



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2021-001957-UCH (CUC/0241/2021)
[2023] UKUT 44 (AAC)
SECRETARY OF STATE FOR WORK AND PENSIONS V MS**

Decided following an oral hearing on 30 November 2022

Representatives

Secretary of State	Julia Smyth of counsel, instructed by the Government Legal Department
Claimant	Jack Castle of counsel, pro bono arranged through the Free Representation Unit

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference:	SC947/20/00139
Decision date:	19 August 2020
Hearing:	Remote by telephone

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: from and including 26 July 2017, the claimant's entitlement to universal credit is to be calculated without any amount for her son.

REASONS FOR DECISION

1. The main issue in this case is whether the child element of universal credit is a social security family benefit under Regulation (EC) 883/2004. I have decided that it is not. There is also an issue whether it is permissible to make a reference to the European Court of Justice. I have decided that it is not and that, in any event, it would not be appropriate to make a reference if I had power to do so.

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2. The appeal was heard at an oral hearing followed by written submissions on the reference issue. I am grateful to both counsel for their clear and interesting arguments on the issues.

3. Just to avoid any confusion, the case has two references numbers because it was transferred to a new database last year.

A. History and background

4. On 17 October 2017, the Secretary of State revised a decision on the claimant's entitlement to universal credit. The effect of the revision was to remove the child element from the calculation of the claimant's award from and including 26 July 2017. On appeal, the First-tier Tribunal decided that the child element should be included from and including 12 September 2017. It is agreed that the tribunal misapplied the law. The issue for the Upper Tribunal is whether the child element should have been included in the calculation of her award and, in particular, whether EU law helps her in that regard.

B. The facts

5. Some facts are not in dispute. The claimant was born in 1979 and at the time of her claim in July 2017 she had a permanent right to reside in the United Kingdom. She has a son, who was born in 2002. Both the claimant and her son are Slovakian. The claimant came to this country in 2005 and was employed for various periods until mid-October 2017. Immediately before claiming universal credit, she went on a short visit to her family in Slovakia from late June to mid-July 2017.

6. The First-tier Tribunal accept the claimant's evidence on the following. Her son lives with his grandparents and has been educated in Slovakia. His mother takes all major decisions in respect of his education, health and so on, and is the sole financial provider for his needs. She pays for his clothes, food, toiletries, utilities and doctor's fees. The grandparents act on her instructions and she makes all the major decisions in her son's life.

C. The legislation

Domestic law

7. Universal credit is governed by the Welfare Reform Act 2012.

8. Section 1 provides:

1. Universal credit

(1) A benefit known as universal credit is payable in accordance with this Part.

(2) Universal credit may, subject as follows, be awarded to—

(a) an individual who is not a member of a couple (a 'single person'), or

(b) members of a couple jointly.

(3) An award of universal credit is, subject as follows, calculated by reference to—

(a) a standard allowance,

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- (b) an amount for responsibility for children or young persons,
- (c) an amount for housing, and
- (d) amounts for other particular needs or circumstances.

9. Section 8 deals with calculation of an award:

8. Calculation of awards

(1) The amount of an award of universal credit is to be the balance of—

- (a) the maximum amount (see subsection (2)), less
- (b) the amounts to be deducted (see subsection (3)).

(2) The maximum amount is the total of—

- (a) any amount included under section 9 (standard allowance),
- (b) any amount included under section 10 (responsibility for children and young persons),
- (c) any amount included under section 11 (housing costs), and
- (d) any amount included under section 12 (other particular needs or circumstances).

(3) The amounts to be deducted are—

- (a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and
 - (b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).
- (4) In subsection (3)(a) and (b) the references to income are—
- (a) in the case of a single claimant, to income of the claimant, and
 - (b) in the case of joint claimants, to combined income of the claimants.

10. Section 10(1) provides:

10 Responsibility for children and young persons

(1) The calculation of an award for universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible.

Schedule 1 to the Act contains supplementary regulation-making powers. Paragraph 5(1) provides:

5 Responsibility for children etc

(1) Regulations may for any purpose of this Part specify circumstances in which a person is or is not responsible for a child or young person.

11. Regulation 4 of the Universal Credit Regulations 2013 (SI No 376) is made under the authority of paragraph 5(1):

4 When a person is responsible for a child or qualifying young person

(1) Whether a person is responsible for a child or qualifying young person for the purposes of Part 1 of the Act and these Regulations is determined as follows.

(2) A person is responsible for a child or qualifying young person who normally lives with them.

...

(4) Where a child or qualifying young person normally lives with two or more persons who are not a couple, only one of them is to be treated as responsible and that is the person who has the main responsibility.

EU law – Regulation (EC) 883/2004

12. Article 1(i) defines ‘member of the family’:

‘member of the family’ means

(1)(i) any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided;

(ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;

(2) If the legislation of a Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family;

(3) If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household only if he lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner; ...

13. Article 1 contains definitions:

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

...

(z) ‘family benefit’ means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintain payments and special childbirth and adoption allowances mentioned in Annex I.

14. Article 3 deals with matters covered by the Regulation:

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

...

(j) family benefits.

...

5. This Regulation shall not apply to:

(a) social and medical assistance; ...

15. Article 67 deals with family benefits:

CHAPTER 8

Family benefits

Article 67

Members of the family residing in another Member State

A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his pension.

EU – Directive 2004/38/EC

16. Two provisions of this Directive are relevant because they refer to social assistance.

17. Article 7 deals with the right to reside longer than three months:

1. All Union citizens shall have a right to reside on the territory of another Member State for a period longer than three months if they:

...

(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; ...

18. Article 24 deals with equal treatment:

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

D. How the First-tier Tribunal went wrong in law

19. This is agreed, so I can state it briefly. The tribunal decided that the claimant satisfied regulation 4(4) because she had the main responsibility for her son. That was wrong because regulation 4(4) only applies if her son ‘normally lives with two or more persons who are not a couple’. In other words, the claimant could only satisfy regulation 4(4) if her son normally lived with both her and his grandparents. Then and only then, it would be necessary to decide which of those people had the main responsibility for the child. On the evidence, the claimant’s son normally lived only with his grandparents, so regulation 4(4) did not apply.

E. Universal credit

20. There was no dispute about the content of the domestic legislation. Section 1 of the Welfare Reform Act 2012, which creates the benefit, provides that it is ‘calculated by reference to’ a number of elements, one of which is ‘an amount for responsibility for children’. Section 8 gives more details about the calculation. There is a maximum amount from which deductions have to be made in order to take account of the claimant’s income. The maximum amount includes an amount for ‘responsibility for children’. Section 10 provides more detail about the amount to be included for responsibility for children. So far, so simple. Inevitably, the Universal Credit Regulations 2013 (SI No 376) make it more complicated. I have already mentioned regulation 4. Regulation 22 is also relevant, as it provides for a claimant who has responsible for a child to retain a percentage of their earned income. In other words, that percentage is not deducted from the maximum amount.

F. Precedent

21. As I read section 6 of the European Union (Withdrawal) Act 2018, I am bound by decisions of the European Court of Justice that were made before this country withdrew from the EU.

G. How cases on Directive 2004/38/EC are relevant

22. This directive deals with citizenship rights. It refers to social assistance, which has been considered by the European Court of Justice.

23. *CG v Department for Communities in Northern Ireland* (Case C-709/20, ECLI:EU:C:2021:602) concerned universal credit. The European Court of Justice decided that universal credit was social assistance:

71. It follows that Universal Credit must, subject to the checks which it is for the referring court to carry out, be categorised as social assistance, within the meaning of Article 24(2) of Directive 2004/38.

...

92. In the present case, it is apparent from the order for reference that CG is a mother of two young children, with no resources to provide for her own and her children’s needs, who is isolated on account of having fled a violent partner. In such a situation, the competent national authorities may refuse an application for social assistance, such as Universal Credit, only after ascertaining that that refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental

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rights, as enshrined in Articles 1, 7 and 24 of the Charter. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and his or her children may actually and currently benefit. In the dispute in the main proceedings, it will be for the referring court, in particular, to ascertain whether CG and her children may benefit actually and currently from the assistance, other than Universal Credit, referred to by the representatives of the United Kingdom Government and the Department for Communities in Northern Ireland in their observations submitted to the Court.

24. That decision was made under Directive 2004/38, and specifically under Article 24(2). The relationship between the concept of social assistance in the Directive and Regulation 883/2004 was explained by the European Court of Justice in *Pensionsversicherungsanstalt v Brey* (Case-140/12, ECLI:EU:C:13:565):

51. In that regard, it should be borne in mind that Regulation No 883/2004 seeks to achieve the objective set out in Article 48 TFEU by preventing the possible negative effects that the exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits ...

52. It is in order to achieve that objective that, through the waiver of residence clauses under Article 7 thereof, Regulation No 883/2004 provides, subject to the exceptions set out therein, for the cash benefits falling within its scope to be exportable in the host Member State ...

53. By contrast, although the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States ..., it is also intended, as is apparent from Article 1(a) thereof, to set out the conditions governing the exercise of that right ..., which include, where residence is desired for a period of longer than three months, the condition laid down in Article 7(1)(b) of the directive that Union citizens who do not or no longer have worker status must have sufficient resources.

...

58. In those circumstances, the concept of ‘social assistance system’ as used in Article 7(1)(b) of Directive 2004/38 cannot, contrary to the Commission’s assertions, be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation.

25. This means that a decision under the Directive cannot be read across to Regulation 883/2004. This does not mean that it is completely irrelevant in the other context. As the meaning of social assistance under the Regulation is the narrower of the two, it provides a useful mental check to ensure that it is not being interpreted too broadly.

H. Applying Regulation (EC) 883/2004

26. Three preliminary points. First, some of the cases were decided under Regulation (EEC) 1408/71. It has now been replaced by Regulation 883/2004. This does not affect

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the analysis; the authorities are interchangeable. Second, the distinction between social security and social assistance arises in two ways. The latter is expressly excluded by Article 5(a). And the cases may discuss the meaning of social security by distinguishing it from social assistance. Third, I am going to analyse this case from the principles set out by the European Court of Justice. I have not found it helpful to compare the circumstances of the European cases with this one in a search for similarities and differences. In my view, the proper way is to apply the principles established by the Court to the circumstances of this case as a whole.

27. I have derived the following principles from the case law of the European Court of Justice.

28. Social security has an autonomous meaning in EU law, which depends on the purposes and conditions of entitlement for the benefit and does not depend on how it is classified in domestic law. That was decided in *Hoeckk v Centre Public D'Aide Sociale de Kalmthout* (Case 249/83, ECLI:EU:C:1985:139):

11. The Court has stated in a number of decisions that the distinction between benefits which are excluded from the scope of Regulation No 1408/71 and benefits which come within it rests entirely on the factors relating to each benefit, in particular its purpose and the conditions for its grant, and not on whether the national legislation describes the benefit as a social security benefit or not.

12. Although it is possible that because of the classes of persons to which they apply, their objectives and the detailed rules for their application, certain laws may simultaneously contain elements belonging to both the categories mentioned and thus defy any general classification, it must be stated that in order to fall within the field of social security covered by Regulation No 1408/71, the legislation at issue must in any event satisfy, in particular, the condition of covering one of the risks specified in Article 4 (1) of the regulation. It follows that the list of risks contained in that paragraph is exhaustive and that as a result a branch of social security not mentioned in the list does not fall within that category even if it confers upon individuals a legally defined position entitling them to benefits.

29. The method of financing the benefit is irrelevant to the classification in EU law. That was decided in *Hughes v Chief Adjudication Officer, Belfast* (Case C-78/91, ECLI:EU:C:1992:331):

21. Contrary to the view expressed by the United Kingdom and German Governments, the fact that the grant of the benefit is not subject to any contribution requirement does not affect its classification as a social security benefit. The method by which a benefit is financed is immaterial for the purposes of its classification as a social security benefit, as is clear from the fact that under Article 4(2) of Regulation No 1408/71 non-contributory benefits are not excluded from the scope of the regulation.

30. *Hughes* also decided that a benefit may still be a social security benefit despite being to some extent income-related:

17. Whilst it is true that a benefit such as family credit is granted or refused solely on the basis of the claimant's assets, income, and the number and age of his dependent children, it does not follow that the grant of the benefit is dependent on an individual assessment of the claimant's personal needs, which is a

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characteristic feature of social assistance ... The criteria applied are objective, legally defined criteria which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances.

31. Social assistance for the purposes Regulation 883/2004 has been consistently defined in terms of entitlement and lack of discretion. This passage from *Hughes* is typical:

15. Moreover, the Court has consistently stated that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 ...

32. The application of the definition has had to take account of the changing nature of domestic social security law. Take this country. National assistance was introduced by the National Assistance Act 1948, abolishing the local poor law that had existed since the reign of Henry VIII. Over the following decade and a half, the discretionary elements were gradually squeezed out of the system until it was seen as, and became, a system based on entitlement. It had reached this point by the time it was renamed as Supplementary Benefit in November 1966. It follows that, for benefits in this country, the reference to an element of discretion is redundant. Although the Court has not used this language, one touchstone for classification is whether the purpose of a benefit is to provide a safety net set at subsistence level.

33. The Court has not helped clarity by itself using 'social assistance' when it must mean 'social security', as it did in the case I now come to.

34. Article 1(z) defines family benefits as those intended to meet family expenses. This means that they must involve a public contribution to a family's budget to alleviate the financial burden involved in the maintenance of children. That was decided in *Caisse nationale des prestations familiales v Hliddal and Bornand* (Cases C-216 and 217/12, ECLI:EU:C:2013:568):

54. It should also be borne in mind that, under Article 1(u)(i) of Regulation No 1408/71, 'the term *family benefits* means all benefits in kind or in cash intended to meet family expenses'. In this regard, the Court has held that family benefits are intended to provide social assistance for workers with dependent families in the form of a contribution by society towards their expenses ...

55. The phrase 'to meet family expenses' which is used in that provision is to be interpreted as referring, in particular, to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children ...

56. The Court has also held that the purpose underlying a parenting allowance which is designed to enable one of the parents to devote himself or herself to the raising of a young child and which is intended, specifically, as remuneration for bringing up that child, and to meet other costs involved in caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from full-time employment is 'to meet family expenses' within the meaning of Article 1(u)(i) of Regulation No 1408/71 ...

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35. The meeting of family expenses need not be the only purpose of the benefit. That was decided in *Hughes v Chief Adjudication Officer, Belfast* (Case C-78/91, ECLI:EU:C:1992:331):

19. It appears from the documents before the Court that family credit in fact performs a dual function: first, as the United Kingdom Government has stated, it encourages workers who are poorly paid to continue working; and secondly, it is intended to meet family expenses, as is clear in particular from the fact that it is paid only where the claimant's family includes one or more children and from the fact that the amount of the benefit varies according to the age of the children.

20. It is by virtue of that second function that a benefit such as family credit falls within the category of family benefits defined in Article 1(u)(i) of Regulation No 1408/71 and hence relates to the risk referred to in Article 4(1)(h) of the regulation.

36. The elements of a benefit may be severed so that some are social security benefits within Regulation 883/2004 and some are not. That was decided in *Commission of the European Communities v European Parliament and the Council of the European Union* (Case C-299/05, ECLI:EU:C:2007:111). The Court was concerned with the validity of the inclusion of certain benefits in the list of special non-contributory benefits. Having referred to attendance allowance, carer's allowance and disability living allowance, the Court said:

68. Accordingly, those three allowances as well as the preceding allowances must be regarded as sickness benefits, even though the DLA includes a distinct part relating to mobility.

69. As the Commission indeed observes, the 'mobility' component of the DLA, which might be regarded as a special non-contributory benefit, is severable, so that that component alone could be included on the list in Annex IIa as amended if the United Kingdom decided to create an allowance which concerned that component alone.

37. The Court considered the mobility component of disability living allowance in *Bartlett, Ramos and Taylor v Secretary of State for Work and Pensions* (Case C-537/99, ECLI:EU:C:2011:278). It decided that, for the purposes of what is now Regulation 883/2004, the mobility component could be, and was, a separate benefit from the care component. This is how the Court dealt with the matter in principle:

20. In order to answer those questions, it is first of all necessary to determine whether the mobility component of DLA can be regarded as a 'benefit' on its own account within the meaning of Article 1(t) of Regulation No 1408/71 and of Regulation No 1408/71, as amended.

21. In that regard, it must be borne in mind that the Court held, in paragraph 69 of the judgment in Case C-299/05 *Commission v Parliament and Council*, that the mobility component of DLA is severable, with the result that that component alone could be included on the list in Annex IIa to Regulation No 1408/71, as amended, if the United Kingdom decided to create an allowance which concerned that component alone. It follows that the mobility component of DLA, by itself, constitutes a 'benefit' within the terms of Article 1(t) of Regulation No 1408/71, as amended.

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22. Such a finding must also be made, and for the same reasons, with regard to Regulation No 1408/71.

23. Accordingly, it must be held that the mobility component of DLA can also constitute a 'benefit' within the terms of Article 1(t) of Regulation No 1408/71.

38. There is no other authority of the European Court of Justice that deals with severability. That leaves me with the possibility that elements of what is treated as a single benefit in domestic law can be split for the purposes of EU law if they are severable. The only indication of what may or may not be severed is that disability living allowance could be severed into its two components. Disability living allowance is probably the clearest case there could be of a British benefit that is severable. Leaving aside adjudication and payment, there was very little connection or interrelation between the mobility component and the care component. The one that comes to mind is the combined operation of the interrelation of the components for those with a severe mental impairment and behavioural problems under section 73(3) of the Social Security Contributions and Benefits Act 1992. In that case, entitlement to the mobility component depend in part on entitlement to the care component.

39. Severability was considered by the Court of Appeal in *Alhashem v Secretary of State for Work and Pensions* [2017] QB 52. This case was decided under Directive 2004/38. As I have said, cases on social assistance decided under the Directive cannot be read across to the Regulation, but that does not affect the issue of severability. The case concerned employment and support allowance. The claimant argued that the allowance could be split into two benefits, one for claimants who were required to undertake work-related activity, and one for those who were not. The Court rejected this argument:

51. Ms Mountfield [for the claimant] submits on this appeal that the benefits paid to the Work Related Activity Group can be separated out.

52. Ms Smyth [for the Secretary of State] submits that ESA is not the sort of benefit that can be separated into component elements because it is part of the function of the benefit that claimants should be able to move from one group to another. She contrasts disability living allowance, where the benefit has distinct components, i.e. mobility and care. They might be separable but the present benefit would not be so.

53. I agree with Ms Smyth's submission. If the two-part benefit in *Alimanovic* was treated as a single benefit, it is difficult to see how EU law could have the result of severing ESA into an ESA Mark 1 for the WCA group and the Support group and an ESA Mark 2 for the Work Related Activity Group. That would be inconsistent with the aim of the benefit which is in part to make the various groups 'porous' (my word) so that over time individuals in the Support Group can move to the Work Related Activity Group and vice-versa dependent on their capability at different points in time.

I. Universal credit is not a social security family benefit

40. I have to identify the purpose and conditions of entitlement for universal credit. I have already set out some of the conditions of entitlement for universal credit. I now need to identify its purpose.

41. In December 2013, the Government published *An Introduction to Universal Credit*. The opening paragraphs set out the purpose of creating the new benefit:

Universal Credit aims to introduce greater fairness to the welfare system by making work pay. It will help to ensure that people are better off in work than on benefits.

Despite considerable welfare spending in recent years, the current benefit system has trapped people in poverty. Universal Credit will ensure that work is the best choice for individuals or families and provides a route out of poverty and away from benefit dependency for thousands of people.

What it means for you

Universal Credit aims to make the welfare system simpler by replacing 6 benefits and credits with a single monthly payment if you are on a low income or out of work. It includes support for the costs of housing, children and childcare, as well as support for disabled people and carers.

Universal Credit started to be introduced in stages from April 2013 and is replacing:

- Income-based Jobseeker's Allowance
- Income-related Employment and Support Allowance
- Income Support
- Working Tax Credit
- Child Tax Credit
- Housing Benefit

...

Making work pay

Universal Credit aims to ensure you will be better off in work and makes it easier for you to start a new job or work more hours. As your take home pay increases Universal Credit will reduce gradually so you won't lose all your benefits at once if you're on a low income. There are no fixed hours thresholds, such as the 16 hours a week rule. Even working just a few hours a week will make a difference, as you move towards financial independence.

42. I also accept Mr Smyth's summary in her skeleton argument that universal credit 'is a unified, minimum subsistence benefit which simplifies the UK benefit system and aims to alleviate poverty, reduce welfare dependency and help vulnerable households.' It is not contributory.

43. The question I have to answer is posed by the European Court of Justice in this form: is the universal credit legislation 'legislation concerning the following branch of social security: (j) family benefits?'

44. Mr Castle identified two questions that arose:

- Is the child element component of universal credit severable, such that it should be considered a separate benefit for the purposes of Regulation 883/2004?
- If yes, is the child element component of universal credit a family benefit within the meaning of Article 3(1)(j) of that Regulation?

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My answer to the first question is: no. In view of that answer, the second question does not arise. If it did arise, the answer would also be: no. The answers are the same because the reasoning is essentially the same. I can, therefore, deal with both questions together.

45. I accept that *Hughes* decided that it was not necessary for the meeting of family expenses to be the only purpose of the benefit. So the fact that universal credit involves a number of different elements would by itself be no impediment to the claimant's case.

46. I accept that it is permissible to sever legislation so that parts are classified differently under the Regulation. I also accept Mr Castle's argument that what the European Court of Justice said about severability was not so much a test as 'a phenomenon of classification under the Coordination Regulation [883/2004] that the CJEU will look at individual components of a benefit treated in national law as composite.'

47. Mr Castle is right that the 'child element ... is the descendent of child tax credit, a family benefit under Regulation 883/2004'. I do not, though, accept Mr Castle's argument that the child element is 'a discrete element' and that the 'drafting and operation of s.8 WRA shows each entitlement ... can be considered individually; they are discrete entitlements which relate to distinct risks'. The elements of the maximum amount are not entitlements. They are amounts that form one part of a calculation that is subject to deductions, which determines entitlement. Children are taken into account when creating the pool that represents the maximum amount along with all the other elements. The child element then essentially loses its identity in that pool, which is subject to reduction as the deductions eat into the value of the pool. To put it another way, the costs of maintaining children are treated as part of the overall household expenses and needs.

48. Nor do I accept Mr Castle's argument that holding against the claimant would 'privilege domestic characterisation of UC as a single benefit in EU law'. He is right that social security has an autonomous meaning in EU law. But Regulation 883/2004 is a coordination provision. It does not confer rights. It takes domestic law and classifies it. That may involve severing, but it cannot involve rewriting domestic law. It is always possible to cut out part of legislation and create a new benefit. So, the mobility component of disability living allowance could have been removed from the legislation and a new benefit created similar to the mobility allowance that it had replaced. The child element of universal credit cannot be severed in that way. It is too embedded in the complicated structure of the calculation of entitlement to universal credit. Turning it back into child tax credit or a different separate benefit would reverse history or amount to substantial rewriting of domestic legislation.

J. Social security and social assistance

49. Having come to the conclusion I have, I do not need to decide whether universal credit is a social security benefit or a form of social assistance for the purpose of Regulation 883/2004. I have limited myself to explaining that the authorities on Directive 2004/38 do not apply to the Regulation for two reasons. First, it is no more than the European Court of Justice has said itself. Second, it may be relevant in future cases or, if this case finds its way to the Court of Appeal, in that Court.

K. A reference to the European Court of Justice?

50. I can deal with this issue briefly. If I had power to make a reference to the European Court of Justice, I would not do so, because I consider that the answer to the issue posed is sufficiently clear to render that unnecessary. In any event, I accept Ms Smyth's argument that a reference is only possible if a question is raised concerning the interpretation of Part Two of the Withdrawal Agreement: see Article 158 of the Agreement on the withdrawal of the United Kingdom ... from the European Union. The issue in this case concerns Regulation 883/2004, but not the Withdrawal Agreement.

**Authorised for issue
on 15 February 2023**

**Edward Jacobs
Upper Tribunal Judge**