009 decision is not the one that was under appeal to the First-tier Tribunal and so the subject of the present appeal to the Upper Tribunal. Any application for a revision of that decision would have to be pursued, if at all, with the DWP.

49. However, the 2009 decision is not determinative in the present appeal of whether the claimant was a dependent family member in the period 2004-2009. It would not fall within the limited categories of findings of fact or other determination which are conclusive under section 17 of the Social Security Act 1998.

50. As to whether the claimant should be permitted to raise in the Upper Tribunal proceedings an argument that was (as I conclude) not raised below, unlike the claimed self-employment, evidence had been given to the First-tier Tribunal going to the issue.

51. The statement of reasons provided:

> "19. I accept that he cannot [be] considered as a dependant because of the dual nationality of his son. There was no need to query their financial/dependency situation much further in this context.
>
> *Self Sufficiency*

> 20. Up until November 2008, he had no need to claim assistance from the State. He had savings, and he had friends and family that were able to provide him with some financial support. In his oral evidence he came across as a proud man. He did not accept that he had been a dependant of his son, and had received little support from him save for help with accommodation on his arrival and, and occasional assistance thereafter. His son confirmed that the assistance he provided was occasional. [The claimant] also told me that he had no need to borrow money during that time, and lived reasonably frugally. He made a lot of use of his friends and family for accommodation."

52. I return below to paragraph 19 of the statement. As to paragraph 20, although the findings are made in the context of self-sufficiency, they are in my view equally relevant to the claim now advanced of permanent residence based on past dependency.

53. What is envisaged by the European authorities on dependency is a "situation of real dependence" (*Jia*, C-1/05, EU:C:2007:1 at [42] and *Reyes,* C-423/12, EU:C:2014:16 at [24]). Likewise, C-316/85 *Lebon* proceeded on an assumption (see paragraph 33 of the Advocate General's Opinion EU:C:1987:4) that, despite the minimex (the Belgian benefit claimed in that case), substantial contributions from relatives were often necessary.

54. In the present case, whatever the position in the period immediately following the claimant's arrival when he stayed with his son, thereafter, when the assistance provide was only "occasional", that was insufficient to show real dependency in fact for the requisite five year period. I therefore reject the submission to the effect that the claimant could rely on a permanent right to reside based on having been a dependent family member.

55. There were however two potential ways in which dependency might have arisen in the First-tier Tribunal proceedings – first, on the basis discussed above that by the date of claim the claimant had amassed five years' lawful residence as a dependent relative and second, on the basis that as at the date of claim, the claimant was a dependent relative.

56. The argument that the claimant was a dependent of his son had been raised in written pre-hearing submissions before the First-tier Tribunal, where it had been met by a submission from the DWP that the point was not open to the claimant because the Immigration (European Economic Area) (Amendment) Regulations (SI 2012/1547) had excluded (with effect from 16 July 2012) dual nationals, such as the claimant's son, from the definition of "EEA national". It seems likely that the submission to the First-tier Tribunal was taken (correctly in my view) by both the DWP and the tribunal as being one of current dependency at the date of claim. The date of claim post-dated the coming into force of SI 2012/1547. Whether the exclusion of dual nationals, understood to have been undertaken in purported transposition of the CJEU's decision in *McCarthy,* C-434/09, EU:C:2011:277 is justified in EU law has since been the subject of a reference (C-165/16) under Article 267 TFEU made by the Administrative Court in *Lounes* [2016] EWHC 436 (Admin), upon which the CJEU has yet to adjudicate. If those Regulations are compatible with EU law, then the Secretary of State would have had a complete answer. If they are not, it would have depended on whether there was evidence of real dependency in fact leading up to the date of claim. Page 38 of the bundle (an additional response from the Pension Service) refers to what is described as "the additional evidence received from [the claimant's representative] on 30 January 2013 and 18 February 2013 which states that [the claimant] would like to amend his grounds of appeal to assert a right to reside as a family member". Curiously, the documents of 30 January and 18 February do not appear to have been included in the bundle; however, the analysis in the "Additional response" correctly notes that evidence of dependency

of the claimant on his son for material support would normally be required before going on to observe that a dependency claim would be precluded because of SI 2012/1547. That view was plainly accepted by the First-tier Tribunal (see statement, paragraph 19.) From the additional response by the Pension Service, I infer that the letters of 30 January and 18 February were in the nature of applications or submissions but in any event did not include evidence going to current dependency at the date of claim, nor is there any elsewhere in the case papers (including the record of proceedings). Therefore, however *Lounes* comes to be decided, the claimant could not have succeeded on the evidence.

57. The claimant has been represented throughout. No point has been taken that, because of an arguably wrong view of the validity of SI 2012/1547, he was wrongly and unfairly excluded by the tribunal from giving evidence going to current dependency at the date of claim which might have availed him. I have been offered no evidence to suggest that he was so dependent.

Right of reimbursement from Switzerland

58. I proceed on a – possibly simplistic – assumption that the social security arrangements between the European Union and Switzerland are such that Regulation 1408/71 did, and Regulation 883/04 now does, apply to Switzerland in the same way as to an EU Member State. Further detail is not required. As at the date of the claim to pension credit (12 December 2012) the claimant had a right to a Swiss pension, albeit that pension was only awarded at a later date, backdated to 1 November 2012. Even if the entitlement to the Swiss pension might have, for that short period, enabled the UK to recover the cost of medical treatment from Switzerland (and I refer briefly below to a potential difficulty in that view), it would not have helped the claimant establish five years' lawful residence. He had in any event been a jobseeker between August 2009 and 12 December 2012 and so during that period resided in accordance with the Directive in any event but he would still have needed to establish a right of residence for the period December 2007 to August 2009. For the reasons given above claims to a right to reside in that period based on self-sufficiency and any based on being a dependent family member fail.

59. There is then the question of whether such a right of reimbursement (if it exists) could be relevant to any residual right there may be to a personalised assessment of the claimant's circumstances following *Brey*. This is not a case where, even with the benefit of the entitlement to the Swiss pension and any putative right of recovery of health costs from Switzerland, the claimant was self-sufficient immediately before his claim: his British and Swiss pensions fell significantly below the guarantee credit for state pension credit and he had additionally been dependent on housing benefit for his accommodation. If he had previously been self-sufficient at that point, even if not for five years, if one were to take the most generous view of the residual applicability of *Brey* following a number of decisions narrowing its ambit, a personalised assessment might have been required and it might have been necessary to determine whether the Swiss pension did indeed confer a right to recoup health costs or whether any right there might otherwise have been was defeated by the operation of Article 23 of Regulation 883/04, bearing in mind that the claimant was also receiving a UK pension; however, that is not the present case.

Any other basis for a personalised assessment?

60. The interaction between proportionality and personalised assessments following *Brey* remains somewhat unclear on the present state of the law. However, as the claimant's right to reside immediately before his claim for state pension credit was solely as a jobseeker, there is even on the most generous view of *Brey* to the claimant no longer any scope for requiring a

personalised assessment of his circumstances to be carried out: see *Alimanovic* [55]–[62]. That case excluded such an assessment in respect of those who fall within Articles 14(4)(b) and 24(2) of the Directive. While Ms Alimanovic had previously worked but was no longer able to retain "worker" status, whereas the present claimant had not worked at all since his return to the UK, there is no principled basis for putting him in a better position with regard to the ability to claim a personalised assessment than a former "worker", now a jobseeker, would have been in.