UPPER TRIBUNAL CASE NO: CA/2023/2017

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC064/16/01092, made on 9 May 2017 at Southampton , did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. The issue

1. The issue in this case is whether the Secretary of State was entitled to remove the claimant's award of attendance allowance on the ground that the United Kingdom was not her competent State for sickness benefits when she had been given indefinite leave to remain in this country before her country acceded to the EU and had an award of attendance allowance before section 65(7) of the Social Security Contributions and Benefits Act 1992 came into force. The answer is: yes.

B. History

2. The claimant is Bulgarian and was born on 1 October 1926. She came to this country to live with and be cared for by her daughter and son-in-law on 4 November 2006. Bulgaria had not, at that time, joined the EU, so the claimant's right to enter and remain was governed by domestic immigration legislation under the Immigration Act 1971. She was given indefinite leave to remain.

3. Bulgaria joined the EU on 1 January 2007. The claimant made a claim for an attendance allowance on 20 July 2011 and received an indefinite award at the higher rate. That award was made on 25 October 2011.

4. A few days later, on 31 October 2011, section 65(7) of the Social Security Contributions and Benefits Act 1992 came into force:

> (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.

That provision was introduced to take account of a decision of the Court of Justice of the European Union that the care component of disability living allowance was a sickness benefit and therefore potentially exportable. Previously, the legislation had been based on the assumption that it was not a sickness

benefit. Attendance allowance is directly comparable to the care component of disability living allowance and the position is the same.

5. The change in the legislation allowed the Secretary of State to supersede the decision awarding an attendance allowance to the claimant. The ground for supersession was that there had been a change of circumstances. It does not matter that the change was a change to the legislation governing attendance allowance rather than a change to the claimant's health or needs. Nor does it matter that the claimant's award was an indefinite one. All awards are subject to the possibility of revision, supersession or appeal. Section 10 of the Social Security Act 1998 authorises supersession.

6. The issue therefore arose whether Bulgaria or the United Kingdom was the competent State for the payment of sickness benefits to the claimant. As she was receiving a pension from Bulgaria, that State was competent in respect of sickness benefits by virtue of Article 25 of Regulation 883/2004. The claimant was receiving attendance allowance and state pension credit, but they are not pensions for this purpose.

7. The Secretary of State did not supersede the decision awarding the attendance allowance until 18 May 2016. It took effect from the date when the legislation changed, just over four and a half years earlier, with the result that the claimant had been paid benefit to which she was no longer entitled. Nevertheless, the overpayment was not recoverable from her, so she will not have to repay any of the benefit to the Department for Work and Pensions.

8. The claimant exercised her right of appeal to the First-tier Tribunal, but without success. Although the tribunal dismissed her appeal, it gave permission to appeal to the First-tier Tribunal. The Secretary of State has been represented by Ms Zoe Leventhal of counsel, who has made a detailed submission setting out and analysing the issues. The claimant has been represented by her son-in-law.

C. The arguments for the claimant

9. The points made by the claimant's representative in reply to the appeal concern the relationship between domestic immigration law, EU law, and domestic social security law. In summary, he argues that the claimant remains entitled to her award of attendance allowance by virtue of having a status under immigration law and that Bulgaria's accession to the EU has had no effect on her award, not least on account of the transitional provisions relating to Bulgaria's accession. I do not accept those arguments.

10. In 2006, the claimant was given leave to enter the United Kingdom and indefinite leave to remain. Those rights were conferred under the Immigration Act 1971. Her entitlement to attendance allowance was governed by the social security legislation. The only role for immigration law is that it can be used to prevent a claimant from having access to public funds under section 115 of the Immigration and Asylum Act 1999. In her case, that restriction was not applied.

11. When Bulgaria joined the EU, she became entitled to her rights under EU law and subject to the restrictions and qualifications that it imposed. That

included being subject to the EU social security co-ordination legislation. There was nothing in the transitional provisions for Bulgaria that affected the operation of that legislation in the claimant's circumstances. When EU law was clarified and attendance allowance was recognised as a sickness benefit, it came within the scope of the co-ordination legislation. At that stage, this country altered its domestic social security law to limit entitlement to attendance allowance to those for whom the United Kingdom would be the competent State. Immigration law has nothing to do with either EU social security co-ordination or with the United Kingdom's decision to limit its welfare provisions to those for whom it is required to provide under the co-ordination provisions.

12. Let me put that in simpler terms. The fact that the claimant was not excluded from entitlement to attendance allowance under the immigration legislation did not confer on her an inalienable right to receive an award or to retain one once made. It did not prevent her being barred from entitlement by reference to EU law. That is because immigration law does not confer entitlement to attendance allowance; all it does is to bar access. In the claimant's case, it did not bar access to an allowance. That left it open to the legislature to impose a restriction under domestic social security legislation.

D. Article 1, Protocol 1

13. It is also necessary to consider whether the claimant could claim protection for her award under human rights law. Article 1 of Protocol 1 to the European Convention on Human Rights provides:

> THE FIRST PROTOCOL
>
> ARTICLE 1
>
> PROTECTION OF PROPERTY
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> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

14. I can deal with this argument briefly, because Ms Leventhal has dealt with it in detail and I can gratefully adopt her analysis, relying as it does in part on my analysis in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176 (AAC).

15. The most fundamental objection to the application of this provision is that legislation can only be challenged on the ground that it was manifestly without reasonable foundation. That is a very difficult test to satisfy, especially in the area of the deployment of limited funds to welfare benefits: *R (MA) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550. That is especially so when this

country was doing no more than aligning itself provision with the terms of EU law.

16. It is clear from the terms of the Article that it is not absolute. It is subject to provision made in the public interest and subject to conditions provided for by law and by the general principles of international law. It is surely in the public interest for the United Kingdom to comply with EU law; I decided in *IG* that the United Kingdom was not entitled to award an attendance allowance when it was not the competent State. And the terms of section 65(7) make clear the circumstances in which a claimant is barred from entitlement.

Signed on original
on 09 April 2018

Edward Jacobs
Upper Tribunal Judge