



Neutral Citation Number: [2026] UKUT 156 (AAC)
Appeal No. UA-2025-000343-CA

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

- v -

KLQ

Respondent

**Before: Upper Tribunal Judge Ovey
Decided on consideration of the papers**

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Judge: Judge Tootell
Tribunal Case No: SC124/23/01706
Digital Case No.: 1685-6310-1583-7687
Tribunal Venue: East London (S)
Decision Date: 13th September 2024

SUMMARY OF DECISION

14 European Union law
14.6 Council regulations 1408/71/EEC and (EC) 883/2004
14.13 other

The Upper Tribunal decided that the provisions of the European Union Withdrawal Agreement continued to apply to a Swedish national to whom they applied at the end of the transition period after his acquisition of British citizenship. It further decided that the decision in *SE v. Secretary of State for Work and Pensions* [2024] UKUT 405 (AAC) applied not only to cases in which it was contended that a derivative right under the social security co-ordination legislation displaced the independent right of a claimant as a United Kingdom resident but also to cases where it was contended that an independent right of the claimant as a pensioner of an EU state displaced his independent right as a United Kingdom resident.

The claimant was born in Iraq and moved to Sweden in 1988, where he remained until 1998, when he came to the United Kingdom. While in Sweden, he acquired the right to a Swedish retirement pension. He resided in the United Kingdom from 1998 onwards and was employed at all material times. He is prospectively entitled to a United Kingdom retirement pension. He acquired British citizenship in 2021 and is a

dual Swedish/British national. His wife is in receipt of the care component of personal independence payment and it was accepted that he gave her care for at least 35 hours a week. His employment terminated on 16th November 2022 and the next day he applied for carer's allowance backdated to 17th August 2022. Since October 2022 he had been in receipt of his Swedish pension, which was payable from the age of 62.

At the end of the transitional period of withdrawal from the European Union on 31st December 2020 the claimant fell within art. 30 of the European Union Withdrawal Agreement and so Regulation (EC) No. 883/2004 applied to him. By the time of the hearing before the First-tier Tribunal the Secretary of State accepted that the United Kingdom was the competent state for the purposes of the Regulation until 21st November 2022 (the end of the benefit week in which he ceased to be employed) but maintained that thereafter the competent state was Sweden rather than the United Kingdom because of his pension entitlement. The tribunal judge was concerned that his status as a British citizen had not been recognised. At the hearing itself that was accepted by the presenting officer, but it transpired that from 22nd November 2022 onwards the claimant had an award of universal credit including the carer element and on that ground was not entitled to receive carer's allowance. The tribunal judge decided that the United Kingdom was the competent state, but on the basis that the claimant was a British citizen and in effect that superseded his rights under the Withdrawal Agreement. The Secretary of State appealed, contending that by virtue of arts. 24, 25 and 29 of the Regulation the competent state after the claimant ceased employment was Sweden.

At that time, the Secretary of State was intending to appeal against the decision in *SE v. Secretary of State for Work and Pensions* [2024] UKUT 405 (AAC) in which in similar circumstances but involving a right derived from the relevant pensioner's right it was decided, effectively applying the Court of Appeal's decision in *Harrington v. Secretary of State for Work and Pensions* [2023] 1 W.L.R. 3473, that the United Kingdom remained the competent state of a United Kingdom resident although a family member was entitled to receive a pension from another state. The Secretary of State subsequently withdrew the appeal and invited the Upper Tribunal to set aside the decision of the First-tier Tribunal because it was based on British citizenship but to remake the decision to the effect that the United Kingdom was the competent state. The Upper Tribunal therefore had to decide (i) whether the provisions of the Withdrawal Agreement continued to apply to the claimant and (ii) whether, if so, the United Kingdom was the competent state despite the claimant's own right to a Swedish pension. The decision is that the claimant retained his rights under the Withdrawal Agreement, with the consequence that the Regulation continued to apply after his acquisition of British citizenship, and that the United Kingdom remained the competent state both during his employment, by virtue of art. 11.3(a) of the Regulation, and after he ceased to be employed, by virtue of art. 11.3(e).

DECISION

The decision of the Upper Tribunal is that the reasoning of the First-tier Tribunal was erroneous because the judge relied on the claimant's status as a British citizen. The decision is therefore set aside.

Under s.12(2)(b)(ii) the decision is remade in the following terms:

1. The claimant is a dual Swedish/British citizen to whom Regulation (EC) No. 883/2004 applies;
2. For the period 18th August to 21st November 2022 the United Kingdom was the competent state pursuant to art. 11.3(a) of the Regulation;
3. Applying the decision in *SE v. Secretary of State for Work and Pensions* [2024] UKUT 405 (AAC), from and after 22nd November 2022 the United Kingdom was the competent state pursuant to art. 11.3(e) but the claimant's entitlement to carer's allowance was subject to the effect of his universal credit claim with the consequence that he was not entitled to receive any payment of carer's allowance.

The practical effect of the decision is unchanged but the underlying reasoning is changed having regard to the possibility of future claims to which the claimant's status in relation to the Regulation may be relevant.

REASONS FOR DECISION

Introduction

1. This is an appeal by the Secretary of State for Work and Pensions against the decision of the First-tier Tribunal given on 13th September 2024. By its decision the tribunal held that the United Kingdom was the "competent state" (as that expression is understood in the context of the co-ordination of social security systems in Europe) for the purposes of the claimant's claim to carer's allowance. (The claimant is the respondent to this appeal, but for convenience I shall continue to refer to him as the claimant.) In practical terms, the decision had the consequence that the claimant was entitled to carer's allowance for the period 18th August to 4th September 2022 and 7th to 21st November 2022. From 22nd November 2022 onwards the claimant had been in receipt of the carer's element of universal credit and he was not entitled additionally to carer's allowance.
2. The appeal was originally stayed at the request of the Secretary of State pending the decision of the Court of Appeal in *SE v. Secretary of State for Work and Pensions* [2024] UKUT 405 (AAC). In the event, the Secretary of State decided not to pursue the appeal in that case and applied to the Court of Appeal for it to be dismissed. I am now asked by the Secretary of State to remake the decision to the effect that the United Kingdom is indeed the competent state but for reasons other than those given by the tribunal.
3. For the reasons which follow, I accept that that is the appropriate course of action to take. It will have no practical impact for the claimant, since the question by what route the United Kingdom comes to be the competent state will not affect his entitlement as determined by the tribunal.

Factual background

4. The material facts are as follows.

5. The claimant was born in Iraq in 1960. In 1988 he went to live in Sweden, where he was employed and became entitled to a retirement pension under Swedish law. He acquired Swedish nationality. In 1998 the claimant came to the United Kingdom, where he has resided at all subsequent times. He was given indefinite leave to remain on 25th February 2019 and on 4th February 2021 became a naturalised British citizen.
6. On 17th November 2022 the claimant claimed carer's allowance from 17th August 2022 in respect of the care he gave to his wife, who was in receipt of the daily living component of personal independence payment. He stated in the claim form that he had been providing care since 17th November 2021 and was providing care for her for more than 35 hours a week from before 17th August 2022. Subject to the competent state issue and with the exception of the period 5th September to 6th November 2022, when the claimant's earnings from his employment were in excess of the carer's allowance earnings limit, it was accepted that he was entitled to that benefit. The present issue arises because at the time of the claim the claimant had dual nationality, being a citizen of both Sweden and the United Kingdom, and he was already in receipt of his Swedish retirement pension, which became payable at age 62.
7. In his claim form for carer's allowance the claimant stated that his nationality was British and gave details of his Swedish pension. He also gave the requested details of his employment since 17th February 2022, stating that the employment had begun before 17th July 2022 and had ended on 16th November 2022. There are payslips for his employment for April, May, September and November 2022 and a copy of the claimant's P45 on the cessation of his employment. The papers include a letter dated 4th August 2016 from a firm of accountants stating that the claimant had begun work on 3rd August 2016 with what appears to be the firm which employed him in 2022. I note, however, that the HMRC income data for the period 1st July 2022 to 4th January 2023 shows no payment in July 2022 and a payment for August 2022 which appears to be half of the payment for September and October 2022.
8. The papers also include a letter dated 18th May 2022 from The Pension Service to the claimant showing that the claimant had claimed state pension from another country and The Pension Service had sent details of his claim to Sweden. It appears that the pension was paid from October 2022.
9. In the light of the information about his Swedish pension the claimant was asked for further information to enable the DWP to decide whether an EEA State (in practice, Sweden) might be responsible for paying him benefits like carer's allowance. In response the claimant stated that he was a British citizen, had been born in Iraq, had moved to Sweden in 1988 and had come to the United Kingdom on 1st November 1998, where he had lived ever since. His reason for coming to the United Kingdom was work.
10. On 9th February 2023 the decision maker at the Department of Work and Pensions ("the DWP") decided that:

- 10.1. The claimant was not entitled to carer's allowance for the period 18th August to 4th September 2022 because the United Kingdom was not the competent state responsible for payment of cash sickness benefits;
 - 10.2. He was not entitled to carer's allowance for the period 5th September to 6th November 2022 because of his earnings, as already noted;
 - 10.3. He was entitled to carer's allowance from 7th to 21st November 2022 at a reduced weekly rate because of his Swedish state pension;
 - 10.4. He was not entitled to carer's allowance from 22nd November 2022 onwards because the United Kingdom was not the competent state.
11. Underlying this decision was the DWP's view, to be found on p.70 of the First-tier Tribunal bundle, that "the UK is not responsible for paying sickness benefits ... as [the claimant] receives state pension from Sweden and this takes precedence over his rights in the UK which are based on residence only (EC Regulation 883/04, articles 25 and 29)."
12. The claimant asked the DWP to reconsider the decision by letter dated 2nd March 2023, saying, among other things, that his Swedish retirement pension had been suspended from March 2023 until he reached the retirement age of 66 and repeating that he was a British citizen. The papers show that the suspension of the Swedish pension was in response to a request from the claimant. He did not challenge the decision for the period 5th September to 6th November 2022, which was based on the level of his earnings, or the decision for the period 7th to 21st November 2022, during which he was paid an amount reduced because of his Swedish pension.
13. The decision was reconsidered on 18th April 2023 but was not changed. The notice of the decision included the following:
- "Although the UK left the European Union on 31 December 2020, any nationals from a European Economic Area (EEA) state who were legally resident in the UK before this date continue to be subject to EU regulations in accordance with the Withdrawal Agreement between the European Union and the UK.
- EC regulation 883/2004 co-ordinates the social security systems across the European Union and is aimed at facilitating the free movement of citizens in the EEA. You did fall within the scope of the scope of Judgement 883/2004 (*sic*) because you are a Swedish national who was living in Great Britain before the end of the transition period on 31 December 2020.
- As a result of European Court Judgment C299/05 given on 18/10/2007, Carer's Allowance is classed as a cash sickness benefit under European legislation.
- Under this Regulation, only one EEA state can be responsible for payment of cash sickness benefits and the Decision Maker had to decide which that should be.

As carer's allowance is classed as a cash sickness benefit under European legislation, certain factors may determine which country is the competent state responsible for payment of cash sickness benefits –

- A person lives in the UK but works in the UK or another EEA State or Switzerland;
- A person lives in the UK but is entitled to a benefit or pension from an EEA State.

At the time of your Carer's Allowance claim from August 2022, you were in receipt of state pension from Sweden based on national on the fact that (*sic*) you had paid contributions into the Swedish social Security system before you moved to the UK. EC regulation 883/2004 covers payments of cash both sickness benefits (*sic*) and pensions based on a person's national insurance record.

The fact that you had been awarded a Swedish state pension but were not working, or receiving a pension from the UK meant that Sweden was the competent state responsible for payment of cash sick sickness benefit (*sic*) from 18 August 2022.

Between August 2022 and 16 November 2022, you were employed by Friends Butchers. During the period of your employment, it was accepted that the UK became responsible for cash sickness benefit as work and your residence here took precedence over your Swedish pension ...

On 16 November 2022, your employment at Friends Butchers ended. This meant that from the following Monday, 22 November the UK was again no longer the competent state responsible for payment of cash sick sickness benefit (*sic*)."

14. The claimant appealed against that decision on the grounds that he had no income other than universal credit, had worked in the United Kingdom continuously for the period 1998-2022¹ and was entitled to a state pension. He explained that the employer had stopped his job because of its own financial problems. Again he did not challenge the decision for the periods 5th September to 6th November and 7th to 21st November 2022.
15. The Secretary of State's submission to the tribunal focused on the effect of the Withdrawal Agreement and Regulation 883/2004. It referred to the claimant's employment with Friends Butchers and stated that it was accepted in consequence that until 21st November 2022 the United Kingdom was the competent state responsible for the payment of cash sickness benefits. Thereafter, it was submitted, Sweden was the competent state because it was paying the claimant a state pension. Although it was recognised that that pension was not being paid, it

¹ There is a part of the notice of appeal which includes the words "[illegible] I was a job seeker." Given what appears about the claimant's employment history as already noted, it appears to me that although he may at times have been a job seeker, he had been in employment for several years at the time of his claim, although his employment had then terminated.

was submitted that the claimant remained entitled to the pension but had chosen not to receive it. The fact that the claimant cared for his wife in excess of 35 hours per week was said not to be in dispute. The conclusion of the submission was that the appeal should be dismissed.

16. I comment at this stage that it is hard to understand why the Secretary of State sought to uphold the decision in respect of the period 18th August to 4th September 2022, in respect of which the ground of refusal was that the United Kingdom was not the competent state. The Secretary of State seems to have been unaware at that point that the claimant was receiving the carer's element of universal credit, so it is understandable that the appeal for the period from 22nd November 2022 onwards was resisted.
17. The appeal came on for hearing on 11th October 2023, on which occasion the claimant produced a copy of his British passport, issued in July 2021. The tribunal was concerned that the submissions of the Secretary of State did not acknowledge that since 31st December 2020 the claimant had become a British citizen and directed the Secretary of State to make a supplementary submission explaining why the claimant was still being treated as an EEA citizen rather than being assessed as a British citizen.
18. A submission was duly provided, to the effect that the claimant was not being treated as an EEA citizen but as a British citizen who came within the scope of the Withdrawal Agreement and was therefore subject to Regulation 883/2004.
19. The appeal was then listed for final determination on the papers on 14th March 2024. The day before the hearing the claimant telephoned and asked for an oral hearing by telephone with an Iraqi interpreter. As explained in an adjournment notice dated 25th March 2024, the judge formed the view that that course was necessary and in the interests of justice. The judge went on to direct that the claimant should produce his naturalisation certificate, that a presenting officer with detailed knowledge of EEA State Competency issues was to attend and that a further supplementary submission should be provided to explain why, given that the Withdrawal Agreement relates to "Union citizens", the claimant should still be considered as a Union citizen after having become a British citizen.
20. The claimant duly produced his naturalisation certificate. A week later the DWP produced the documentation relating to the grant of indefinite leave to remain and made the following supplementary submission:

"The claimant has stated that he is British, but information obtained by the DWP from Home Office records (attached) indicates that he is a Swedish national who was granted EU settled status with indefinite leave to remain in the UK on 25 February 2019.

It was on this basis that it was stated that Article 30(1)(a) of the Withdrawal Agreement applies to the appellant."
21. That remained the state of play when the tribunal hearing took place.

Legal framework

22. The European Union Withdrawal Agreement, which was made in 2019, contains in art. 2 a definition of “Member States” as, in effect, all the states of the European Union other than the United Kingdom, a definition of “Union citizen” as any person holding the nationality of a Member State and a definition of “United Kingdom national” which is rather more complex, but would include a British citizen. “Transition period” is defined in art. 126 as the period starting with the date of the Withdrawal Agreement and ending on 31st December 2020.
23. Part 2 of the Withdrawal Agreement deals with citizens’ rights. Art. 10 provides that Part 2 applies, so far as material, to Union citizens who exercised their right to reside in the United Kingdom before the end of the transition period “and continue to reside there thereafter” and to United Kingdom nationals who exercised their right to reside in a Member State.
24. Title III of Part 2 deals with the co-ordination of social security systems. By art. 30.1 it applies, consistently with art. 10, to Union citizens who are subject to the legislation of the United Kingdom at the end of the transition period, United Kingdom nationals who are subject to the legislation of a Member State at the end of the transition period, Union citizens who reside in the United Kingdom and are subject to the legislation of a Member State at the end of the transition period and United Kingdom nationals who reside in a Member State and are subject to the legislation of the United Kingdom at the end of the transition period. It also applies to the family members and survivors of such persons. By art. 30.2 all those people are “covered” for as long as they continue without interruption to be in one of the situations set out in art. 30.1 (which includes more situations than I have mentioned) involving both a Member State and the United Kingdom at the same time. Art. 31 then provides that the rules and objectives set out in, inter alia, Regulation (EC) No. 883/2004 on the coordination of social security systems apply to the persons covered by Title III. Art. 39 provides that the persons covered by Part 2 enjoy the rights provided in the Titles of that Part for their lifetime, unless they cease to meet the conditions set out in those Titles.
25. S.7A of the European Union (Withdrawal) Act 2018, inserted by s.5 of the European Union (Withdrawal Agreement) Act 2020, makes provision for rights under the Withdrawal Agreement itself to be directly enforceable in the United Kingdom.
26. A primary objective of Regulation (EC) No. 883/2004 is set out in Art. 11, which provides that persons to whom the Regulation applies shall be subject to the legislation of a single Member State and sets out how the relevant legislation is to be determined. (The United Kingdom is of course a Member State for the purposes of the Regulation.) Under paragraph 3(a) a person pursuing an activity as an employed person in a Member State is subject to the legislation of that Member State and paragraph 3(e) contains a default provision to the effect that any person whose situation is not specifically covered is subject to the legislation of the Member State of residence, without prejudice to other provisions of the Regulation guaranteeing benefits under the legislation of another Member State. Art. 2 provides that the Regulation applies to, among others, nationals of a Member State who are or have been subject to the legislation of one or more Member States.

27. The relevant rules themselves operate primarily by reference to “an insured person” and the members of the insured person’s family. Art. 1 of the Regulation defines “insured person”, for present purposes, as any person satisfying the conditions required under the legislation of the competent Member State to have the right to sickness, maternity and equivalent paternity benefits and death grants, taking into account the provisions of the Regulation. As explained in *SE v. Secretary of State for Work and Pensions*, the Court of Appeal in *Konevod v. Secretary of State for Work and Pensions* [2020] 1 W.L.R. 5234 and *Harrington v. Secretary of State for Work and Pensions* [2023] 1 W.L.R. 3473 took the view that the starting point in identifying the competent state is to identify the state the legislation of which applies to the relevant person. That approach has the effect that the competent state for an employed person will be the state where the person works, regardless of where the person resides.
28. Chapter 1 of Title III of the Regulation contains special provisions relating to sickness, maternity and equivalent paternity benefits. It is clear that since 2007, following the decision of the Court of Justice of the European Union in *Commission of the European Communities v. European Parliament and Council of the European Union*, Case C-299/05, carer’s allowance has been recognised to be a cash sickness benefit for the purposes of the Regulation. Arts. 17 to 22, which come under the heading “Insured persons and members of their families, except pensioners and members of their families”, contain a number of provisions relating to cases in which an insured person resides or stays in a state other than the competent state. In broad terms, those provisions protect the right of the insured person to benefits in kind (which in the United Kingdom is essentially NHS provision) or cash benefits and allocate the responsibility for payment between the institutions of the competent state and the other relevant state.
29. Arts. 23 to 30 then deal with pensioners and members of their family. Arts. 23 to 28 are all concerned with the provision of benefits in kind. Under art. 25, where a person who is receiving a pension under the legislation of a Member State resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person (as is the case with carer’s allowance) and no pension is received from that Member State, the cost of benefits in kind provided to that person or a family member is to be borne by the competent institution of the Member State providing the pension (where there is only one such state), to the extent that the person or family member would be entitled to such benefits if resident in the Member State. Under art. 29, where a person is receiving a pension under the legislation of a Member State, cash benefits are to be paid by the competent institution of the Member State in which is situated the competent institution responsible for the cost of benefits in kind provided to the pensioner in the pensioner’s Member State of residence. Art. 21 is to apply *mutatis mutandis*.
30. Carer’s allowance itself is governed by s.70 of the Social Security and Contributions Act 1992 and the Social Security (Invalid Care Allowance) Regulations 1976, S.I. 1976 No. 409, both of which have been heavily amended. S.70(1) specifies three conditions which a claimant must satisfy:

- 30.1. That the claimant is regularly and substantially engaged in caring for a severely disabled person (defined in subs. (2) as including a person in respect of whom the daily living component of personal independence payment is payable);
- 30.2. That the claimant is not gainfully employed;
- 30.3. That the severely disabled person is of a prescribed description.
31. Whether a person is regularly and substantially engaged in caring for a disabled person is to be determined in accordance with reg. 4 of the 1976 Regulations. For present purposes, it is sufficient to say that a claimant is to be treated as regularly and substantially engaged in caring for a severely disabled person on every day in a week “if ... as at that week [the claimant] is, or is likely to be, engaged and regularly engaged for at least 35 hours a week in caring for” the severely disabled person. Reg. 6 provides, in effect, that any severely disabled person who is being cared for by the claimant is of a prescribed description. Whether the claimant is gainfully employed is determined in accordance with reg. 8, which provides that a claimant is to be treated as gainfully employed on every day in a week if the claimant’s earnings in the immediately preceding week have exceeded a specified level, which is uprated annually and was £132 at the material time for present purposes.
32. As a general rule, the claimant must also satisfy prescribed conditions as to residence or presence in Great Britain: s.70(4) of the 1992 Act. Under s.70(4A), however, a person to whom Regulation (EC) No. 883/2004 applies is not entitled to an allowance for a period unless the United Kingdom is competent for payment of sickness benefits in cash to that person for that period. That subsection was added by reg. 5(3) of the Social Security (Disability Living Allowance, Attendance Allowance and Carer’s Allowance) (Miscellaneous Amendments) Regulations 2011, S.I. 2011 No. 2426, in the light of the decision in Case C-299/05.
33. The general conditions as to residence are to be found in reg. 9 and, broadly speaking, require the claimant to be habitually resident in the United Kingdom, not to be subject to immigration control, to be present and to have been present for not less than 104 of the preceding 156 weeks. Reg. 9A provides that it is not necessary to satisfy the last condition if (among other conditions) Regulation (EC) No. 883/2004 applies. That provision was added by reg. 2(3) of the Social Security (Disability Living Allowance, Attendance Allowance and Carer’s Allowance) (Amendment) Regulations 2013, S.I. 2013 No. 389 as part of a wider revision of the residence and presence conditions for such benefits.
34. For completeness, I should say that Regulation (EC) No. 883/2004 formed part of retained direct EU legislation within the meaning of s.3 of the European Union (Withdrawal) Act 2018 as originally enacted, which came into force on IP completion day (31st December 2020), and so became part of United Kingdom domestic law. It was, however, immediately revoked by reg. 3 of the Social Security Co-ordination (Revocation of Retained Direct EU Legislation and Related Amendments) (EU Exit) Regulations 2020, S.I. 2020 No. 1508, subject inter alia to reg. 6 providing that it should continue to have effect in so far as it related to the

co-ordination of the provision of benefits in kind. The net effect is that except in relation to persons falling within art. 30 of the Withdrawal Agreement, the Regulation is of effect only as respects benefits in kind.

35. As is apparent from what is said above, the Regulation distinguishes between cash benefits and benefits in kind. The European Court of Justice decided in *Molenaar v. Allgemeine Ortskrankenkasse Baden-Württemberg*, Case C-160/96, that benefits with features similar to the features of carer's allowance are cash benefits rather than benefits in kind, as was recognised subsequently in Case C-299/05.

The First-tier Tribunal's decision

36. The hearing took place on 13th September 2024 and was a remote hearing. It was attended by the claimant, who was supported by an interpreter, and by a presenting officer on behalf of the DWP, as directed by the tribunal judge. It is clear from the decision notice that the presenting officer accepted that the DWP had not correctly assessed the claimant's claim but had proceeded on the basis that he was a Swedish citizen with indefinite leave to remain. It was also the presenting officer who pointed out that since 22nd November 2022 the claimant had been in receipt of the carer's element of universal credit. (In practical terms this meant that arguments about the effect of the claimant's having voluntarily suspended his right to receive his Swedish pension ceased to be relevant.) In the light of those submissions the tribunal allowed the appeal, decided that the United Kingdom was the competent state for the purposes of the claim and as a result decided that the claimant was entitled to carer's allowance for the periods 18th August to 4th September 2022 and 7th to 21st November 2022. It appears that the tribunal understood the presenting officer to have accepted that the claimant's claim for carer's allowance had been refused for the latter period. In fact, as set out above, the Secretary of State's decision had been that the claimant was entitled to carer's allowance for the period 7th to 21st November 2022, but at a reduced rate because he was then in receipt of his Swedish pension.
37. The decision notice is to be read with the statement of reasons, dated 4th November 2024. It makes clear that there was no dispute of fact and that it was common ground between the parties that the appeal turned solely on the issue of the competent state. It sets out the DWP's position in some detail and refers to the two sets of directions by which the tribunal sought to clarify that position bearing in mind the claimant's status as a British citizen. It then summarises the presenting officer's stance at the hearing. The statement of reasons then continues:

"29. I find that the appellant was a British Citizen as at the time of his claim for Carer's Allowance and that his claim should have been assessed on this basis and not on the basis that he was a Swedish national with Indefinite Leave to Remain subject to the 31st December 2020 (*sic*).

30. In reality, despite the fact that the appellant had clearly stated his British Citizenship from the outset in his application form, it was overlooked by the DWP. Despite directions issued by the Tribunal seeking clarification as to why it is that the appellant's British Citizenship did not appear to be determinative in his claim for Carer's Allowance, none was forthcoming."

The statement then refers to the indefinite leave to remain documentation produced by the DWP in response to the final direction for a submission and comments that it confirms the tribunal's view that the claimant was assessed as a Swedish national with settled status, in which case he would have been subject to the Withdrawal Agreement, rather than as a British citizen.

38. Having received the statement of reasons, the Secretary of State applied to the First-tier Tribunal for permission to appeal. In a decision notice issued to the parties on 24th February 2025 the tribunal judge granted permission, stating that the case was "an unusual case and appropriate case for permission to appeal to be granted." The tribunal judge nevertheless drew attention to paragraphs 21 to 26 of the statement of reasons, which were said not to have been addressed. Those paragraphs related to the DWP's final response to directions and to the stance taken by the presenting officer at the hearing.
39. The claimant, having become aware of the application for permission to appeal, wrote to H.M. Courts and Tribunals Service on 6th January 2025 objecting to the Secretary of State's decision to challenge the tribunal's decision. The objection was based in part on the DWP's failure at all times prior to the hearing to pay attention to his British citizenship, which had been disclosed at the outset, and in part on what was contended to be an incorrect application of the Withdrawal Agreement. The argument was that the claim fell squarely under UK domestic law, not the Withdrawal Agreement. The claimant supported the decision that the United Kingdom is the competent state for the purposes of his claim to carer's allowance. The bundle also contains an undated letter from Citizens Advice Redbridge, received on 27th February 2025, from which it appears that Citizens Advice was assisting the claimant and I infer that the letter of 6th January 2025 was written with their assistance.
40. The Upper Tribunal granted the Secretary of State's request for a stay in case management directions dated 9th June 2025.

The grounds of appeal and the parties' submissions

41. The grounds of appeal sufficiently appear for present purposes from the following:

"3. [The claimant] came to the UK in 1998 and had exercised a freedom of movement treaty right as a worker (Article 7 of Directive 2004/38(EC)) and has continued to live here. He was granted indefinite leave to remain on 25/02/2019 and has dual Swedish and British nationality, having received his British naturalisation certificate on 04/02/21.

4. According to settled case-law, nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals continue to enjoy their treaty rights as Union Citizens. [Reference was made to C-165/16.]

5. Thus the claimant is a dual Swedish/British national who is within scope of the Withdrawal Agreement between the UK and the EU as a Union citizen who had exercised his right of free movement and was legally resident in the

UK. Consequently, entitlement to Carer's Allowance is determined in accordance with articles 24, 25 and 29 of Regulation (EC) No. 883/2004 ...

6. I respectfully further submit that, as a Dual national to whom Reg. (EC) No. 884/2004² applies, the issue of competent state is pertinent to this case.

7. The Judge will be aware of the judgment of *SE v SSWP [2024] UKUT 405 (AAC)* ...

8. The Secretary of State is seeking permission to appeal to the Court of Appeal of England and Wales regarding *SE v SSWP* ...

...

10. As the EU social security rules apply to this customer and this was not considered in the First Tier Tribunal judgment, I therefore respectfully request that the decision on 13/09/2024 be set aside and the matter be re-determined ...

...

11. Further, I respectfully request that the Upper Tribunal exercise its power ... and stay this case until proceedings at the Court of Appeal regarding *SE v SSWP [2024] UKUT 405 (AAC)* have concluded."

42. The stay was granted but in the event, as already mentioned, the Secretary of State did not pursue an appeal in *SE v. Secretary of State for Work and Pensions*. The Upper Tribunal is now invited to remake the decision in the terms that:

"[the claimant] is a dual Swedish/British citizen to whom Regulation (EC) 883/2004 applies and *SE v. SSWP* applies such that the UK is the competent state for payment of cash sickness."

43. It is to be noted that the Secretary of State's most recent submission maintains the correctness of paragraphs 3 to 6 of the grounds of appeal, except that it is no longer asserted that entitlement is determined in accordance with articles 24, 25 and 29 of Regulation (EC) No. 883/2004. That is to say that the Secretary of State maintains that the tribunal erred in law in deciding that the claim should have been assessed on the basis that the claimant was a British citizen at the time of his claim, although the error is said not to be material since the United Kingdom was in fact the competent state.

Analysis

44. In those circumstances, the following issues arise:

44.1. Does the Withdrawal Agreement have the effect that Regulation (EC) No. 883/2004 and therefore s.70(4A) of the Social Security Contributions and

² This appears clearly to be an error for "883/2004".

Benefits Act 1992 applied to the claimant at the time of his claim to carer's allowance?

- 44.2. If so, was the United Kingdom the competent state as respects that claim at all material times?

The Withdrawal Agreement

45. It seems to me clear that at the end of the transition period the claimant fell within art. 30.1(a). He was a Union citizen as defined and he was subject to the legislation of the United Kingdom as an employed person under art. 11.3(a) of the Regulation. His rights were accordingly protected by the Withdrawal Agreement and s.7A of the European Union Withdrawal Act 2018. The more difficult question is whether his acquisition of British citizenship affected his position under the Withdrawal Agreement.
46. In *Lounes v. Secretary of State for the Home Department*, Case C-165-16, referred to by the Secretary of State, the facts were that Ms. Ormazabal, a Spanish citizen, moved to the United Kingdom to study in 1996, resided here at all material times thereafter and from 2004 onwards was employed full time. She became a naturalised British citizen in 2009 but retained her Spanish citizenship. In 2013 she began a relationship with Mr. Lounes, an Algerian national who had overstayed his visitor's visa, and they got married in 2014. Thereafter they resided in the United Kingdom. Mr. Lounes applied for a residence card as a family member of an EEA national and it was refused on the grounds that Ms. Ormazabal was no longer regarded as an EEA national for the purpose of the relevant Regulations following an amendment to those Regulations which changed the position which had previously applied in respect of dual nationals. The European Court of Justice decided that (i) when Ms. Ormazabal became a British citizen her own right of residence in the United Kingdom was the unconditional right of a national and she was no longer a beneficiary of Directive 2004/38, governing the right of an EU citizen to permanent residence in another Member State, which would have given derivative rights to her family members, but (ii) under art. 21 of the Treaty on the Functioning of the European Union, which gives every EU citizen the right to move and reside freely within the territory of the Member States, a person from a third country could enjoy a derived right of residence on the ground that it was necessary to ensure that a Union citizen could exercise the right of freedom of movement effectively whether or not the EU citizen subsequently acquired the nationality of the host state, and that where nationality had been acquired, the right must not be on conditions stricter than those which applied where reliance could be placed on the 2004 Directive rights.
47. In summary, rights acquired by or derived from Ms. Ormazabal in her capacity as an EU citizen were not necessarily lost when she acquired British nationality. It seems to me to follow that rights acquired by the claimant under the Withdrawal Agreement in his capacity as a Swedish national residing in the United Kingdom were not necessarily lost when he acquired British nationality. He did not cease to fall within the provisions of Art. 30.1 because he had another capacity to which the rights conferred by the Withdrawal Agreement were irrelevant. I therefore conclude that, by virtue of art. 31, the rules of Regulation (EC) 883/2004 applied to the

claimant and that accordingly s.70(4A) of the Social Security Contributions and Benefits Act applied to him, so that the statutory conditions for entitlement to carer's allowance included the condition that the United Kingdom was competent for the payment of sickness benefits in cash.

48. It should be noted that, as mentioned in paragraph 26 above, art. 2 of the Regulation provided that the Regulation applied generally to nationals of a Member State who had been subject to the legislation of a Member State, consistently with its purpose being to establish a system of co-ordination of social security legislation throughout the EU under which those to whom the Regulation applied should be subject to the legislation of a single Member State only. It follows that prior to the revocation of the Regulation s.70(4A) applied to British citizens claiming carer's allowance, although no doubt in the substantial majority of cases it would have been clear that the United Kingdom was the competent state and its application would not have given rise to any issue.

Competent state: relevant case law

49. Turning to the second issue, it is helpful to begin by considering the *Konevod* and *Harrington* cases referred to in paragraph 27 above. The facts in *Konevod* were that the appellant had lived and worked in the United Kingdom, making national insurance contributions sufficient to entitle him "in due course" to a state pension. He moved to Cyprus in December 2014 to act as carer to a friend who had been awarded attendance allowance in November 2014 and was in receipt of a United Kingdom state pension, but had retired to Cyprus. He applied for carer's allowance in April 2015, at a time when he did not work in or receive benefits from either the United Kingdom or Cyprus. The claim was refused on the ground the appellant did not satisfy s.70(4A), the competent state being Cyprus. In the Court of Appeal it was accepted that under art. 11.3(e) of the Regulation he was subject to the legislation of his state of residence, Cyprus. The appellant relied on art. 21, which provided that an insured person residing in a Member State other than the competent Member State was entitled to cash benefits provided by the competent institution in accordance with the legislation applied by the institution, combined with the protection given by the concluding part of art. 11.3(e) to other provisions of the Regulations guaranteeing benefits under the legislation of another Member State. The Court of Appeal considered whether the appellant fell within the definition of "insured person" for the purposes of art. 21 and concluded that he did not, because to do so he would have to meet the requisite conditions for benefit under the legislation of the Member State competent under Title II and that meant the Member State to whose legislation he was subject, i.e., Cyprus. Sir Stephen Richards, with whom the other members of the Court of Appeal agreed, also stated that even without the definition, he would have held that the competent Member State for the purposes of art. 21 was the state whose legislation was applicable under Title II. S.70(4A) therefore applied to exclude the appellant from entitlement to benefit.

50. *Harrington* was discussed in some detail in *SE v. Secretary of State for Work and Pensions*. The facts in *Harrington* were that the appellant was a child resident with her mother in the United Kingdom. Her father was self-employed and living in Belgium. Both parents were British nationals, as was the child. She was awarded

the care component of disability living allowance, which is also a cash sickness benefit, in January 2014 but the Secretary of State revised that decision in May 2015 on the ground that the competent state was Belgium, since she was a family member of a person who was self-employed in Belgium and subject to the Belgian social security legislation. The conditions for entitlement to the care component included a condition similar to s.70(4A) that the United Kingdom should be the competent state.³ The crucial question was whether the effect of the Regulation was that the child's derivative rights took priority over her independent rights, with the consequence that Belgium was the competent state.

51. Lewis L.J., with whom the other members of the Court of Appeal agreed, began his analysis in *Harrington* by considering the appellant's position. The Regulation applied to her by reason of art. 2, since she was a national of a Member State and was or had been subject to the legislation of the United Kingdom. She satisfied the conditions required to have the right to benefits since she was subject to the legislation of the United Kingdom as her Member State of residence. It appeared, therefore, that the United Kingdom was the competent state and she was an insured person. The next question was whether there was any rule of priority as a result of which she was to be made subject to the legislation of another Member State, which would then become the competent state. The Secretary of State contended that art. 21 was such a rule of priority. Lewis L.J. did not accept that contention for the following reasons:

51.1. Art. 21 was not expressed as a rule of priority and was intended to prevent an insured person and the person's family members from being denied cash benefits from the competent state in accordance with its legislation because of residence in a state other than the competent state;

51.2. The history of the legislative provisions indicated that it is the state of residence which has priority in cases involving the payment of cash sickness benefits. Specifically, under the previously applicable Regulation, family members resident in a state other than the competent state who were entitled to receive cash benefits from the state of residence under its legislation were entitled to those benefits. It was only if they were not so entitled that they became entitled to receive cash benefits from the competent state. There was nothing to suggest an intention to change the position when Regulation (EC) No. 883/2004 was adopted. Although rights under the legislation of the state of residence were no longer expressly preserved, the combination of the definition of "insured person" and art. 11.3.(e) gave priority to those rights and there was nothing to displace that priority.

51.3. Such an interpretation was consistent with ensuring free movement of workers and the self-employed. Loss of a child's disability living allowance would be a potential deterrent to movement if the child were to remain in the original Member State, especially in the context that most European countries provided similar benefits by way of social assistance not subject to

³ See s.72(7B) of the Social Security Contributions and Benefits Act 1992.

the Regulation and to residents only, with the result that the benefits would not be available to a child in the appellant's circumstances.

- 51.4. The interpretation respected the principle that an insured person is subject to the legislation of a single state, that state being the state of residence of economically inactive insured persons in the circumstances of the case before the court. It also gave meaning to the protection in art. 11.3(e) to benefits guaranteed by other provisions of the Regulation, which was not intended to give rise to concurrent rights but, for example, to protect a child's derivative rights where there was no independent right under the legislation of the state of residence.
52. This brings me to *SE v. Secretary of State for Work and Pensions* itself. The facts in that case were that the appellant had dual British and Swiss nationality, as did her husband. They both lived in the United Kingdom. The appellant had not worked in the United Kingdom. Her husband was in receipt of a disability pension from Switzerland from at least 1999. She claimed invalid care allowance, subsequently renamed carer's allowance, in July 1999 on the basis of care provided to one of her children and it was awarded. In 2003 she made a claim in respect of a second child which was also accepted. There was no change to her award following the decision in Case C-299/05. She made another claim in respect of a third child in November 2018 and that claim was refused from November 2018 on the ground that the United Kingdom was not the competent state for payment of cash sickness benefits. (The consequence would of course be that the condition in s.70(4A) was not satisfied.) The appellant appealed to the First-tier Tribunal and on that appeal the Secretary of State contended that entitlement to carer's allowance had ceased on 18th October 2007, the date of the decision in Case C-299/05. The First-tier Tribunal found that Switzerland was the competent state and decided that the appellant was not entitled to carer's allowance from 18th October 2007.
53. The issues before Judge Buley K.C, who decided *SE*, included issues arising from the removal of carer's allowance from 2007, at which time the predecessor of Regulation (EC) 883/2004 applied. Moreover, since the First-tier Tribunal decision, the Court of Appeal had given its decision in *Harrington*. The Secretary of State contended that since no overpayment was sought to be recovered for the period 2007-2018 the question whether Switzerland was the competent state for that period was academic and ought not to be determined, but if it was to be determined, the Secretary of State no longer maintained the position that Switzerland was the competent state.
54. Judge Buley rejected the contention that the question which was the competent state for the period 2007 to 2018 was academic and noted that the Secretary of State had in effect conceded that Switzerland was not the competent state. He nevertheless went on to consider the position under the predecessor Regulation and concluded that the United Kingdom was indeed the competent state. He then turned to the period from 2018 onwards and did so on the assumption that the appellant's husband was a pensioner for whom the competent state and the legislation applicable was Switzerland.

55. Applying the approach in *Konevod* and *Harrington*, Judge Buley first decided that the legislation applicable to the appellant was United Kingdom legislation, in accordance with art. 11.3(e). It followed that, as in *Harrington*, the question was whether there was any provision in the Regulation which operated to take priority over the applicability of the legislation of the United Kingdom. The Secretary of State relied on arts. 24, 25 and 29. The judge rejected the contention that that was their effect on the grounds that:

- 55.1. Art. 29 identifies the competent institution responsible for paying cash benefits to a person receiving a pension or a member of that person's family as the competent institution responsible for the cost of benefits in kind provided to the pensioner in his state of residence. That is determined by arts. 24 and 25, so art. 29 can only be understood alongside those articles.
- 55.2. Arts. 24 and 25 do not operate as a rule of priority. Art. 24 makes provision for cases where a pensioner is not entitled to benefits in kind under the legislation of the state of residence (i.e., residence is not a sufficient condition) and so cannot function as a rule of priority displacing an entitlement. Where entitlement to benefits in kind under the legislation of the state of residence is not subject to conditions of insurance or activity as an employed or self-employed person and that state is not providing a pension, art. 25 permits the shifting of the cost of providing such benefits from the state of residence to the competent institution of the state which is providing the pension to the extent that the pensioner and family members would be entitled to such benefits if they resided in that state. It does not remove the right to benefits in kind under the legislation of the state of residence. Whether or not the state of residence takes advantage of the recoupment provisions does not affect the right to benefits.
- 55.3. Art. 29, while making provision for which state should pay cash benefits, does not expressly state that the state of residence should not pay cash benefits. As a matter of language, it can be read in a way similar to the way in which art. 21 was read in *Harrington*, as providing that there is an entitlement to cash benefits from the pension paying state as an alternative to any entitlement in the state of residence, so that the pensioner and family members are not denied cash benefits because they are resident in a state other than the competent state. To achieve the outcome contended for by the Secretary of State it would be necessary to construe art. 29 as deliberately displacing the general rule of Title II and in particular art. 11 about determining the legislation applicable to an individual and the judge did not think that the language of art. 29 took away the rights confirmed by Title II.
- 55.4. That conclusion was reinforced by the protective provisions of art. 11.3.(e) relating to benefits guaranteed by other provisions of the Regulations. An economically inactive insured person is subject to the legislation of the state of residence and entitled to the benefits that state provides, but subject to any rights to alternative provision arising under Title III where the application of the rules of the state of residence would deprive the person concerned of benefits. Although art. 29 was not expressed in the same way as art. 21,

which was considered in *Harrington*, that did not lead to a different conclusion if art. 29 did not create a clear rule of priority. Such a clear rule can be seen in art. 32 and art. 29 was not expressed in the same way as that rule either.

55.5. Art. 29 cross-refers to art. 21, which is to apply *mutatis mutandis*. The judge did not find that easy to understand, but regarded it as reinforcing 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. (This point is considered further in paragraph 64 below.)

55.6. Looking at the history of the legislative provisions, the predecessor Regulation did not displace the entitlement which a pensioner or family member might have to cash benefits under the legislation applicable in the state of residence. There is nothing to show that the introduction of the replacement Regulation was intended to take away such entitlement. Given the effect of the provisions identified by the judge in both Regulations, it would be anomalous if art. 29 alone operated as a rule of priority.

55.7. The right of free movement attached to pensioners as well as workers and the Secretary of State's interpretation would tend to deter exercise of the right, although that was a less powerful consideration in relation to pensioners. The construction the judge adopted respected the principle that an insured person was subject to the legislation of a single state.

56. Judge Buley also made the additional point, although he did not rely on it, that on the Secretary of State's construction the rights of an insured person under United Kingdom legislation could be detrimentally affected by the entitlement of a family member to an unrelated entitlement or insurance from another Member State, even if the person in question had no connection with the latter state. His approach to art. 29 avoided such consequences.

Application

57. As can be seen from the above discussion, *SE*, like *Harrington*, raised the question whether an independent right to benefit under the legislation of the United Kingdom was displaced by a derivative right as a family member. The present case raises the question whether the claimant's independent right to benefit under the legislation of the United Kingdom is displaced by a right arising under art. 29 from his independent right to a Swedish pension.

58. The starting point is that the claimant was for many years economically active in the United Kingdom as an employed person. For the period now known to be relevant for present purposes, he was subject to United Kingdom legislation by virtue of art. 11.3.(a) as a person pursuing an activity as an employed person and was an insured person. It appears that until October 2022 he was an insured person who was not also a pensioner, since it was only then that he began to receive his Swedish pension. If that is correct, there was no basis for deciding that the competent state was other than the United Kingdom prior to that time.

59. If that is not correct, and in any event for the remaining period up to and including 21st November 2022, I have to determine whether paragraphs 3 to 6 of the Secretary of State's grounds of appeal are correct with the omission of the proposition that the competent state is to be determined by reference to arts. 24, 25 and 29 and on the footing that *SE v. Secretary of State for Work and Pensions* applies. I have already given my reasons for taking the view that the claimant continues to enjoy rights under the Withdrawal Agreement, that Regulation (EC) 883/2004 applies and that at the material time he had to satisfy the condition in s.70(4A) of the Social Security Contributions and Benefits Act in order to be entitled to carer's allowance. That is the substance of what is said in paragraphs 3 to 6 with the relevant omission.
60. The fact that the present case is not concerned with derivative rights is not in my view a ground for distinguishing *SE v. Secretary of State for Work and Pensions*. The central question is still whether there is anything in arts. 24, 25 and 29 which takes priority in identifying the competent state. I agree with Judge Buley's analysis of the effects of arts. 24 and 25. Art. 24 clearly protects what would be a person's right to benefits in kind if the person receiving a pension resided in the Member State or one of the Member States which is providing the pension and does so at the expense of that state or one of those states, although it is the institution of the place of residence which is to provide the benefits in kind. (Interestingly, despite the principle of a single competent state, art. 24 envisages that there may be more than one Member State and institution competent in respect of the pensioner's pension.) That is an obviously practical approach given the nature of benefits in kind. The place of residence does so "as though" the person concerned were entitled to benefits in kind under the legislation of the Member State of residence, although that is not in fact the case, and to the extent of (i.e. "insofar as") the hypothetical entitlement under the legislation of the Member State paying the pension. The article clearly envisages that the state of residence and the pension-paying state will be different. In the case of a pensioner who is not economically active, the applicable legislation for the purpose of determining the competent state will be the legislation of the state of residence under art. 11.3(e), not the legislation of the state providing the pension. In those circumstances, art. 24 offers an additional benefit for the purposes of the protective wording in art. 11.3(e). If the pensioner is still economically active, the applicable legislation for the purpose of determining the competent state will be the legislation of the state in which the activity takes place, in accordance with art. 11.3(a), and that state may or may not be the pension-paying state. The pensioner will still, however, have a right to receive benefits in kind provided by the state of residence at the expense of the competent state, if it pays the pension, and the state which provides the pension if the competent state does not. There is nothing in the Regulation as a whole which provides for a change in the competent state when a person becomes entitled to a pension and the state responsible for paying the pension is not the competent state immediately before the pension comes into payment, whether the competent state is determined by reference to economic activity or residence.
61. Art. 25 deals with the case where a person has a right to benefits in kind from the Member State of residence under the applicable legislation without satisfying conditions of insurance or economic activity but is not receiving a pension from that state. As already mentioned, it does not purport to remove the person's right to

benefits in kind but permits a shifting of responsibility for the cost of the benefits in kind, again to the extent that the person concerned would be entitled to benefits in kind from the relevant Member State paying the pension if the person resided there. The expression “the institution of one of the Member States competent in respect of his pensions” to my mind reinforces the point that art. 25 is intended to determine responsibility for payment rather than to identify the competent state. It is not necessary to provide for the benefits in kind to be payable “as though” they were payable under the legislation of a particular state, because they are in fact payable under the legislation of the state of residence, although the cost is potentially recoverable, at least in part, from some other Member State.

62. It should be noted that it is not only arts. 24 and 25 which are brought into play by art. 29. It requires an inquiry as to the competent institution responsible for the cost of benefits in kind provided to the pensioner in the Member State of residence. In appropriate circumstances, that will require reference to art. 23, which deals with the situation where a person receives a pension under the legislation of two or more Member States, one of which is the state of residence, and is entitled to benefits in kind under the legislation of the state of residence. In that case benefits in kind are payable from and at the expense of the institution of the state of residence and the hypothesis is that the pension is payable solely under the legislation of that Member State. Arts. 26, 27 and 28 deal respectively with entitlement to benefits in kind in cases of family members who reside in a state different from the pensioner’s state of residence, stays by the pensioner or family members in a Member State other than their state of residence and retired frontier workers. They contain a variety of cost shifting and hypothetical provisions.
63. The one case which is not dealt with in any of the articles other than art. 29 is the case of the pensioner who is not economically active, who is receiving a pension from the Member State of residence but from no other Member State and who is entitled to benefits in kind under the legislation of the state of residence (and the derivative rights of family members of such a pensioner who reside in the same state). That is presumably because no special provision is required. As the pensioner is not economically active, the state of residence will be the competent state under art. 11.3(e) and the rights to both benefits in kind and pension will arise under the applicable legislation without any reason for hypothetical provisions or cost shifting. There is, however, nothing to suggest that art. 29 does not equally apply to govern the obligation to pay cash benefits in such circumstances unless such a conclusion is to be inferred from the fact that Chapter I of Title III is making special provision to supplement the general rules. If so, Judge Buley’s point on the cross-reference to art. 21 remains and I certainly share his view that the cross-reference is hard to follow. In view of the wide range of situations to which art. 29 applies, however, I do not regard it as correct to say, if Judge Buley intended to say, that the situations it covers are always situations in which the competent state is not the state of residence. I also note that art. 21 itself may apply where the competent institution is the institution of the place of residence but the insured person or a family member is staying somewhere else.
64. This further consideration of the relevant provisions does not lead me to conclude that *SE v. Secretary of State for Work and Pensions* does not apply in the present case. Rather, it leads me to agree with the conclusion that the purpose of the various provisions is in some cases to give additional guarantees as envisaged by

the protective provision in art. 11.3(e) and in other cases to give rights of reimbursement as between Member States in respect of the costs of providing benefits in kind and cash benefits.

65. Since the Secretary of State's most recent submission was made, the decision in *SE* has been followed in two other cases, *Mrs. GR v. Secretary of State for Work and Pensions*, a dual nationality case in which the claimant claimed personal independence payment and it was refused on competent state grounds because her husband received an Italian state pension, and *AS v. Secretary of State for Work and Pensions*, a case in which the claimant was an EU citizen protected by the Withdrawal Agreement who was in receipt of carer's allowance but lost it on competent state grounds when she became entitled to a Polish state pension. In both cases reliance had been placed on art. 29 and the judge decided that such reliance was mistaken. Those decisions reinforce my view that *SE* applies in this case.
66. I note for completeness that in *AS* the judge explained that the view previously taken by the Secretary of State was based on the decision of the Upper Tribunal in *JM v. Secretary of State for Work and Pensions* [2018] UKUT 329 (AAC). That was again a case of a claim to carer's allowance. The claimant was a Polish national in receipt of a Polish pension who moved to the United Kingdom to live with her daughter and did a limited amount of work as a self-employed cleaner. She stopped that work at the point she claimed carer's allowance in respect of the care given to her granddaughter and the claim was refused on competent state grounds. In the Secretary of State's submission to the First-tier Tribunal reliance was placed on arts. 23, 24 and 29, but without any explanation of their operation. It is not possible from the report to tell what the arguments based on arts. 23 and 24 were, because Judge Mesher suggested that art. 25 might be more relevant. The situation covered by art. 25 was certainly the situation in which the claimant found herself and the Secretary of State agreed that the material provisions were arts. 25 and 29. The judge then proceeded on the footing that it was not in dispute that the effect of arts. 11.3, 25 and 29 was that if the claimant continued to be pursuing an activity as a self-employed person, she fell within art. 11.3(a) and the United Kingdom was the competent state, but if she fell within art. 11.3(e) the combined effect of the various articles was that Poland was the competent state because her pension was paid under Polish legislation and Poland was responsible for the payment of benefits in kind, and therefore for payment of cash benefits. Since that proposition was not in dispute, there is no detailed analysis of art. 25 along the lines undertaken in *SE* and equally there is no detailed analysis of how art. 29 had the effect of displacing the United Kingdom as the claimant's state of residence from being the competent state. Consideration of *JM* therefore does not cause me to reconsider the conclusion I have reached in the light of the subsequent case law.
67. I also note that *JM* itself may have been based on the earlier decision *Secretary of State for Work and Pensions v. AK* [2015] UKUT 110 (AAC), a case involving a claim to attendance allowance by a Greek national who had not been economically active in the United Kingdom and who received a Greek pension. Among the issues it dealt with was the effect of arts. 11.3(e), 25 and 29. The judge, following another decision, treated what I have called the protective provision art 11.3(e) (the words "without prejudice to other provisions of this Regulation guaranteeing him benefits

under the legislation of one or more other Member States”) as qualifying the opening words of art.11.3(e) as if the opening words were made subject to such other provisions. As he put it, recanting from his own earlier view in the light of a decision by another judge, art. 11.3(e) is subject not only to arts. 12 to 16, a qualification which applies to the whole of art. 11.3, but also to the provisions of the articles in Title III. The effect of the decision in *SE* is that the words “without prejudice” are not to be read as equivalent to “subject to” but as protecting the additional effect of such other provisions of the Regulation. That seems to me to be the more natural reading of the words, particularly since the “subject to” formula had been employed earlier in the same article. In addition, the implication of reading those words as equivalent to “subject to” seems at least arguably to be that the Title III provisions do not apply to a person falling within art. 11.3(a) to (d). As can be seen from the previous discussion of the various articles, that does not seem to me to be correct. The *SE* approach on the facts of *AK* would mean that the cost shifting provisions of art. 25 would apply and responsibility for payment of cash benefits might also be shifted, but the claimant would not lose his entitlement to the cash benefits payable under the legislation of the United Kingdom as the competent state.

68. Finally, looking at the wider issue of the implications for freedom of movement, the effect of the original decision was that once the claimant ceased economic activity in the United Kingdom the competent state would become Sweden because he was able to draw his pension in Sweden at an earlier age than he was able to draw the pension earned in the United Kingdom and his right, if any, to a benefit such as carer’s allowance would depend on the entitlement conditions of a country he had left more than 25 years earlier. It is at best not obvious that the possibility that drawing the Swedish pension early would have a potentially adverse effect on the claimant’s entitlement to cash benefits in the United Kingdom might not have an adverse effect on freedom of movement. It is also unfortunate that this possibility only arises because the claimant falls within the provisions of the Withdrawal Agreement, which was clearly intended to be protective.

Conclusion

69. I have considerable sympathy with those who have to administer these complex provisions even if there does seem to have been a failure to recognise at the outset that, as was eventually accepted, the claimant fell within art. 11.3(a) at what turned out to be all material times, once the effect of his universal credit claim was appreciated. I also have considerable sympathy with the judge, who made strenuous efforts to get to the bottom of the legislation. For the reasons I have given, however, I conclude that Regulation (EC) No. 883/2004 applied to the claimant at all material times and the judge erred in law in proceeding on the footing that the claimant’s status as a British citizen was determinative of the appeal in his favour.

70. I also conclude that the United Kingdom was the competent state by virtue of art. 11.3(a) from 18th August to 21st November 2022 and continued to be the competent state by virtue of art. 11.3(e) thereafter. Strictly speaking, *SE* only applies to the extent that art. 11.3(e) is the relevant article, since it was on the basis of words in that paragraph that it was at one time thought that the state of residence was

displaced as the competent state by the combination of arts. 25 and 29. It is worth noting the point, however, since, as I understand the position, the claimant's claim to carer's allowance from 22nd November 2022 falls to be disallowed under the overlapping benefits legislation and not because the United Kingdom is not the competent state.

71. Although the error does not have an immediate practical effect, since I have reached the same conclusion as to the competent state as did the judge, although for different reasons, the Secretary of State in effect submits that it is desirable that it should be clear on what basis the claimant is entitled to carer's allowance for the period which turned out to be in issue. I agree. Given the position now taken by the Secretary of State and its consequences, it is not necessary to prolong this matter by offering the claimant the opportunity to make submissions and I therefore set the decision aside in exercise of the power given by s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

72. As I do so on a pure point of law, there is nothing to be gained by remitting the matter to the First-tier Tribunal and I therefore proceed to remake the decision under s.12(2)(b)(ii). Since, however, the relevance of *SE* is in my view slightly narrower than the Secretary of State's formulation suggests, the terms of my decision are that the claimant is a dual Swedish/British citizen to whom Regulation (EC) No. 883/2004 applies, that for the period 18th August to 21st November 2022 the United Kingdom was the competent state pursuant to art. 11.3(a) of the Regulation and that, applying *SE*, thereafter the United Kingdom was the competent state pursuant to art. 11.3(e) but the claimant's entitlement to carer's allowance was subject to the effect of his universal credit claim. This is so close to the Secretary of State's formulation that I do not regard it as necessary to give the Secretary of State the opportunity to make further submissions.

73. I should make clear that since the Secretary of State's appeal raised only the issue of the competent state and there has been no submission at any stage by the claimant that either the refusal of the claim for the period when his earnings exceeded £132 a week or the reduction of the award when his Swedish pension came into payment were wrong, my decision has no effect on those parts of the original decision, which were themselves made on the footing that the United Kingdom was the competent state.

74. I apologise to the parties for the delay in producing this decision.

Elizabeth Ovey
Judge of the Upper Tribunal

Authorised by the Judge for issue on 20th April 2026

Decision anonymised on 06 May 2026 by
Edward Jacobs
Upper Tribunal Judge