THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CDLA/0882/2017
[2020] UKUT 53 (AAC)

AH V SECRETARY OF STATE FOR WORK AND PENSIONS

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC322/16/01312
Decision date: 19 December 2016
Venue: Ashford

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the claimant is not entitled to a disability living allowance on her claim that was made on 30 October 2013 and refused on 29 January 2014 (as revised on 19 May 2015).

REASONS FOR DECISION

1. If someone is engaged in activity as a self-employed person in one State, are members of their family required to claim sickness benefits in that State, even if they are habitually resident in another State? That is the issue that arises in this case. Two questions arise. First, is the claimant entitled to a disability living allowance provisionally on the basis that there was a difference of views between this country and Belgium over which is competent to pay her a sickness benefit? Second, if she is not, is she entitled to the allowance on the basis that the United Kingdom is the competent State? The answers depend on the interpretation and application of the EU social security co-ordination legislation in Regulation (EC)

883/2004 and its implementation provisions in Regulation (EC) 987/2009; the relevant provisions are in Appendix 1 and 2. My answer to both questions is: no.

A. What has happened

2. The claimant was born in Austria in November 2009. She is British and lives with her mother in this country. The family came here in August 2012 so that she could receive specialist medical treatment. In September 2012, her father moved to Belgium, where he works as a self-employed English teacher. Her mother worked in this country in sales between 1985 and 1995. The couple are separated, but not divorced.

3. A claim for disability living allowance was made on the claimant's behalf on 30 October 2013. On 29 January 2014, the Secretary of State made an award consisting of the care component only, but this was revised and the claim refused on 19 May 2015 on the ground that the claimant was a family member of her father who was working in Belgium, as a result of which Belgium was the competent State to pay sickness benefits. A claim by the claimant's mother for a carer's allowance had already been refused.

4. The First-tier Tribunal allowed the claimant's appeal on 19 December 2016, but I gave permission to the Secretary of State to appeal to the Upper Tribunal on 29 June 2017. That appeal eventually came before me at an oral hearing on 23 January 2020. Galina Ward of counsel appeared for the Secretary of State and Adrian Berry and Desmond Rutledge, both of counsel, appeared for the claimant. I am grateful to all of them for their written and oral arguments. I have referred only to Mr Berry when setting out the arguments for the claimant, as he took the lead at the hearing.

B. Disability living allowance in EU law

5. This case concerns the care component of disability living allowance. The care component is a sickness benefit in EU law: *Commission of the European Communities v European Parliament and Council of the European Union* (Case-299/05 EU:C:2007:608) [2007] ECR I-8695 at [67]-[68] and *Secretary of State for Work and Pensions v Tolley* (Case C-430/15 EU:C:2017:74) [2017] 1 WLR 1261 at [51] and [55]. It is also a cash benefit.

6. Just for completeness, the mobility component of the allowance is not a sickness benefit, but a special non-contributory cash benefit: *Bartlett, Ramos and Taylor v Secretary of State for Work and Pensions* (Case C-537/09 EU:C:2011:278) [2012] AACR 34. As such, it is payable, and only payable, in the claimant's place of residence: Article 70(4) of Regulation 883/2004. No award of this component has been made.

C. Difference of views between Member States

7. Regulation 883/2004 makes provision for identifying which State is competent for providing particular classes of benefit, in this case sickness benefits. Article 6 of Regulation 987/2009 makes provision for the possibility that States disagree on which is of them is competent. If there was a difference of views between this country and Belgium, the claimant is provisionally entitled to a disability living allowance, if she otherwise qualifies, pending the resolution of the difference.

8. As the language of Article 6(1) makes clear, the difference of views has to be on competence. That is a matter of fact: see the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Fileccia* [2017] EWCA Civ 1907, [2018] AACR .

D. The First-tier Tribunal was in error of law to find that there was a difference of views on competence

9. The tribunal found that there was a difference of views between this country and Belgium. It was not entitled to make that finding because the evidence before it did not support it.

10. The evidence before the tribunal was contained in emails between the claimant's representative and a Belgian official. The representative asked on 17 November 2016: 'Please would you confirm whether this [a pervious reply] means that Belgium has formally accepted that it is the competent state to pay [the claimant's] disability benefit under European Union co-ordination rules.' The official replied on 21 November: 'We can't confirm whether that Belgium has accepted that it is the competent state to pay [the claimant's] disability benefit. We send your letter to the child benefits agency ADMB in Brugge to investigate the situation.'

11. The tribunal found on the balance of probabilities that there was a difference of views. 'If there was no difference of view this matter should have been resolved by the date of the Tribunal which was over 18 months after the referral was made by the UK to Belgium.' That was not sufficient reasoning to justify the finding. In my experience, communications between States under Regulation 883/2004 can take a long time and getting an unequivocal answer is not always easy. A complete failure to reply is, sadly, not unknown. When there are replies, there is often confusion, or lack of clarity at least, between (a) whether another State is competent and (b) whether that State has any benefits for which the claimant might qualify. What the tribunal should have done was to analyse the evidence rather than resort to general reasoning, for which (as far as I can tell) the tribunal had no basis in evidence or experience.

12. The best evidence of the view taken by Belgium was contained in the email of 21 November. The claimant's representative had asked a direct question, to which the official could have answered yes or no. In the event, she did neither,

but wrote that she could not confirm one way or the other. That is not evidence of a difference of views. It is evidence of a lack of view, an answer that anticipated that a view would be reached when the matter was considered by the correct office. The best that might be said for the claimant is that Belgium had a view, but the official did not know what it was. That, however, would be pure speculation.

13. At the end of the oral hearing, I put to Mr Berry my concern that Belgium had simply not expressed a view, let alone a different view from this country. His answer was that there was a difference, but it was one that had been expressed tactfully and in emollient terms. I do not accept that that is a fair reading of the email of 21 November. If there was a difference of view, there was no need to be coy about it. Why not just say so, especially when asked the direct question?

14. Strictly speaking, the First-tier Tribunal was limited to deciding whether there had been a difference of views at the time of the Secretary of State's decision on 29 January 2014 by virtue of section 12(8)(b) of the Social Security Act 1998 as interpreted in *R(CS) 1/03*. I have assumed that that is what it was doing and that the purpose of the correspondence between the claimant's representative and the officials in Belgium was intended to find evidence relevant to that date.

E. There is still no difference of views over competence

15. I have decided that the tribunal was not entitled to find that there was a difference of views on the evidence before the tribunal. It is not necessary to remit the case to the First-tier Tribunal to decide if there was a difference of views on the evidence now available. I should approach the question of difference of views in accordance with section 12(8)(b). That is not, though, how the question was discussed at the hearing. Both Ms Ward and Mr Berry addressed me on whether on the evidence available there was now a difference of views; I hope I did not misunderstand them. As the answer is the same, whether considered as in January 2014 or as of now, I will deal with the question in the same way as it was at the hearing. I have decided on the evidence now available that there is still no difference of views.

16. The latest evidence is in an email of 17 May 2018 from a Senior Legal Officer in Belgium:

> According to the information you provided for in your E-mail the applicant … is a 9 year old child. Therefore my colleagues ask what kind of UK benefits are at stake? (and which would then be refused by the DWP based on the competence of Belgium in this case on the basis of Article 21)?
>
> My colleagues point out that it is true that Article 21 §1 of the (EC) Regulation N°883/2004 talks about the insured person and members of families. But in Belgium we do not know to our knowledge, and certainly not

> in the Belgian Sickness and Invalidity Insurance, sector benefits, derived rights for family members.
>
> As regards to children with disabilities, it is regulation via supplements / mark-ups provided for in the family benefits regulation.
>
> Moreover, as there is no right in Belgium for family members, we are of the opinion that the United Kingdom must still take into account the Bossmann case law rendered by the ECJ in the case where a national law based on the British legislation exists for the child concerned.

The case referred to is *Bosmann v Bundesagentur für Arbeit-Familienkasse Aachen* (Case C-352/06 EU:C:2008:290) [2008] ECR I-3827. I come to this later.

17. When I saw that evidence, I wrote in a direction: 'Given the response from the Belgian authorities, there does not seem much prospect of success arguing that there is a difference of views.' Ms Ward relied on that remark saying:

(i) The email refers to the '*competence of Belgium in this case on the basis of Article 21*';

(ii) It accepts that Article 21 refers to the insured and members of their families;

(iii) It refers to the case of *Bosmann* (C-352/06), which addresses the ability of member states to pay benefits when another state is competent; and

(iv) It does not dispute competence at any point.

As I understood Ms Ward at the hearing, those points were made in support of an argument that Belgium now accepted that it was competent. That is, of course, not quite what I said my direction. I only said that there was not much prospect of arguing successfully that there was a difference of views, because once again Belgium did not say explicitly that it accepted competence. But, as before, it did not say that it did not. The reasoning in the email of 17 May may not accord with the approach taken to Article 21 in this country, but a difference of approach and reasoning is not the same as a difference of views on competence. And, as so often with these replies from other States, it slips between competence, the availability of appropriate benefits, and whether the claimant might satisfy the conditions of entitlement. But all that does is to make it more difficult to discern a particular view on competence; it does not necessarily show a difference of views.

18. Mr Berry argued that the email did not accept competence and that 'the whole thrust of the text is to question this assumption.' He also argued, relying on *Fileccia* at [44], that it was necessary 'to avoid a construction of Article 6 of Regulation 987/2009 which would require the person seeking benefit to take steps to pursue the relevant institutions in the Member States for a clarification of its position in order to trigger the payment of benefits on a provisional basis …'

19. My conclusion is that the evidence from Belgium does not go so far as to show a difference of views. There is no explicit statement one way or the other. If

there is a view to be found, particularly in the most recent email, it has to be excavated from the language and reasoning. If anything, the email suggests that Belgium does now accept competence in principle, rather than that it does not, but I accept Mr Berry's point that the email does not go that far. It is, though, quite clear to me that it is impossible to find a view that it does not accept competence. I do not accept the relevance of Mr Berry's point about the interpretation of Article 6; it is based on a misunderstanding of *Fileccia*. What the Court was referring to at [44] in that decision was the argument that a difference of views could only be shown if the other State had given a formal decision. That explains the Court's reference to pursuing the relevant authorities in other States.

F. The Secretary of State was right that Belgium was competent

20. It is usual to refer to the competent State or to the State competent for the class of benefit. That conceals a chain of reasoning. The chain:

- begins with the legislation to which the person is subject (Article 11),
- from which the institution responsible for applying that legislation is identified (Article 1(p)),
- from which in turn the competent institution is identified (Article 1(q)).
- The location of that institution then dictates the competent State (Article 1(s)).

This may appear circular in that it begins with the State where the person is pursuing employment or habitually residence and ends with the same State as the competent State. However, along the way the chain of reasoning identifies the competent institution, which is relevant to some provisions of the Regulation. There may be different institutions that operate in different parts of a State. In the United Kingdom, for example, there is separate legislation for disability living allowance in Great Britain and in Northern Ireland, administered by different Departments.

21. There is a small difficulty in identifying the competent institution. Only heads (i) and (ii) are potentially relevant. *Head (i)* applies when there has been a claim for a benefit. That was how the European Court of Justice reasoned in *Secretary of State for Work and Pensions v Tolley* (Case C-430/15 EU:C:2017:74) [2017] 1 WLR 1261 at [82].

22. The language of *head (ii)* does not work grammatically or syntactically. In order to make sense, it must be read like this: 'the institution from which the person concerned, if he or a member or members of his family resided in the Member State in which the institution is situated, is or would be entitled to benefits'. There is no authority on this head. It was discussed by the Advocate General in *Coppola v Insurance Officer* (Case 150/82 EU:C:1983:4) [1983] ECR 43 at page 61. He said that head (ii) only applied if head (i) did not and that 'in any event [it] is only applicable where the individual or his family are only

disqualified from benefit because they are not resident in the member-State concerned.' The Court did not deal with this issue. It merely said of the definition as a whole:

> 10. That definition must be applied within the framework of Article 18(1), in the light of the general rule contained in Article 13 of Regulation 1408/71, with regard to determination of the applicable legislation. …

Which is neither clear nor helpful.

23. I have decided that head (i) applies. The result of that depends on whether the person concerned is the claimant herself or her father.

24. I begin with the claimant's father. He is pursuing an activity as a self-employed person in Belgium, so he is subject to the legislation of that State under Article 11(3)(a). I do not know the internal structure of social security institutions in Belgium, but the institution and therefore the competent institution will be in Belgium, which means that Belgium is the competent State.

25. The position is different for the claimant and her mother. Neither is pursuing an activity as an employed or self-employed person, so they are subject to the legislation of their State of residence under Article 11(3)(e). That State is the United Kingdom. The institution that applies that legislation to the claimant and her mother is the Department for Work and Pensions, which is also the competent institution and it is, of course, situated in the United Kingdom, which is therefore the competent State.

Why Article 21 is relevant

26. So far so good, but this apparent simplicity conceals some difficulties. An obvious question is: why is the position of the claimant's father relevant at all? The answer lies in Article 21, which applies to an 'insured person and members of his family'. They are entitled to cash sickness benefits from the competent institution. This caters for a number of possibilities. One is that the insured person is working in one State but the whole family is habitually resident in another. Another possibility is that the insured person is working and habitually resident in one State, while the rest of the family is habitually resident in another State; that is the position here. The obvious purpose of the Article is to ensure that all members of the family can look to one State for their sickness benefits.

27. But is the claimant's father an 'insured person'? The language suggests a person who has a right to sickness benefit on the basis of insurance or contributions. That is not how I interpret the words. In order to understand why, it is helpful to look at Regulation (EEC) 1408/71, the predecessor of Regulation 883/2004. The issue that arises in this case was covered by Article 19:

Article 19

Residence in a Member State other than the competent State — General rules

1. An employed or self-employed person residing in the territory of a Member State other than the competent State, 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, shall receive in the State in which he is resident:

(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside.

…

28. Regulation 883/2004 is structured differently. It uses the concept of 'insured person', which is defined by Article 1(c). That definition is almost word for word the same as the language of Article 19(1), which referred to a 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'. Article 18 dealt with aggregation. The main difference is the introduction of the concept of an 'insured person'. It seems to me that this is just an umbrella term. Article 19, like Regulation 1408/71, dealt with the employed and self-employed. Article 21, like Regulation 883/2004, is broader. 'Insured person' seems to be a convenient term to cover the full range of potential social security claimants under the new Regulation. It does not justify limiting the scope of the definition to benefits that are based on insurance or contributions. Nor does it justify limiting the scope of Article 21 in its application to family members in a way that covers only those benefits to which family members may be entitled by virtue of their status as family members rather than in their own right. These limitations would be inconsistent with the wider scope of Regulation 883/2004. It might have made sense to limit Regulation 1408/71 in those ways, given that it was concerned with persons who were employed or self-employed who are by definition likely to be protected by some form of insurance or contributions. But it

would be anomalous to limit it like that when the scope of the co-ordination provisions has been extended by Regulation 883/2004 to include economically inactive persons. That is how I apply Article 21.

29. There is no doubt that the claimant is a member of her father's family. As a minor child, she comes within head (2) of the definition in Article 1(i). It is irrelevant that the claimant and her mother are separated from her father.

Priorities

30. There is now another obvious question: why is the claimant limited to her Article 21 rights? Why can she not rely on her own entitlement by virtue of her habitual residence in the United Kingdom or as a family member of her mother as an insured person? To put it another way: why does Article 21 have priority and with the father as the insured person? There is provision for priority in Article 32, but it only applies to benefits in kind; it does not apply to cash benefits.

31. I was referred to a proposed Regulation amending Regulation 883/2004 and Regulation 987/2009. This would insert additional provision dealing with priority, but as with Article 32 the amendments deal only with benefits in kind. I have taken no account of the proposed amendments, if for no other reason than that they are not in force.

32. I have, though, decided that Article 21 overrides the claimant's entitlement in her own right and as a family member of her mother as an insured person. This is why.

33. First, there is the importance of a claimant being subject to the legislation of one State only. Article 11(1) so provides, Recital (15) refers to the need to avoid the complications of overlapping provisions, and Recital (18a) says that the principle is of great importance and should be enhanced. Second, this is especially important when a family is not habitually resident in the competent State: see Recital (20). Third, when a member of the family is pursuing employment in a State, it is possible that that State will make provision, through insurance or contributions, for sickness benefits to be payable not only to that person but also the members of their family. As I have said, I do not read Article 21 as limited to that situation, but it is fair to take account of that possibility when considering how the Article was designed to work.

34. Fourth, it is instructive to compare Article 21 with Article 19 of Regulation 1408/71. Under Article 19, (self-) employed persons were entitled to cash sickness benefits from the competent State even if they were habitually resident in another State. The same applied to members of their families unless they were entitled to benefits in the State where they were habitually resident. The point to note is that the (self-) employed and their family members were treated differently and the wording of the Article leaves no doubt about it. In other words, the competent State for the (self-) employed was their place of work,

whereas the competent State for their family members was their place of residence, with the place of work as a fall-back if there was no entitlement there. The structure of Article 21 and the wording of Article 19(2) provided a precedent to use if Article 21 was to allow a claimant's right under the legislation of their State of residence to have priority over the legislation of the insured person's place of work, but it was not followed. Although this is not a decisive point, I regard it as significant that the precedent available was not followed. It is at least consistent with residence not overriding the place of (self-) employment and even suggestive that that is indeed the position.

35. My interpretation does not hamper or deter freedom of movement. It is not inconsistent with that basic right. Quite the reverse. A State remains the competent State for the family as its members move around, individually or collectively, bringing continuity and therefore certainty to their benefit entitlements, and avoiding the need to make new claims for different benefits with the inevitable delays in decision-making.

36. This may seem to focus too much on an insured person who is employed or self-employed. Haven't I said that insured person is wider than that? It is true that, on my interpretation, an insured person may be economically inactive. In that case, the legislation to which the person is subject under Article 11(3)(e) is that of the State of residence, but the design of Article 11 is to give priority to the place where a person is pursing an activity as a (self-) employed person, as the opening words of Article 11(3)(e) make clear. I accept that there is a difficulty if both parents come within Article 11(3)(a), but that is not the position here.

G. The claimant is not entitled in domestic law as the United Kingdom is not the competent State

37. The claimant cannot be entitled under domestic law; that possibility is precluded by section 72(7B) of the Social Security Contributions and Benefits Act 1992, which came into effect on 31 October 2011, two years before the claim in this case. I decided in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176 (AAC), [2016] AACR 41 at [42] that the equivalent provision for attendance allowance was valid and effective. I applied the same reasoning to section 72(7B) in *Secretary of State for Work and Pensions v TG* [2019] UKUT 86 (AAC) at [29]. I stand by my reasoning in *IG*.

38. Mr Berry argued that in the circumstances of this case section 72(7B) was contrary to EU law, as the claimant and her mother were at a disadvantage compared to cases in which a family pursues all their activities in a single State, and her freedom of movement would be deterred. He also provided me with a detailed calculation of the effect of the Secretary of State's decision on the family finances in order to show that the provision had put the claimant and her mother at a substantial disadvantage to those who had not exercised their freedom of movement.

39. I have already explained why my interpretation of Article 21 enhances freedom of movement rather than hampers it. The only potential impediment to freedom of movement is the financial one. I am not going to set out Mr Berry's calculation of financial loss, because it is not relevant to my reasoning. Ms Ward did not challenge it, but I do have some concerns. First, it did not take account of other sources of funding available in this country under social service arrangements. I accept that identifying that amount may not be straightforward, but it still has to be taken into account if the calculation is to do what it said on the tin. Second, the calculation failed to take account of any benefit payable from Belgium as a family benefit on account of the claimant's disability. Third and most important is the point that this calculation is not relevant at all, as the European Court of Justice has recognised that 'the primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned' (*da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse* (Case C-388/09 EU:C:2011:439) [2011] ECR I-5761 at [72]). If anything, the calculation shows that the challenge to section 72(7B) is ultimately a financial one. The argument would not have been put as it was, could not have been put, if it were to the claimant's advantage for Belgium to be the competent State. To rely solely on financial consequences would conflict with *da Silva* and the numerous other cases that make the same point.

H. EU law does not impose a duty on the United Kingdom to provide the care component of disability living allowance despite section 72(7B)

40. Regulation 883/2004 provides for coordination, not harmonisation. States are free to make their own provision for social security benefits, but only so long as they act 'in compliance with European Union law' (*da Silva* at [71]).

41. The European Court of Justice has relied on the principle of freedom of movement to prevent States removing rights that have been earned when the claimant moves to another State (*Bosmann* at [29]). I am not aware of any rights that the claimant or her mother have earned but lost on moving to this country. Essentially, EU law protects insurance or contributory benefits that have been paid for in one State so that entitlement is not lost on moving to another State. An export provision, in other words.

42. That aside, as I have just said, there is no guarantee that a person will not be disadvantaged financially as a result of exercising their freedom of movement, particularly where sickness benefits are concerned (*da Silva Martins* at [72]). It is, therefore, not permissible to rewrite either the Regulation or domestic law on the basis of a general appeal to freedom of movement. As I explained in *IG*:

> 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. … 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.

43. The Court has gone so far as to decide that States are not even free to make provision when they are not the competent State for a particular class of benefit. It set out its approach in *Ten Holder v Nieuwe Algemene Bedrijfsvereniging* (Case C-302/84 EU:C:1986:242) [1986] ECR 1821:

> 21. … As the Court pointed out in its judgments of 23 September 1982 in Case 276/81 *(Kuijpers* [1982] ECR 3027) and in Case 275/81 *(Koks* [1982] ECR 3013), 'the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable' since they are 'under an obligation to comply with the provisions of Community law in force'.

The Court has allowed exceptions, but only if two conditions are met. They were set out in *Ministerstvo práce a sociálních věcí v B* (Case C-394/13 EU:C:2014:2199) at [28]:

> 'if there are specific and particularly close connecting factors between the territory of that State and the situation at issue, on condition that the predictability and effectiveness of the application of the coordination rules … are not disproportionately affected'.

44. In this case, of course, this country does not make provision for entitlement when it is not the competent State. But even if it wished to do so, EU would not allow it, because at root it is an argument based on the balance of financial advantage, which is antithetical to the design of a carefully constructed set of conflict of laws provisions. Just to avoid any misunderstanding, my reasoning is not based on the chance that Mr Berry happened to present a balance sheet. My reasoning is based on the fact that that is the only way that his argument could be constructed given my analysis of Article 21.

I. Mr Berry's 'best interests of the child' argument

45. Mr Berry argued that it was a general principle of EU law that the best interests of a child should prevail and the child should be given such protection and care as is necessary for her well-being. This, he argued, meant that priority should be given to the State where the claimant's resides with her principal

carer. He relied on Article 24 of the Charter of Fundamental Rights of the European Union:

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

46. I reject this argument. It is, again, essentially an argument about finance. Mr Berry did not, of course, argue that money is all that matters to a child's interests and well-being. But the purpose of his argument was to make the United Kingdom competent to pay cash sickness benefits to the claimant, and financial support for a disabled child is obviously an important matter. I do not accept that Article 24, or anything else, can be used to subvert the core structure of Regulation 883/2004. It would override a system of principles rules and replace them with broad issues of judgment that require a comparison of benefit entitlements. That is straightforward if there is no comparable benefit in one State. But if both States make provision, entitlement would have to be investigated and calculated in both systems before a decision could be made on competence. And if one State deals with disability by a sickness benefit whilst the other through family benefits, as Belgium seems to do, the disruption of the structure of Regulation 883/2004 will drift outside the realm of sickness benefits. Mr Berry's approach would also require value judgments about the extent to which non-financial factors could be taken into account and with what significance.

J. There will be no reference to European Court of Justice

47. Finally, Mr Berry invited me to refer questions to the European Court of Justice. I still have power to do so, despite the United Kingdom leaving the EU at the end of January 2020. Ms Ward opposed the suggestion. I have decided that a reference is not required, because there is a clear line of reasoning that allows me to decide the case without doing so.

Signed on original
on 18 February 2020

Edward Jacobs
Upper Tribunal Judge

APPENDIX 1

REGULATION (EC) 883/2004

Whereas:

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

(13) The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.

(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.

(17a) Once the legislation of a Member State becomes applicable to a person under Title II of this Regulation, the conditions for affiliation and entitlement to benefits should be defined by the legislation of the competent Member State while respecting Community law.

(18a) The principle of single applicable legislation is of great importance and should be enhanced. This should not mean, however, that the grant of a benefit alone, in accordance with this Regulation and comprising the payment of insurance contributions or insurance coverage for the beneficiary, renders the legislation of the Member State, whose institution has granted that benefit, the applicable legislation for that person.

(20) In the field of sickness, maternity and equivalent paternity benefits, insured persons, as well as the members of their families, living or staying in a Member State other than the competent Member State, should be afforded protection.

(21) Provisions on sickness, maternity and equivalent paternity benefits were drawn up in the light of Court of Justice case-law. Provisions on prior authorisation have been improved, taking into account the relevant decisions of the Court of Justice.

(22) The specific position of pension claimants and pensioners and the members of their families makes it necessary to have provisions governing sickness insurance adapted to this situation.

(23) In view of the differences between the various national systems, it is appropriate that Member States make provision, where possible, for medical treatment for family members of frontier workers in the Member State where the latter pursue their activity.

(24) It is necessary to establish specific provisions regulating the non-overlapping of sickness benefits in kind and sickness benefits in cash which are of the same nature as those which were the subject of the judgments of the Court of Justice in Case C-215/99 *Jauch* and C-160/96 *Molenaar*, provided that those benefits cover the same risk.

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation:

(a) 'activity as an employed person' means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;

(b) 'activity as a self-employed person' means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;

(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;

(l) 'legislation' means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1); …

(m) 'competent authority' means, in respect of each Member State, the Minister, Ministers or other equivalent authority responsible for social security schemes throughout or in any part of the Member State in question;

(p) 'institution' means, in respect of each Member State, the body or authority responsible for applying all or part of the legislation;

(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; …

(r) 'institution of the place of residence' and 'institution of the place of stay' mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, in accordance with the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State concerned;

(s) 'competent Member State' means the Member State in which the competent institution is situated;

…

Article 3

Matters covered

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits; …

(d) old-age benefits; …

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.

…

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits

SECTION 1

INSURED PERSONS AND MEMBERS OF THEIR FAMILIES, EXCEPT PENSIONERS AND MEMBERS OF THEIR FAMILIES

Article 21

Cash benefits

1. An insured person and members of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.

2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.

3. The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.

4. Paragraphs 2 and 3 shall apply mutatis mutandis to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the

periods which the person concerned has completed under the legislation of one or more other Member States.

SECTION 2

PENSIONERS AND MEMBERS OF THEIR FAMILIES

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 32

Prioritising of the right to benefits in kind – Special rule for the right of members of the family to benefits in the Member State of residence

1. An independent right to benefits in kind based on the legislation of a Member State or on this Chapter shall take priority over a derivative right to benefits for members of a family. A derivative right to benefits in kind shall, however, take priority over independent rights, where the independent right in the Member State of residence exists directly and solely on the basis of the residence of the person concerned in that Member State.

2. Where the members of the family of an insured person reside in a Member State under whose legislation the right to benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person, benefits in kind shall be provided at the expense of the competent institution in the Member State in which they reside, if the spouse or the person caring for the children of the insured person pursues an activity as an employed or self-employed person in the said Member State or receives a pension from that Member State on the basis of an activity as an employed or self-employed person.

TITLE V

MISCELLANEOUS PROVISIONS

Article 81

Claims, declarations or appeals

Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. The date on which such claims, declarations or appeals were submitted to the authority, institution or tribunal of the second Member State shall be considered as the date of their submission to the competent authority, institution or tribunal.

TITLE VI

TRANSITIONAL AND FINAL PROVISIONS

Article 87

Transitional provisions

8. If, as a result of this Regulation, a person is subject to the legislation of a Member State other than the one determined in accordance with Title II of Regulation (EEC) No 1408/71, that legislation shall continue to apply as long as the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation. The request shall be submitted within three months after the date of application of this Regulation to the competent institution of the Member State whose legislation is applicable under this Regulation if the person concerned is to be subject to the legislation of that Member State as of the date of application of this Regulation. If the request is made after the time limit indicated, the changeover shall take place on the first day of the following month.

APPENDIX 2

REGULATION (EC) 987/2009

TITLE I

GENERAL PROVISIONS

CHAPTER II

Provisions concerning cooperation and exchanges of data

Article 6

Provisional application of legislation and provisional granting of benefits

1. Unless otherwise provided for in the implementing Regulation, where there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States, the order of priority being determined as follows:

…

(b) the legislation of the Member State of residence … if the person concerned is neither employed nor self-employed; …

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

CHAPTER 1

Sickness, maternity and equivalent paternity benefits

Article 28

Long-term care benefits in cash in the event of stay or residence in a Member State other than the competent Member State

A. Procedure to be followed by the insured person

1. In order to be entitled to long-term care benefits in cash pursuant to Article 21(1) of the basic Regulation, the insured person shall apply to the competent institution. The competent institution shall, where necessary, inform the institution of the place of residence thereof.

B. Procedure to be followed by the institution of the place of residence

2. At the request of the competent institution, the institution of the place of residence shall examine the condition of the insured person with respect to his need for long-term care. The competent institution shall give the institution of the place of residence all the information necessary for such an examination.

C. Procedure to be followed by the competent institution

3. In order to determine the degree of need for long-term care, the competent institution shall have the right to have the insured person examined by a doctor or any other expert of its choice.

…