IN THE UPPER TRIBUNAL **UA-2022-000202-CA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 405 (AAC)**

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

Between:

S.E.

Appellant

- v –

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Buley KC

Decision date: 5 December 2024
Decided on consideration of the papers

Representation:
Appellant:
(1) Liz Staunton and Pam Goulding, Appeals Representatives, Hertfordshire Council
(2) The AIRE Centre

Respondent:
Yaaser Vanderman, Barnay McCay, instructed by the Government Legal Department

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 16 September 2021 was made in error of law. I set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii), I re-make the decision. The decision that I make is that the Appellant is entitled to Carer's Allowance from 12 November 2018.

REASONS FOR DECISION

Introduction

1. I allow the appeal to the Upper Tribunal, and set aside the decision of the First-Tier Tribunal ("the FTT") dated 21 September 2021. I also re-make the decision that the Respondent should have made, which is that the Appellant, "SE", is entitled to Carer's Allowance ("CA") from 12 November 2018. Since I have also set aside the FTT's decision that SE was not entitled to CA from 18 October 2007, the effect of this is to restore SE's entitlement to CA in the period from 18 October 2007 onwards.

2. The legal issues in this case are extremely complex, and they are affected by case law that has been decided since the FTT made its decision. My decision that the FTT erred in law therefore implies no criticism of the FTT. I am grateful for the various submissions received by representatives for the parties.

3. The Respondent's decision in this case is dated 4 April 2019, which is approximately 5 ½ years from the date of this judgment. It took 2 ½ years to get a decision from the FTT in September 2021, and the appeal to the Upper Tribunal ("UT") has taken a further 3 years. There are a wide range of reasons for this, reflecting the complexity of the case, allocation of the case to a District FTT judge who was then regrettably unable to hear it, adjournments for presenting officers whose involvement was later decided to be unnecessary, questions which were identified for the first time at the UT stage, some delay arising from the (valuable) involvement of the AIRE Centre, and others. The delay does not therefore reflect fault on the part of any person or party. It must nevertheless be recognised that delay of this kind is highly regrettable, and may be hard to understand from SE's perspective. I therefore wish to extend my sympathies to her for the long wait that she has had to endure.

4. The case turns on whether the "competent state" for the purposes of the SE's claim to cash sickness benefits, under Regulation (EC) No 1408/71 ("Reg 1408/71"), from 2007 to 2012) or Regulation (EC) No 883/2004 ("Reg 833/2004, thereafter) was Switzerland or the UK. The Respondent decided that it was Switzerland, because SE's husband was in receipt of a disability pension from Switzerland. I have concluded that this is wrong, and that the UK was at all times the competent state, because:

   (i) Art 28 of Reg 1408/71 has the effect that the family member of a pensioner may be entitled to be paid cash sickness benefits by the state that is responsible for the payment of a pension, where they are not entitled to be paid such benefits by the state in which they are resident. It does not, however, have the effect that, if the family member is otherwise entitled to be paid cash sickness benefits by the state of residence, that entitlement is removed or the state of residence ceases to be the competent state in respect of the payment of cash sickness benefits to that person. It follows that the FTT's decision that SE was not entitled to CA from 18 October 2007, when Reg 1408/71 was still in force, is wrong in law.

   (ii) Likewise, Art 29 of Reg 833/2004, construed in light of the Court of Appeal's decision in *Harrington v SSWP* [2023] 1 WLR 3477, ensures that the family member of a pensioner may be entitled to be paid cash sickness benefits by the state that is responsible for the payment of a pension, where they are not entitled to be paid such benefits by the state in which they are resident, but does not have the effect of removing such entitlement if the family member is otherwise entitled to be paid such benefits from the state of residence. SE's entitlement to CA was therefore not affected by the coming into force of Reg 833/2004.

Relevant legal provisions

Carer's Allowance

5. CA is provided for in section 70 of the Social Security Contributions and Benefits Act 1992 ("the SSSCBA"). It is payable to a person who is engaged in caring for a severely disabled person, where the conditions in subsection (1) are met.

6. Section 70(4) provides that a person shall not be entitled to CA under she satisfies prescribed conditions as to residence or presence in Great Britain. Again, there is no

dispute that SE, who is a UK national who lives in the UK, has satisfied these conditions at all material times.

7. However, subsection (4A) provides as follows:

> *A person to whom either Regulation (EC) No 1408/71 or Regulation (EC) No 883/2004 applies shall not be entitled to* [CA] *unless … 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.*

8. The two EU regulations referred to are measures of EU law whose purposes is to "co-ordinate" the provision of social security law between EU member states. A fuller account of their place within EU law, and the powers and purposes under which they were enacted, can be found in *Harrington* (¶¶5-10).

9. Reg 883/2004 was brought into force by EU Reg 987/2009 ("the Implementing Reg"), on 1 May 2010, from which date it replaced Reg 1408/71. Since the facts of this case span the period of application of both regulations, it is relevant to consider both. I would add that, following the approach of Lewis LJ in *Harrington*, it may be relevant to the construction of Reg 883/2004 to consider the predecessor provisions in Reg 1408/71.

10. Reg 833/2004 only came into force for Switzerland in 2012. Nothing turns on this because it is not suggested that anything of significance occurred in SE's case between 2010 and 2012, albeit I think that, strictly, it the date of coming into force in Switzerland that matters.

11. The decision under appeal pre-dates the UK's departure from the European Union, and relates to the rights of SE during a period which pre-dates that departure, so it is not necessary to consider any complexities arising from that departure.

<u>Reg 1408/71</u>

12. Reg 1408/71 was amended very significantly over the period of 30 or so years that it was applicable (see Recital (3) to Reg 883/2004). Fortunately, the provisions that are material to this case were not altered in the period over which the regulation may have had any application to SE, from 1999 to 2010, and those provisions were also those in force immediately before the move to Reg 883/2004.

13. Since Reg 1408/71 provided the initial template for Reg 883/2004, which I deal with, I do not propose to set its provisions out in the same detail. However, I note the following:

    (i) Article 2 says that the regulation applies "to employed or self-employed persons", who are therefore the persons to whom the regulation applied *rationae personae*.

    (ii) The definitions of employed and self-employed persons in Article 1 were however rather wider than the terms themselves suggest, being defined, not by current or even past employment, but by reference to whether the person is "insured" for one of the risks covered by a social security scheme, so that it has been held that it is sufficient that a person is insured against the risk of old age by virtue of future entitlement to a retirement pension to bring themselves within the protection of the regulation even in relation to unrelated benefits (see *Sala v Freistaat Bayern (Case C-85/96)* [1998] ECR I-2691, ECJ, *HMRC v Ruas* [2010] PTSR 1757, *Tolley v SSWP* (Case C-430/15) [2017] 1 WLR 1261. The difference between these provisions, and Reg 883/2004, which applies "rationae personae" to "insured persons", is therefore less than might at first appear.

(iii) Title II of Reg 1408/71, like Title II of Reg 883/2004, dealt with the "determination of the legislation applicable" to an individual. Article 13(1) provides for the principle that "persons to whom this regulation applies shall be subject to the legislation of a single Member State only". Article 13(2) provides for a "cascade", whereby one must consider whether a series of conditions are met in turn. The default provision, applicable where none of the other conditions applies, in Art 13(2)(f), is that an individual will be subject to the legislation of the state of residence.

(iv) Title III of Reg 1408/71 provides for detailed rules concerning particular benefits, which had the potential to supplement or override the basic rule about legislation applicable in particular cases.

14. One example of a special rule in Title III, of importance to this case, was Art 28, which concerned the position of pensioners and their families residing in a state other than that which was responsible for payment of their pension. In the form that it took between 2000 and 2010, it provided, materially, as follows:

> ***Pensions payable under the legislation of one or more States, in cases where there is no right to benefits in the country of residence***
>
> *1. A pensioner who is entitled to a pension under the legislation of one Member State or to pensions under the legislation of two or more Member States and who is not entitled to benefits under the legislation of the Member State in whose territory he resides shall nevertheless receive such benefits for himself and for members of his family, in so far as he would, taking account where appropriate of the provisions of Article 18 and Annex VI, be entitled thereto under the legislation of the Member State or of at least one of the Member States competent in respect of pensions if he were resident in the territory of such State. …* [Emphasis added]
>
> [The rest of the article makes provision for the conditions under which such benefits shall be paid, and how the costs shall be distributed between the paying institutions, but does not affect the basic principle]

Reg 883/2004

15. Art 1 of Reg 883/2004, "definitions", includes:

> *(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 by the legislation of the Member States competent under Title II to have the right to benefits, taking into account the provisions of this regulation;*

16. There are definitions of "competent authority", "competent institution", and "competent Member State", in Arts 1(m), (q) and (s), to which I will return briefly below.

17. I will not set out the definition of "benefits in kind" in Art 1(va) in full, but it means, in relation to sickness, benefits paid to supply etc the "cost of medical care". In the UK, that is, essentially, NHS provision.

18. Art 2, "persons covered", provides that the regulation applies to persons "who are or have been subject to the legislation or one or more Member States, as well as to members of their families".

19. Title II of Reg 883/2004 is headed "Determination of the Legislation Applicable". The key provision is Art 11, which provides, materially, as follows:

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.
…
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/her 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 sub-paragraphs (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/her benefits under the legislation of one or more other member states.

20. This is the analogue to Art 13 of Reg 1408/71, to which I have already referred. The "special rules" in Arts 12-16 are not material to this case.

21. Title III makes special provision for particular kinds of benefits for particular categories of person.

22. Chapter 1 of Title III is concerned with "Sickness, maternity and equivalent paternity benefits". Section 2, Chapter 1 of Title II deals with this topic in relation "pensioners and members of their families" (whereas Chapter 1 deals with insured persons other than pensioners).

23. In this case the provision ultimately relied upon by the Respondent is Art 29, but that provision can only be understood alongside two other articles in this Section of the Regulation, so I will deal with them in numerical order.

24. First, Art 24 deals with the situation where a pensioner is "not entitled to benefits in kind under the legislation of the Member State of residence" (see the heading, and also the wording of Art 24(1)). So that covers the situation were a pensioner is not entitled to benefits in kind by reason of their residence in the host state. Since benefits in kind in the UK equates to NHS provision, and the right to NHS provision does not depend on payment of national insurance contributions etc, that is not applicable to the UK. However, Art 24(2) provides for a mechanism for determining which state should pay for the costs of benefits in kind in this situation, where a pensioner is insured in more than other Member State. I refer to this because it is also referred back to in Art 25, but the detail is not material.

25. Art 25, by contrast, deals with the situation where a pensioner who receives a pensioner from another Member State is nevertheless entitled to benefits in kind in the state of residence. It provides as follows:

Where the person receiving a pension or pensions under the legislation of one or more Member States resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self-employed person, and no pension is received from that Member State, the cost of benefits in kind provided to him

> *and to members of his family shall be borne by the institution of one of the Member States competent in respect of his pensions …*
>
> [The omitted words refer back to the mechanism in Art 24(2) for dealing with cases where a pension is paid by more than one Member State]

26. Since NHS provision is not dependent on conditions of insurance etc, this Article is applicable in the UK. Its effect is however not to remove entitlement to NHS from the pensioner concerned (nor from members of his or her family). It does not purport to affect that entitlement at all. Rather, it merely provides that, *if* the pensioner etc "would [also] be entitled to" those benefits in the state from which she draws her pension, then the state of residence may recover the costs of the benefits in kind provided to the pensioner etc from the state which pays the pension. It grants a right to the state of residence *vis a vis* the state that pays the pension, without altering the rights of the person to whom benefits in kind are to be provided.

27. As I say, Article 29 can only be understood against that background. It provides as follows:

> ***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 institutions of the Member State in which is situated the competent institution responsible for the costs 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.*

28. So this article operates by requiring consideration first of which Member State is "responsible" for the costs of paying benefits in kind in the Member State of residence, which must be determined under Arts 24 or 25, as applicable. It then provides that cash benefits "shall" be paid to the pensioner by that State, which will generally be that which pays the pension. Art 29(2) provides that the same shall apply to members of the family of the pensioner. The question at the heart of this case is whether, in addition to conferring a right to benefits from the state that pays the pension, it also takes away any right to benefits from the state of residence.

Art 6 of the Implementing Reg

29. Art 6 of the Implementing Reg deals with the situation where there is a "difference of views" between Member States as to whose legislation is applicable to an individual or which is the competent state for the provision of benefits. This situation may, among other things, leave an individual in limbo because each Member State takes the view that the other is responsible. Art 6(2) provides for the default rule that, in the face of such a difference of views, the individual should be entitled to benefits from the state of residence. The Court of Appeal gave guidance on what is required for a difference of views to engage Art 6(2) in *Fileccia v SSWP* [2018] 1 WLR 4129.

Facts

30. The Appellant, "SE", is a dual British and Swiss national, who is married to a dual British / Swiss national. They live in the UK. The Appellant was born on 4 March 1962.

31. SE has not worked in the UK, although she has acted as a carer, from to time, for her children. It is not in dispute that SE satisfied the conditions of entitlement to CA in section

70 SSCBA by reason of the care she provided to her children from time to time, subject only to the effect of section 70(4A).

32. SE's husband is entitled to, and has been in receipt of, a disability pension from Switzerland since at least 1999.

33. In July 1999, SW made a claim for Invalid Care Allowance, on the basis that she provided care to one of her children, "C1". She declared that her husband was in receipt of the Swiss disability pension. Her claim was granted.

34. At that time, CA would have been understood by the UK to be a "special non-contributory benefit" ("SNCB") within the meaning of Reg 1408/71, and as such not to be affected in any way by Art 28 of that regulation. So the fact that the claim was granted in 1999 does not in itself say anything about the Respondent's understanding of Art 28 of Reg 1408/71.

35. By reason of the grant of CA, the Appellant also become entitled to be credited with national insurance contributions from the date that she was in receipt of CA.

36. From 1 April 2003, Invalid Care Allowance was renamed "Carer's Allowance" ("CA"). This did not affect SE's entitlement.

37. Also in 2003, SE made a claim for CA in respect of another child, "C2". This was granted and there was no break in her claim.

38. On 18 October 2007, the ECJ gave its judgment in *EU Commission v Council and Parliament of the EU* (Case C-299/05), [2007] ECR I-8696, holding that CA (along with Disability Living Allowance ("DLA") and Attendance Allowance ("AA")) were not SNCBs but were cash sickness benefits. However, rightly or wrongly, no point was taken by the Respondent that this in any way affected SE's entitlement to CA at this time. Likewise no point was taken that the coming into force of Reg 83/2004 in 2010 or 2012 affected SE's claim.

39. SE submitted a further claim in respect of another child, "C3", from 12 November 2018.

40. On 4 April 2019, the Respondent made a decision was made that SE was not entitled to CA from 12 November 2018:
> *... because the UK is not the competent state for payment of cash sickness benefits.*

41. SE disagreed, and sought to challenge that decision, eventually bringing an appeal to the First-tier Tribunal ("FTT").

42. On the appeal, the Respondent maintained her position that SE was not entitled to CA from 12 November 2018, but further submitted that entitlement to CA had ceased from an earlier date, namely 18 October 2007, and invited the FTT to "substitute" a decision to that effect. No reference is made to the fact that at this stage, Reg 1408/71 was still in force in 2007. The basis for substituting the new date was said to be:
> *... there has been a change of circumstances since this decision* [presumably, the 2003 decision] *took effect. This that on 18 October 2007, the European Court of Justice re-classified Carer's Allowance as a cash sickness benefit. ...*

43. The FTT hearing was on 16 September 2021, and its reasons are dated 21 September.

44. The FTT made two main findings, namely:
    (i) That "Switzerland is the competent member state" (FTT 18).
    (ii) That there was no "difference of views" as between the UK and Switzerland as to which was the competent Member State, so that Article 6(2) of the Implementing Reg did not apply so as to require the UK to pay benefits to the Appellant pending the resolution of such dispute (FTT 20).

45. The FTT did not give any reasons as to whether it should, in addition to refusing the appeal in respect of the date of 18 November 2018, go further and substitute a new decision that SE was not entitled to CA from 18 October 2007. It appears to have taken for granted that its conclusion was valid for all periods. Its decision is recorded (FTT 3) as being that SE "is not entitled to Carer's Allowance from 18 October 2007.

46. The Appellant sought permission to appeal to the Upper Tribunal (UT), relying principally on the argument that there was a dispute between the UK and Switzerland so as to engage Art 6(2) of the Implementing Reg. Permission to appeal was refused by the FTT but was granted by Upper Tribunal Judge Jacobs on 25 July 2022, who observed that he was not particularly persuaded by the ground of appeal relating to Art 6(2) of the Implementing Regulation but that he was concerned about the fact that the FTT had removed entitlement from 2007, since at this point Reg 1408/71 in force. He drew attention, in particular, to Art 28 of Reg 1408/71.

47. In a response drafted by counsel, Mr Yaaser Vanderman, dated 14 October 2022, the Respondent submitted that:
    (i) Switzerland was the competent state under Reg 833/2004, from 12 November 2018, relying on Arts 24, 25 and 29, as set out above.
    (ii) The question of whether the Switzerland or the UK was the competent state from 2007 to 2018 was "academic and should not be determined". This was because the Respondent was not seeking to recover any overpayment for this period. The conditions for the determination of an academic case (see *R (Zoolife International Ltd) v SSEFRA* [2007] EWHC 2995 (Admin), *et al*) are not made out.
    (iii) If, contrary to the foregoing, the UT did wish to determine the issue of competent state for the period 2007 to 2018, then the Secretary of State "no longer maintains the position" that Switzerland was the competent state.

48. Following an extension of time for the Appellant to respond, Judge Jacob gave a further direction on 3 May 2023, making various observations but also drawing attention to the decision of the Court of Appeal in *Harrington,* and asking whether the Respondent maintained her position that Switzerland was the competent state under Reg 883/2004 in light of that judgment. He also expressed some concerns about the way in which the Respondent had invited him to deal with the period from 2007 to 2018.

49. Mr Vanderman made a further written submission for the Respondent on 9 June 2023, submitting that *Harrington,* which concerned Art 21 of Reg 883/2004, should be distinguished in relation to Arts 24, 25 and 29.

50. Further directions followed, and the Appellant was given permission to rely upon a submission from the AIRE Centre, which was provided on 14 March 2024. The AIRE Centre submitted, essentially, that:

(i) The FTT had erred in law in finding that there was no difference of views between Switzerland and the UK within the meaning of Art 6(2) of the Implementing Reg; and

(ii) That, in light of *Harrington*, the UK and not Switzerland was the competent state under Title III of Reg 833/2004, and hence from 12 November 2018.

51. Mr Barney McCay, counsel, made further submissions on behalf of the Respondent dated 19 August 2024, largely directed at the difference in views issue. In addition however he very properly drew attention to some Northern Ireland case law in which Commissioner Stockman had reached conclusions that were adverse to the Respondent's argument. I will return to these cases briefly below.

52. I have not set out the factual background of communications with the Swiss authorities that is relied upon by SE for the purposes of Art 6(2) of the Implementing Regulation because I do not think I need to deal with that issue to decide the appeal.

Harrington

53. *Harrington* concerned the eligibility of a child, "H", to DLA, in circumstances where she met the domestic conditions of entitlement under section 71 of the SSCBA, but where the Respondent argued that the UK was not the competent state under Reg 833/2004. H was herself a UK national, as were both her parents, and she lived in the UK with her mother. However, her father, from whom the mother was separated, lived and worked in Belgium. As such he was himself covered by Reg 833/2004 as an "insured person", and the legislation applicable to him under Art 11 of Reg 833/2004 was that of Belgium rather than the UK, so that Belgium was, for him, the "competent state". H was his "family member".

54. Art 21 of Reg 833/2004 provides that "an insured person and members of his family residing … in … other than the competent state shall be entitled to cash benefits provided by the competent state in accordance with the legislation it applies". The Respondent argued that the effect of this was to create a rule of priority, whereby:

(i) Art 21 conferred entitlement on H to cash sickness benefits, including DLA or its analogue in Belgium, from Belgium, as the family member of her father, for whom the competent state was Belgium.

(ii) H's entitlement to cash sickness benefits from the UK, which she would otherwise enjoy as an insured person in the UK to whom UK legislation was applicable under Art 11(3)(e), was therefore excluded, because the UK was not the competent state for the payment of such benefits to her and / or because that is the effect of Art 21 and / or the principle of "single applicable legislation".

55. The Court of Appeal rejected the second part of this analysis, (ii) above. Lewis LJ said:

> *43. I accept that the basic principle is that there is to be a single member state whose legislation is applicable. That is inherent in the opening words of article 11 of, and recital (35) to, the Regulation. I do not, however, accept that the provisions of article 21 operate to take priority over the applicability of the legislation of the United Kingdom to the appellant, as an insured person, as that legislation is applicable to her by virtue of article 11(3)(e). …*

56. I will not set out his reasons in full, but in summary they were that:

(i) The wording and purpose of Art 21 was to prevent an insured person and their family members from being denied cash benefits because they are resident in a state other

than the competent state. It was not to displace the entitlement they might otherwise have to benefits from the state of residence, where they were subject to the legislation of that state in accordance with Article 11(3). *Harrington*, ¶44.

(ii) The history of the legislative provisions, and in particular Art 19 of Reg 1408/71, which was the predecessor to Art 21 of Reg 833/2004, further supported this conclusion. Lewis LJ placed particular weight on the fact that, under Art 19 of Reg 1408/71, a worker or their family member would be entitled to cash benefits from the competent state "in so far as they are not entitled to such benefits under the legislation of the state in which they reside". Lewis LJ said that "there is nothing to indicate that the European Union legislature [in enacting Reg 833/2004] wished to bring about a significant change in that position". *Harrington*, ¶¶45-50, especially ¶¶48-9.

(iii) The approach that he preferred would support the principle of free movement, whereas that which the Respondent argued for would undermine it (¶¶51-2).

(iv) These considerations were not displaced by the importance of the single legislative system, which would be respected by holding that the competent state in a case such as this was the state of residence (¶53-4).

57. These points cannot be transplanted wholesale to the present context, since the wording of the relevant provisions of Reg 1408/71 and Reg 833/2004 are different, but they provide a useful framework for analysis of the provisions relevant to this case, and certain aspects of the reasoning seem to me to be very consequential for this case.

Issues

58. In light of the above, I propose to address the following issues:

(i) Should I decline to determine the question of whether the FTT erred in law in its treatment of the period 1 October 2007 to 12 November 2018 on the basis that that issue is academic?

(ii) If not, did the FTT err in law in deciding that the UK was the competent state on 18 October 2007, at which time the issue had to be considered under Reg 1408/71?

(iii) In any event, did the FTT err in law in holding that Switzerland was the competent state under Reg 833/2004 from 12 November 2018?

(iv) What decision should I make in light of my conclusions on these issues?

59. There are other issues raised by the appeal, such as whether the FTT erred in its conclusions under Art 6(2) of the Implementing Reg, but in view of the conclusions I have reached on the issues outlined above, I do not think it is necessary to address them. Given the complexity of the issues that I do have to consider, I do not propose to do so.

Issue (i): 2007-2018 Period Academic

60. In her submission to the FTT dated 15 July 2020, the Respondent made the point that SE has "always been clear about her husband's disability pension" so that "any overpayment is not recoverable". In those circumstances, on the Respondent's approach, the question of whether the Appellant's entitlement to CE should have ended in 2007, rather than 2018, was always "academic" in the sense that she now uses that term. The Respondent nevertheless invited the FTT to substitute this purely academic correction to the decision that she herself had made concerning entitlement from 2018.

61. That seems to me be an unattractive starting point for the Respondent to now submit to the UT that it should decline to consider this issue further, now that the Respondent has secured a ruling from the FTT that CE entitlement ended in 2007. Why, if it was always academic, should the Appellant and the FTT have been put to the trouble of addressing this issue at all?

62. It seems to me even more unattractive for the Respondent to take this stance that the UT should not consider the issue, in circumstances where her alternative position is that she does not otherwise maintain the position that Switzerland was the competent state from 2007-2018. I think I am entitled to take that as a positive concession that Switzerland was not the competent state under Reg 1408/71, perhaps for the reasons hinted at by Judge Jacobs in his direction of 30 July 2022. But if that is the position, albeit no reasons for it are given, I think that it would be unsatisfactory to leave the FTT's decision on this part of the case in place.

63. In any event, I am not satisfied that it is right to describe the question of entitlement from 2007 to 2018 as an academic question, for two reasons:

    (i) As matters stand, there is a formal decision of the FTT, with legal consequences, which determines that the Appellant was not entitled to CA from 1 October 2007 to 12 November 2018. This is not therefore the situation which sometimes obtains when an issue is described as academic, where for example a decision has been withdrawn or overtaken by a later decision which robs it of any formal consequence. I quite see that the practical importance of the issue to the Appellant may be reduced by the fact that the Respondent will not seek to recover any overpayment but it does not necessarily follow that a decision of that kind will have no practical consequences for SE.

    (ii) I am concerned that there may one important practical consequence in paticular for SE if the decision in relation to 2007-2018 were allowed to stand despite being incorrect. As I have pointed out above, a person who is in receipt of CA will also be entitled to be credited with NI contributions for the period in which CA is paid. The effect of the FTT's decision on her past NI contributions is not addressed by the Respondent and it is unclear to me whether the Respondent would be willing, or legally able, to continue to treat SE as having made contributions for the period 2007-2018 in the event that the FTT decision stands. It may be that the Respondent would be able to satisfy me on this point but I am not minded to go back to her, and further delay the determination of this appeal, for her to address this issue, especially in circumstances where I consider that there are a range of other reasons for me to address the position under Reg 1408/71.

64. A further important point is that on no view does the issue relating to 2007-2018 render this appeal as a whole academic. I must determine the issue of SE's entitlement to CA from 12 November 2018 in any event, so this is not a case where I would be able to dispose of the appeal as a whole on the basis that this particular issue is academic, even if I considered that it was. I think that the *Zoolife* line of cases is primarily directed to circumstances where a case as a whole is academic, so that the court need not be troubled to resolve the issues at all. I am inclined to think that the court's discretion is broader in cases where the academic point does not dispose of the proceedings, especially where it may have some bearing on the live issues. In this case, if I were to allow the appeal from 2018 onwards, I will have to remake the decision or remit it, in which case it would be

particularly odd to leave the decision relating to the earlier period in place in the face of what amounts to a concession by the Respondent that it is wrong.

65. Finally, and critically, I do not think it would be right for me to deal with the question of Reg 833/2004, and the impact of *Harrington*, without considering what the position would have been under Reg 1408/71, bearing in mind the reliance placed by Lewis LJ on the predecessor to Art 21 of Reg 833/2004 in Reg 1408/71. I think that I must take the same approach, which means that I will need to consider what the position would have been under Reg 1408/71 in any event. Having done so, and taken with the Respondent's apparent concession of this issue, it would not be appropriate to leave the decision re 2007-2018 in place if I have in effect concluded that it was wrong.

66. In those circumstances, I doubt whether it is correct to describe the 2007-2018 issue as academic, and even if it were, I consider that I should exercise my discretion to decide it. I reach that conclusion without relying on the *Zoolife* criteria (wider public interest, large number of similar cases anticipated, etc), which do not impose a straitjacket on the exercise of the court's discretion to consider academic cases. I note however that consideration of Reg 1408/71 does have implications for Reg 833/2004, which I think can fairly be described as being of wider public interest, and that at least on Reg 833/2004, other cases may be anticipated. I do not think that the issue is fact-sensitive – it is determined by the correct interpretation of Art 28 of Reg 1408/71.

(ii) 2007-2018 CA Entitlement (Reg 1408/71)

67. As I have explained above, the EU regulation that was in force on 1 October 2007 was Reg 1407/71. It remained in force for the UK until 2010, and for Switzerland until 2012. It is not suggested that there was any change of circumstances that would affect SE's entitlement between 2010 / 2012 until 12 November 2018, within the meaning of Art 87(8) of Reg 833/2004, prior to the application in relation to C3 in 2018. Accordingly, the question of competent state for the whole of this period must be determined in accordance with Reg 1408/71.

68. As I have said, the Respondent has, subject to the "academic" point, in effect conceded this issue, in Mr Vandermann's submission of 14 October 2022. If that goes too far, she has in any event declined to advance any submissions on the point, in the face of Judge Jacobs indication that he considered that he might need to determine this issue, and his preliminary concerns that the UK was the competent state under Reg 1408/71. However, given its knock-on consequences for Reg 833/2004, I do not think I should deal with it solely as a matter of concession.

69. I approach this issue on the basis that:
    (i) SE's husband was a pensioner for whom the competent state, and the legislation applicable, was Switzerland
    (ii) SE was not herself an employed or self-employed person within the meaning of Art 1 of Reg 1408/71. That is not completely straightforward, because SE had been credited with some NI contributions by 2007 by reason of the grant of CA, and she may therefore have been insured against the risk of old-age in the UK so as to come *rationae personae* within the scope of Reg 1408/71 (see *Sala* / *Ruas* / *Tolley*, supra), but my decision does not depend on this point.

70. Given my conclusions on Art 28, below, and in light of the doubt about whether the Appellant is an "employed person" in her own right, I don't think it is necessary to determine the "legislation applicable" to the Appellant under Title II. For completeness, for reasons that are in parallel to those set out below in relation to Reg 833/2004, I think that the legislation applicable to SE under Title II of Reg 1408/71 is that of the UK, which is also therefore the competent state for the purposes of Title II. I have a slight hesitation on this only because Art 13(2)(f) (unlike Art 11(3)(e) of Reg 833/2004) is said to apply only "where the legislation of a Member State cease to be applicable". I do not know whether SE was ever subject to the legislation of Switzerland, but if she were not then it could be argued that Art 13(2)(f) does not apply to her at all. However, that would leave no way of determining what legislation applied to SE, without affecting in any way her entitlement to benefits under UK law as UK citizen residing in the UK.

71. So the question is whether any of the provisions of Title III make Switzerland the competent state for the payment of cash sickness benefits to SE, so as to disapply the entitlement which she would otherwise enjoy by reason of her residence in the UK, and / or because the UK's legislation is applicable to her under Title II.

72. The provision which governed the payment of cash sickness benefits to pensioners and their family members in Reg 1408/71 is Art 28, which I have set out above. This is stated to apply where the pensioner "is not entitled to benefits under the legislation of the Member State in whose territory he resides". So this only applies to a pensioner where the pensioner is not entitled to cash sickness benefits in the state of residence. At least in relation to the pensioner, therefore, it does not have the effect of removing entitlement in the host state, if the legislation of that state entitles the pensioner to sickness benefits.

73. I can see a possible linguistic argument that this condition does not apply to family members. On a literal reading, it is the pensioner himself who must be "not entitled". If that condition holds, as it may well do for SE's husband, then it might be argued that the rest of the article applies, so that the pensioner "shall receive such benefits for himself and members of his family" from the pension paying state, regardless of whether the family member is entitled to benefits in the state of residence.

74. This would an exceptionally odd result, in that it would mean that the right of the pensioner themselves to receive benefits in the state of residence would be unaffected by the fact that they may have such a right from the state that pays their pension, but the right of their family members to receive benefits in the state of residence is removed by the fact that their family member (parent, spouse etc) has a pension from another country, whatever independent rights they may enjoy without reference to that family member.

75. I do not think this is required by the language of Art 28, even read very literally. Art 28 provides that, where the pensioner is not entitled to benefits in the state of residence, "he shall receive such benefits for himself and his family". On its strict language, it therefore grants a right to the pensioner himself, not to the family member. Further, applying a "teleological" approach as is required when construing EU law provisions, the general thrust of Art 28 cannot be read as taking away a right from family members, in circumstances where the obvious purpose is to ensure that the pensioner and his family are not left without assistance by reason of a lack of entitlement in the host state (and see again ¶44 of *Harrington*). Nothing in Art 28 expressly states that either the pensioner or his or her family member is not entitled to benefits from the state of residence.

76. It follows that, under Reg 1408/71, and for any period after the coming into force of Reg 833/2004 during which there was no change of circumstances for SE, the UK was the competent state for the payment of cash sickness benefits to SE. It follows that the FTT erred in law in substituting a decision that SE was not entitled to CA from 18 October 2007, when Reg 1408/71 was in force, and that decision must be set aside.

(iii) CA Entitlement from 12 November 2018 onwards (Reg 833/2004)

77. I therefore turn to the question of which was the competent state under Title III of Reg 833/2004, for the purposes of deciding whether SE's CA entitlement was rightly determined on 12 November 2018.

78. I will again start by assuming that SE's husband was a pensioner for whom the competent state, and the legislation applicable, was Switzerland.

79. On the question of whether SE is an "insured person", it is necessary to apply the definition in Art 1, set out above, under which SE must satisfy "the conditions required by the legislation of the Member States competent under Title II to have the right to benefits". In short, to be an insured person, one must be entitled to benefits, or the benefit in question, under domestic law, form the state "competent under Title II". That seems clear but in any event it is the approach taken by Lewis LJ in *Harrington,* at ¶40.

80. There is no doubt that the legislation applicable to the Appellant under Title II is that of the UK, under Art 11(3)(e). None of the cascade of provisions in Arts 11(3)(a) to (d) apply to her, or produce any different result. The feature of Art 13(2)(f) of Reg 1408/71 that I have identified above, that it applies where the legislation of a Member State ceases to be applicable, does not appear in Art 11(3)(e).

81. In *Konevod v SSWP* [2020] 1 WLR 5234, Sir Stephen Richards took the view that the starting point in considering what is the "competent Member state" is that it is the state of applicable legislation under Title II (see ¶41), and I note that Lewis LJ took the same approach in *Harrington* (¶41). This is binding on me.

82. The alternative approach to identifying the competent state would be to try to work through the definitions of competent authority, competent institution and competent state in Arts 1(m), (q) and (s). On reflection, and even if *Konevod* were not binding on me, I would be inclined to accept that this is not the right approach. Those definitions are essentially self-referential, so as to clarify the relationship between competent authority, institution and state. They are not necessarily of any assistance in identifying the competent state for a particular person. For example, whereas Art 1(m) says that the "competent authority" is the authority designated by the Member State concerned, so that is looking at what is the competent authority for a given Member State, not what is the competent authority for a given person. The definition in Art 1(q)(iii) likewise deals with identifying the "competent institution" for "the member state concerned", and relied on the previous definition of competent authority. In any case, as in *Konevod* (see ¶43), even if one took as one's starting point the definition in Art 1(q)(i), the competent institution / state for SE would be the UK, because that is where she, as opposed to her husband, is insured.

83. It follows that the UK is the competent state under Title II, subject to any special rules under Title III which alter that in relation to cash sickness benefits. The question is therefore, as in *Harrington,* whether there is any provision in Title III which operates "to

take priority over the applicability of the legislation of the United Kingdom" to SE (*Harrington* ¶43).

84. For reasons which are similar to those given by Lewis LJ, I do not think that these provisions, and in particular Art 29, do operate as a "rule of priority" so as to exclude SE's entitlement. To explain this I will seek to keep as closely as possible to the structure of the reasons given by Lewis LJ in *Harrington,* allowing for the differences of language and history of the relevant provisions.

Wording and purpose of Arts 24, 25, and 29

85. Art 29 can only be understood alongside Arts 24 and 25, since it relies upon them to locate the state that is responsible for the costs of benefits in kind.

86. Arts 24 and 25, taken together, however, plainly do not operate as a rule of priority in relation to benefits in kind. They expressly avoid this.

87. Art 24 deals only with the situation where a person is not otherwise entitled to benefits in kind from the state of residence – in other words, to cases where the equivalent to NHS provision is only available on condition of having paid insurance contributions or some other stipulation beyond lawful residence. By definition, therefore, it cannot affect the entitlement to benefits in kind to which a person is otherwise entitled.

88. Art 25, by contrast, deals with the situation where a person is entitled to benefits in kind by reason of residence alone, or without paying insurance contributions. However, it expressly avoids the removal of that entitlement. What it does instead is permit (though not require) the state of residence to recoup the costs of providing benefits in kind to the pension-paying state, without preventing the provision those benefits in kind in the meantime. It therefore does not affect the right of the pensioner and his or her family to benefits in kind from the state of residence, nor directly confer on them any rights to such benefits from the pension paying state.

89. Further, whether or not the state of residence chooses to take up this right of recoupment, or the pension paying state disputes it, has no effect on the pensioner or his family's rights to receive the benefits.

90. The fact that Arts 24 and 25 do not operate as a rule of priority so as to exclude entitlement in the state of residence does not, logically mean that Art 29 does not do this, if that is the clear effect of its language. But it is a striking context in which to consider Art 29, given the reliance of that article on the earlier provisions.

91. Art 29(1) says that cash benefits "shall be paid to [the pensioner] by" the competent institution responsible for benefits in kind, and Art 29(2) says that this shall also apply to members of the pensioner's family. Applying Art 24 or 25, that will generally be the state that pays the pension. In this case, it means that cash benefits "shall be paid" to SE by Switzerland.

92. Art 29 does not, however, say, at least in express terms, that cash benefits "shall not" be paid by the state of residence. As a matter of language, it is therefore possible to read it as saying no more than that, as with Art 21 considered in *Harrington*, the pensioner and his family have an entitlement to cash benefits from the pension paying state in the alternative to any entitlement to that in the state of residence, so that, per Lewis LJ at ¶44,

they are not "denied cash benefits because they are resident in a state "other than the competent state".

93. I accept that this is not clear one way or another from the language of Art 29 taken alone, but I certainly do not accept that the language of Art 29 is clear cut in favour of the Respondent's position.

94. Leaving aside wider points about history and purpose that I will turn to below, it must be considered alongside the provisions of Title II, and Art 11 in particular. In that regard, the starting point is that Art 11 expressly confirms the general rule about how to determine the legislation applicable to an individual, and the entitlements that they have flowing from that legislation. It is therefore necessary, to achieve the outcome contended for by the Respondent, to construe Art 29 as deliberately displacing that general rule, so as to remove those entitlements. I do not think that the language of Art 29 takes away the rights that are expressly confirmed by Title II.

95. That is further reinforced by the final words of Art 11(3)(e), which provide that the legislation applicable to a person by reason of residence shall be "without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of [other] Member States". To my mind that reinforces the conclusion that Art 29 would have been understood by the EU legislature as adding to rather than taking away from rights available under the applicable legislation. The general rule is that an economically inactive insured person is subject to the legislation of the state of residence, and therefore entitled to such benefits as it may provide, but that is subject to a right to such alternative provision as may arise under Title III, where the application of the rules of the state of residence would mean that the person is deprived of benefits. That general rule would then explain why it was not felt necessary, in Arts 21 and 29, to expressly state that the entitlements that they grant only arise where there is no right to benefits in the state of residence. I note that Lewis LJ made a similar point at ¶54 of *Harrington*.

96. I accept that the wording of Art 29 is different from Art 21, and that it does not use the word "entitled", but this does not in itself lead to a different conclusion if, as I would hold, the wording of Art 29 does not create a clear rule of priority. It may be said that, if the intention was to achieve the same outcome as in Art 21, the same language would have been used. But it can equally be said that, if the intention was to create a rule of priority, the language of Art 32 would have been used. The language used in different parts of Title III shows no consistency, even where the same result is intended. So there is no substitute for considering the meaning of the particular words used in Art 29, regardless of what language is used elsewhere in Title III.

97. Finally, Art 29(1) cross-refers to Art 21, which is to apply "*mutatis mutandis"*. I confess that I do not find this easy to understand but it tends to reinforce the idea that Art 29 should be read so as to align with Art 21, given that both concern the payment of cash benefits to persons for whom the competent state is not the state of residence. It is not easy to see why, as a matter of policy, they should have different effects. I do not need to rely on this for my overall conclusion but it tends to reinforce it.

The history of the legislative provisions

98. The predecessor to Art 29 of Reg 833/2004 was Art 28 of Reg 1408/71. As I have already held, that did not create a rule of priority or otherwise displace the entitlement which a pensioner or their family member might have to cash benefits under the legislation

applicable to them in the state of residence. Just as in *Harrington*, there is nothing to demonstrate that the EU legislature was intending to effect so significant a shift as to take away the entitlement to cash benefits which family members of pensioners might previously have enjoyed.

99. Standing back from this, it is clear following *Harrington* that:
    (i) any entitlement of a family member of an employed or self-employed person *other than a pensioner* to cash sickness benefits in the state of residence was not displaced by Art 19 of Reg 1408/71, when that was in force;
    (ii) any entitlement of a family member of a pensioner to such benefits in the state of residence was not displaced by Art 28 of Reg 1408/71;
    (iii) any entitlement of a family member of an insured person other than a pensioner to such benefits in the state of residence is not displaced by Art 21 of Reg 833/2004;
    (iv) any entitlement of family members of both employed persons etc and pensioners to benefits in kind in the state of residence was not displaced by, respectively, Arts 19(2) and Arts 28(1)(a) of Reg 1408/71;
    (v) any entitlement to benefits in kind of family members of insured persons and pensioners is not displaced by, respectively, Arts 17 and 24/25 of Reg 883/2004.

100. In these circumstances it seems to me that it would be anomalous if Art 29, alone amongst these former and current provisions, were to operate as a rule of priority in the way contended for by the Respondent. Though not necessary to my decision, therefore, that points further against the Respondent's position.

Free movement, and the importance of the single legislative system

101. Essentially for the reasons given by Lewis LJ at ¶51, the Respondent's interpretation would tend to deter free movement. The right of free movement under EU law attached to pensioners as well as to workers, provided that they satisfied certain preconditions. Even if this is consideration is less powerful in relation to pensioners than workers, I think it still has some force. Likewise, and again for the reasons given by Lewis LJ at ¶53, the interpretation that I have adopted will respect the principle that an insured person is subject to the legislation of a single state. The consequence of the interpretation of Art 11(3)(e) at ¶54 of the judgment, by which I am bound and which I would in any event accept, is that SE does not have concurrent rights from both the UK and Switzerland, but merely that her rights under UK law, and under Art 11(3)(e), take priority.

Other matters

102. The matters which I have set out are sufficient, in my judgment, to conclude the matter in favour of SE. There is however a further point which troubles me, which I will mention here without needing to rely on it.

103. The logic of the Respondent's argument, as I understand it, is that Art 29 operates to displace any other entitlement to cash sickness benefits which the family member of a pensioner may enjoy, provided only that a Member state other than the state of residence is responsible for the costs of benefit in kind paid to that pensioner. Given the wording of Art 29, there does not appear to be any scope for any exception to be made.

104. In the present case, as in *Harrington*, that might be thought to produce a surprising result, whereby the *prima facie* entitlement of a UK citizen living in the UK to a UK benefit for which they otherwise qualify is taken away by reason of their relationship to a family

member who happens to have some unrelated entitlement or insurance from some other EU member State. That would be so even if the family relationship was formed in the UK, or if the family member had never moved out of the UK or exercised free movement rights. In *Harrington*, it would have been so despite the fact that H did not live with the relevant family member, and so far as I can see would still have been the case even if H's mother had been economically active in the UK. In the present case, it would be so, on the Respondent's approach, even for someone in broadly SE's position who had no connection with Switzerland other than by marriage, or even if she had received CA in respect of her children for many years before remarrying a person with a Swiss pension in say 2017.

105. It is possible to go further however. SE does not, as I understand it, currently receive a UK pension, but at least by 2018 she would have been credited with sufficient NI entitlements to qualify her for such a pension when she reaches retirement age (which by my calculation will be in 2029, at the age of 67). In her case she may not, of course, still be caring for C3 by then. But even if she herself becomes a pensioner, she will still be the "family member" of a person in receipt of a Swiss pension, and on the Respondent's approach, Art 29 will continue to affect her access to cash sickness benefits, including not only CA but also for example AA. I cannot see that there is any provision in Reg 833/2004 which deals with the situation where the family member of an insured person, or of a pensioner, is themselves an insured person or a pensioner (compare Art 23, which only applies where the pensioner themselves receives a pension from the state of residence, but not where their family member does). On my approach, as with the approach in *Harrington*, that makes sense, because Arts 21 and 29 only confer additional rights, but do not operate to take them away. But on the Respondents' approach, in either case, the rights of one insured person in the Member State in which they are insured may be detrimentally affected by the rights of another insured person, merely because the latter is living outside the state in which they are insured. I struggle to see how that can accord with the purposes of co-ordinating the social security schemes of the Member States.

106. Finally, as I have said, Mr McCay drew my attention to two decisions of Commissioner Stockman, in Northern Ireland, namely *SP v DC (PIP)* [2023] NiCom 23, and *IP v DC (AA)* [2023] NICom 27, where the Respondent's arguments about the effect of Art 29 was, implicitly at least, rejected. He submitted however that they provided limited assistance, *inter alia* because "the Commissioner … did not have a cogent explanation as to why the UK could deny competence by reference to the provisions of Title III of" Reg 833/2004. Having considered those judgments, I accept that there is force in that point, so far as it goes. In *SP*, Commissioner Stockman repeatedly expresses frustration at the Department's failure to explain its case, and its repeated change of position. At ¶33, he refers to a "route via Article 25, Article 24(2), Article 29 and Article 21", and says that "I found this submission confusing", and points out that it was not the case presented at the hearing. It does not appear to have been clarified further and, when Commissioner Stockman directed further clarification, Art 29 was not further relied upon by the Department and indeed it conceded the competent state issue (¶36). Commissioner Stockman therefore set out no reasoned conclusion as to the construction of Art 29. In *SP*, the Department appears to have again conceded the case, and Commissioner Stockman simply reaffirmed his earlier decision. I am not bound by the decision of a single Commissioner, and in light of the above, they have limited persuasive value on the key issues I have to decide. Having considered those issues for myself, however, I have reached the same outcome as Commissioner Stockman.

(iv) What decision should I make?

107. It follows from what I have said that the FTT erred in law, in relation to both the period 2007-2018, and the period from 12 November 2018 onwards. I therefore set its decision aside.

108. Given my conclusions above, there is no issue that is suitable for remittal, and I will exercise my power to "re-make" the decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The decision that I make is that SE was entitled to CA from 12 November 2018.

109. I do not think that I need to substitute a decision in relation to the earlier period. My re-made decision stands in place of the decision dated any earlier decision which the Secretary of State made in on 4 April 2019, with effect that SE's previous entitlement to CA from 2007 to 2018 remains in place.

Tim Buley KC
Deputy Judge of the Upper Tribunal

Authorised for issue on 5 December 2024