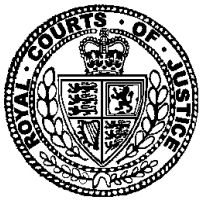

Neutral Citation Number: [2021] EWCA Civ 1724

Case No: C3/2020/0248

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE EDWARD JACOBS
[2019] UKUT 289 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2021

Before :

LADY JUSTICE CARR
LORD JUSTICE LEWIS
and
SIR LAUNCELOT HENDERSON

- -

Between :

WENDY CARRINGTON	**Respondent/ Appellant**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants/ Respondents**
- and –	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Interested Party**

- -
- -

Julia Smyth (instructed by the **General Counsel and Solicitor for HMRC and the Treasury Solicitor**) for the **Appellants** and the **Interested Party**
Admas Habteslasie (acting pro bono and instructed by **Hogan Lovells LLP,** also acting pro bono) for the **Respondent**
Julie Anderson (instructed by the **Treasury Solicitor)** acting as **Advocate to the Court** (by written submissions)
Hearing dates: 26 and 27 October 2021

- -

Approved Judgment

Sir Launcelot Henderson:

Introduction and background

1. The basic issue raised by this appeal is whether the respondent, Mrs Carrington, was entitled to continue to receive United Kingdom ("UK") child benefit when in late August 2011 she left England with her husband and her son (whom I will call T) to live permanently in Spain. The child benefit was payable in respect of T, who was then 11 years old. If Mrs Carrington had remained ordinarily resident in Great Britain, and continued to be responsible for T's care, she would in the usual way, and absent any material change of circumstances, have been entitled to continue receiving child benefit weekly in respect of T at least until he was 16.

2. In the UK, responsibility for the administration of child benefit rests with the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), who are the appellants in this court. T was also entitled (in his own right) to another social security benefit, namely the care component of disability living allowance ("DLA"), because he had Autistic Spectrum Disorder. Responsibility for the administration of DLA lies with a different government department, the Department for Work and Pensions ("DWP"). An application was made by the Secretary of State for Work and Pensions ("SSWP") to be joined in this appeal as an interested party, which was granted by Dingemans LJ on 7 May 2021. By that stage, HMRC and the DWP had agreed to make common cause and had therefore instructed the same counsel, Ms Julia Smyth. The permission granted by Dingemans LJ was therefore limited to reliance on a written document supporting the SSWP's application to intervene.

3. Before the move to Spain in 2011, Mr and Mrs Carrington had worked for the National Health Service, and each of them had accrued occupational pension rights. Their decision to retire and move with T to live in Spain was explained as follows by Mrs Carrington in a letter she wrote to HMCTS, Social Security and Child Support Appeals, Newcastle upon Tyne, on 26 May 2014:

> "We both retired to Spain, as we are a multi-racial family and felt that this country offered the best environment to bring up [T]. As mentioned earlier, [T] has ASD, and by not going out to work it allows us both to give him the support and care that he needs."

As a prelude to the move, an adoption order was made whereby Mr Carrington adopted T as his son.

4. Although Mrs Carrington duly notified the DWP of the move, she did not separately notify HMRC. Nobody now criticises her for this oversight, as she may well have assumed that the two benefits were administered together, or (even if she knew that they were not) that arrangements were in place for notice to one department to be transmitted to the other. The result was, however, that child benefit continued to be paid to her every week, as well as the care component of T's DLA, until HMRC became aware of her move to Spain in 2013. On 10 July 2013, HMRC informed Mrs Carrington that payment of her child benefit would be suspended until HMRC had completed their enquiries.

5. HMRC's enquiries resulted in a formal decision made on 24 January 2014 which superseded the original decision to award child benefit to Mrs Carrington, on the basis that her permanent departure from Great Britain on 29 August 2011 was a relevant change of circumstances which meant that she had ceased to be entitled to child benefit with effect from 5 September 2011. Since her absence from Great Britain had been intended to be permanent from the outset, it could not be treated as a temporary absence. Accordingly, HMRC calculated that she had been overpaid child benefit from 5 September 2011 to 5 May 2013 in the total amount of £1,766.10, and they claimed repayment of that sum because she had failed to disclose the material fact that she had left the UK permanently.

6. Mrs Carrington appealed against this decision to the Social Entitlement Chamber of the First-tier Tribunal ("FTT"). The appeal was dealt with by way of a non-oral disposal (Tribunal Judge I D Jacques) on 10 July 2014, when a decision notice was issued refusing the appeal and confirming HMRC's decision of 24 January 2014. In his written statement of reasons for the decision, the judge set out the background facts, which were not in dispute. He observed that, regrettably,

> " there is no joined up communication between various Government Departments with the obligation being upon the recipient of benefit to notify the appropriate Department of any change. "

He accepted that Mrs Carrington had ceased to be entitled to child benefit from 5 September 2011, and that the subsequent overpayments would not have occurred had she notified HMRC of the relevant change of circumstances. The judge also considered that European Union ("EU") law did not assist Mrs Carrington, for the reasons set out in Appendix 1 to HMRC's written response to the appeal.

7. On 30 September 2014 the FTT granted Mrs Carrington permission to appeal to the Upper Tribunal. It is unfortunate that there was then a delay of five years before her appeal was determined in September 2019. The reason for the delay is that her appeal was stayed by a series of directions pending determination of a domestic case, and then two cases in the Court of Justice of the European Union ("the CJEU") , which were thought to raise similar issues. The CJEU cases were, first, Case C-430/15, Tolley v Secretary of State for Work and Pensions [2017] 1 WLR 1261 ("Tolley") and, secondly, Case C-322/17, Bogatu v Minister for Social Protection [2019] PTSR 1322.

8. As a result of the decision in Tolley, it soon became clear that under EU law T remained entitled to receive the care component of DLA after his move to Spain, and in September 2019 the Upper Tribunal gave its consent to the withdrawal by the SSWP of her appeal in parallel proceedings concerning T's continued entitlement to DLA after September 2011. T was then paid all the arrears of DLA due up to 1 May 2016, the day before his sixteenth birthday. Child benefit, however, is not subject to the same domestic rules as DLA, and for the purposes of EU law child benefit is classified as a family benefit, whereas the care component of DLA is classified as a sickness benefit. Accordingly, it did not follow that Mrs Carrington's ability to continue receiving child benefit for T should necessarily be treated in the same way as her son's entitlement to the care component of DLA, and Mrs Carrington therefore had to maintain her separate appeal in the child benefit proceedings..

9. Long before the stay was finally lifted, it had become apparent to HMRC that the decision of the FTT could not be supported, because the legal analysis of the relevant EU law provisions which their representative had presented to the FTT, and which the FTT had expressly adopted, was erroneous. Accordingly, HMRC supported Mrs Carrington's appeal to the extent of agreeing that the decision of the FTT was erroneous in point of law and should therefore be set aside. HMRC submitted, however, that the FTT had nevertheless reached the right conclusion, because (put shortly) following the family's move to Spain that country automatically became the competent State for the payment of child benefit, whether or not it was claimed in Spain, and the UK ceased to be under any obligation to pay it after the end of the month in which the change of residence took place.

10. It is another unfortunate aspect of the present case that, when the appeal finally came on for determination in the Upper Tribunal, neither party requested an oral hearing, with the consequence that the matter was again decided on the basis of written submissions. Furthermore, HMRC were still not represented by counsel. However, the Upper Tribunal judge who decided the appeal (Judge Edward Jacobs) has great experience in this field, and he played a commendably proactive role in requesting clarification of HMRC's case, including in particular on the question whether Mrs Carrington could rely on Article 7 of Regulation (EC) No 883 of 2004 on the coordination of social security systems ("Regulation 883/2004"), which had come into force on 1 May 2010, to allow her to retain her entitlement to UK child benefit for T after moving to Spain.

11. For her part, Mrs Carrington did not attend the hearing and relied on written material which she had submitted in support of her appeal as long ago as October 2014, supplemented by her brief written responses to subsequent directions given by the Tribunal.

12. In the event, by his decision dated 19 September 2019 ("the UT Decision"), Judge Jacobs allowed Mrs Carrington's appeal, holding that there were no grounds to supersede the original UK decision awarding child benefit to her when she and her family moved to Spain: see [2019] UKUT 289 (AAC). The decision of the FTT was therefore set aside under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, and Judge Jacobs re-made the decision accordingly.

13. The core of Judge Jacobs' reasoning is contained in paragraphs 5 to 7 of the UT Decision, under the heading "Child benefit can be exported under Article 7" :

> "5. There is no dispute that this case is governed by Regulation 883/2004. Child benefit is a family benefit for the purposes of that Regulation under the definition in Article 1 (z) by virtue of being a benefit "in cash intended to meet family expenses".
>
> 6. As the claimant was receiving child benefit when the family moved to Spain, the issue is whether she can retain her award. In the language that is usually used, the issue is whether she can export it. That depends on Article 7:
>
> *Article 7*

> **"Waiving of residence rules**
>
> Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated. "
>
> 7. The representative for the Commissioners has submitted that this Article applies. I accept that argument… Article 7 is a general provision that applies to all benefits covered by Regulation 883/2004 unless it provides otherwise. There is no provision that expressly overrides Article 7 in the case of family benefits and I can see no reason why this might be implied. "

14. Judge Jacobs went on to dismiss other submissions advanced by HMRC which were based on Article 68 of Regulation 883/2004 (which sets out rules of priority in cases where a family benefit may be payable under the law of more than one Member State) and on Article 59 of Regulation (EC) No 987/2009, which provides for the implementation of Regulation 883/2004 ("the Implementing Regulation"). The Judge considered, in short, that there was no scope for the application of either Article.

15. HMRC now appeal to this court, with permission granted by Lewison LJ on 20 October 2020. In his written reasons for granting permission, Lewison LJ observed that the grounds of appeal "raise important points of principle about (a) the "exportability" of child benefit and (b) where it is "exported", which national rules apply."

16. The three grounds of appeal which HMRC now wish to pursue are succinctly set out in the amended grounds of appeal settled by Ms Smyth. They are as follows:

> "Ground 1: The Upper Tribunal erred in deciding (a) that Article 7 required the UK to continue paying child benefit after [*Mrs Carrington]* had moved to Spain; and/or (b) that the effect of the application of Article 7 was that the applicable legislation did not change.
>
> Ground 2: The Upper Tribunal wrongly decided that Article 68 of 883/2004 did not apply.
>
> Ground 3: In the alternative to ground 2, the Upper Tribunal ought to have decided that Article 10 of 883/2004 (prevention of overlapping of benefits) applied."

As a result, submit HMRC, the Upper Tribunal ought to have decided that there were grounds for superseding the award of child benefit when Mrs Carrington moved to Spain, and therefore that an overpayment arose.

17. With the benefit of advice from counsel, HMRC appreciated that, if the case were to be properly argued in this court, they would need to obtain permission to raise points of

law about Articles 7 and 10 of Regulation 883/2004 which had not been pursued in either Tribunal below. It was also appreciated that arrangements would need to be made for Mrs Carrington to be effectively represented if the court was to be in a position to rule on the important points of principle which Lewison LJ had recognised when granting permission to appeal. Steps were therefore taken to arrange a preliminary hearing which took place on 11 February 2021 before David Richards, Rose and Dingemans LJJ. At the conclusion of the hearing, which took place remotely, the court said that it would grant permission to HMRC to raise the new points of law for reasons to be set out later in writing. Those reasons were contained in the judgment of Dingemans LJ handed down a week later, on 18 February 2021, with which the other two members of the court agreed: see [2021] EWCA Civ 174.

18. In his judgment, Dingemans LJ helpfully summarised Mrs Carrington's position as it was then understood to be:

> "17. Mrs Carrington in a letter dated 8 November 2020 contended that the UK remained the competent state to pay child benefit. Mrs Carrington asked for payment of the arrears of child benefit up until 2018 which was when her child left approved secondary education. In a further written submission dated 23 December 2020 Mrs Carrington stated that the argument remained the same and recorded that the DWP had accepted the position following the Upper Tribunal decision when continuing to pay DLA. In a final written submission Mrs Carrington confirmed that there was no outstanding DLA claim and that her son had transitioned to a Personal Independent Payment. Mrs Carrington confirmed that she wished to rely on the judgment of UTJ Jacobs in this case."

19. Dingemans LJ then dealt with the question of Mrs Carrington's representation, including a suggestion made by the court that she might consider applying to Advocate, the Bar Council's pro bono unit. He explained that HMRC had made it clear that they would not seek costs from Mrs Carrington if the appeal succeeded, that they would not seek repayment of any benefits, and that they would make payments of benefits to Mrs Carrington on the basis that she had continued to be entitled to receive them, regardless of the outcome of the appeal. The court was therefore satisfied that HMRC had ensured that Mrs Carrington's position would not be unfairly prejudiced by granting permission to HMRC to raise the new points of law: see [20].

20. Dingemans LJ went on to explain the continuing relevance and significance of the relevant provisions in Regulation 883/2004:

> "21. The 2004 Regulation had direct effect in the UK pursuant to the European Communities Act 1972 when the UK was a member of the European Union. The UK has left the European Union, and the transitional arrangements under which European law continued to apply ceased to have effect on 31 December 2020. It appears, however, that special arrangements were made in Part Two, Title III of the Withdrawal Agreement, to which effect was given in section 7A of the European Union (Withdrawal) Act 2018 in respect of citizen's rights. In general

> terms it appears that articles 30 and 31 of the Agreement provide for the continued application of the 2004 Regulation in particular circumstances. This means that the points of law raised by HMRC are still relevant and important to future cases."

21. For the avoidance of doubt, I would emphasise that those observations were directed to future cases in which similar issues may arise. So far as concerns the present case, the relevant events all took place several years ago when the UK was still a member of the EU, and when both Regulation 883/2004 and the Implementing Regulation had direct effect in the UK.

22. Finally, the court accepted HMRC's suggestion that it would be assisted by the appointment of an advocate to the court, and it adjourned the appeal so that this could be arranged: see [27] and [29]. In due course, Ms Julie Anderson was appointed as an advocate to the court for the appeal hearing pursuant to CPR rule 3.1A and Practice Direction 3G. On 11 August 2021, Ms Anderson filed written submissions which she updated on 11 October 2021. By that stage, however, Mrs Carrington had, through Advocate, obtained pro bono representation by both solicitors (Hogan Lovells LLP) and counsel (Mr Admas Habteslasie), so the court was able to dispense with the assistance of Ms Anderson for the hearing of the appeal, which took place on 26 and 27 October 2021.

23. The court is grateful to Ms Anderson for her comprehensive and helpful written submissions, which it has taken fully into account although she did not address us orally. We are equally grateful to Mr Habteslasie and his instructing solicitors for the high quality of the representation that they have provided on Mrs Carrington's behalf; and last, but not least, we record our gratitude to Ms Smyth for her clear and cogent submissions, both written and oral, as well as to HMRC for the steps which they have taken in the public interest to enable this appeal to be fully and effectively argued.

24. It only remains to note, as I have already said, that the SSWP has been joined to the appeal as an interested party and is also represented by Ms Smyth.

25. With this introduction, I will first say a little more about the domestic scheme of child benefit and the facts, before moving on to the EU legislation and case law, the grounds of appeal, and my conclusions.

Child benefit

26. Child benefit in Great Britain (there are separate provisions in Northern Ireland) is in principle a universal, non-contributory benefit funded by general taxation. It is not means-tested, but since 2013 the benefit (if claimed) has in effect been cancelled by an equivalent tapering charge to income tax for recipients whose annual income from other sources exceeds £50,000.

27. Pursuant to section 141 of the Social Security Contributions and Benefits Act 1992 ("SSCBA"), child benefit is payable on a weekly basis to a person "who is responsible for one or more children or qualifying young persons". A child for these purposes is a person under the age of sixteen, while a qualifying young person is over that age but must satisfy prescribed conditions: section 147. The relevant conditions are contained in the Child Benefit (General) Regulations 2006, SI 2006/223 ("the 2006 Regulations").

Their broad effect is to extend the availability of child benefit to young persons under the age of twenty who are in full-time non-advanced education or approved training.

28. Again in broad terms, a person is "responsible for" a child if the child lives with that person, or if that person contributes to the child's upkeep an amount at least equivalent to the child benefit payable for that week: see section 143 and Part 3 of the 2006 Regulations.

29. As one would expect, there is also a residence condition which has to be satisfied. Section 146 of SSCBA provides:

> "(1) No child benefit shall be payable in respect of a child or qualifying young person for a week unless he is in Great Britain in that week.
>
> (2) No person shall be entitled to child benefit for a week unless he is in Great Britain in that week.
>
> (3) Circumstances may be prescribed in which any person is to be treated for the purposes of subsection (1) or (2) above as being, or as not being, in Great Britain."

By virtue of regulation 23(1) of the 2006 Regulations:

> "A person shall be treated as not being in Great Britain for the purposes of section 146(2) of SSCBA if he is not ordinarily resident in the United Kingdom."

30. Accordingly, as a matter of domestic law, child benefit is payable only if both the child and the person in receipt of the benefit are ordinarily resident in Great Britain during the relevant week. In the present case, it is common ground that both Mrs Carrington and T ceased to be ordinarily resident in Great Britain when they moved to Spain with the intention of living there permanently. It follows that, if the position were governed by domestic law alone, Mrs Carrington would prima facie have had no defence to the overpayment claim made by HMRC.

31. Section 13 of the Social Security Administration Act 1992 (" the Administration Act") provides that entitlement to child benefit depends on the making of a claim, in accordance with the machinery prescribed by regulations made under section 5. Part III of the Administration Act deals with overpayments and adjustments of benefit. Where there has been (inter alia) a failure to disclose any material fact, and in consequence of the failure a payment has been made in respect of a benefit, the Secretary of State is empowered by section 71 to recover the amount of the overpayment, but by virtue of subsection (5A) an amount shall not normally be recoverable "unless the determination in pursuance of which it was paid has been reversed or varied on an appeal…or superseded under section 10 of the Social Security Act 1998".

Facts

32. There is little to add to the outline of the relevant facts which I have already given. Since they moved to Spain in 2011, Mr and Mrs Carrington have had no other sources of income apart from their UK occupational pensions. Neither of them has sought employment in Spain, and there is no evidence that either of them, or T, has claimed any Spanish social security benefits. It appears from Mrs Carrington's letter of 26 May 2014 to HMCTS that they have private medical insurance to cover their health care needs.

33. There was no evidence before either Tribunal about the social security system in Spain, or whether there existed any equivalent of child benefit to which Mrs Carrington might in principle have been entitled had she taken steps to apply for it. Judge Jacobs said in paragraph 9 of the UT Decision that he was "sure", as the representative then appearing for HMRC had apparently submitted, that Spain had a benefit that was equivalent to child benefits, but in the absence of any evidence to that effect, this cannot in my judgment be treated as either a finding or an agreed fact. It was, rather, an assumption that the judge was prepared to make for the purpose of dealing with an argument about overlapping benefits which HMRC were then advancing.

34. It certainly cannot be assumed that, as a Member State of the EU, Spain must have had child benefits similar or equivalent to those available in the UK. The reason is that there has never been any harmonisation of social security benefits within the EU. Regulation 883/2004, like its predecessor Regulation 1408/71, is concerned with the coordination of social security systems throughout the EU, and identifying the legal system which is to apply to the provision of benefits when a person moves from one Member State to another, with the general object of promoting freedom of movement within the EU. It is no part of the object of Regulation 883/2004, or of the Implementing Regulation, to harmonise the benefits actually provided under the national laws of Member States. That is one reason why, as Ms Smyth emphasised to us, the whole subject is one of daunting complexity.

35. I now turn to consider the relevant EU legislation to which we were referred.

EU legislation

(1) Regulation 883/2004

36. The recitals to Regulation 883/2004 begin by describing its overall purpose, and its relationship to the predecessor Regulation 1408/71:

> "(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.
>
> …
>
> (3) Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Communities has been amended and updated on numerous occasions in order to take into account not only

> developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level. Such factors have played their part in making the Community coordination rules complex and lengthy. Replacing, while modernising and simplifying, these rules is therefore essential to achieve the aim of the free movement of persons.
>
> (4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination."

37. Recitals (13) and (14) refer to the need for the coordination rules to "guarantee that persons moving within the Community and their dependants and survivors retain the rights and advantages acquired and in the course of being acquired", and state that "(t)hese objectives must be attained in particular by aggregating all the periods taken into account under the various national legislation…"

38. The next group of recitals emphasises the importance of the principle that, at any given time, a person should be subject to the legislation of only one Member State. These recitals also introduce the concept of "the competent Member State". Recitals (15) to (18a) include the following:

> "(15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.
>
> …
>
> (17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his/her activity as an employed or self-employed person.
>
> (17a) Once the legislation of a Member State becomes applicable to a person under Title II of this Regulation, the conditions for affiliation and entitlement to benefits should be defined by the legislation of the competent Member State while respecting Community law.
>
> …
>
> (18a) The principle of single applicable legislation is of great importance and should be enhanced…"

39. It is convenient to note at this point that determination of the legislation applicable to a person is dealt with in Title II of the Regulation, with the general rules set out in Article 11. The default rule, in Article 11(3)(e), is that a person "shall be subject to the

legislation of the Member State of residence". The related concept of "the competent Member State" is elucidated by definitions contained in Article 1 of Title I. Article 1(s) defines "competent Member State" as meaning "the Member State in which the competent institution is situated". "Institution" means "the body or authority responsible for applying all or part of the legislation", while "competent institution" is given four apparently alternative definitions in Article 1(q), of which the first is:

> "(i) the institution with which the person concerned is insured at the time of the application for benefit;…"

40. A further group of recitals refers to "family benefits", which are defined in Article 1(z) as meaning "all benefits in kind or in cash intended to meet family expenses…". It is common ground that UK child benefit is a "family benefit" within the meaning of that definition. Recitals (34) and (35) state that:

> "(34) Since family benefits have a very broad scope, affording protection in situations which could be described as classic as well as in others which are specific in nature, with the latter type of benefit having been the subject of the judgments of the Court of Justice in Joined Cases C-245/94 and C-312/94 *Hoever* and *Zachow* and Case C-275/96 *Kuusijärvi,* it is necessary to regulate all such benefits.
>
> (35) In order to avoid unwarranted overlapping of benefits, there is a need to lay down rules of priority in the case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of the members of the family."

41. Recital (37) returns to the theme of the "exportability of social security benefits" already touched upon in recital (13), although in different language:

> "(37) As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation."

I pause to note that Chapter 9 of Title III deals with "special non-contributory cash benefits", not with family benefits which are the subject of Chapter 8.

42. Recital (38) refers to the need to establish an Administrative Commission with a representative from the government of each Member State, to deal with all issues of administration or interpretation arising from the Regulation, as well as promoting further co-operation between the Member States.

43. Finally, recital (45) explicitly identifies the objective of the Regulation as being "the coordination measures to guarantee that the right to free movement of persons can be exercised effectively".

44. Title I of the Regulation contains general provisions, running from Article 1 ("Definitions", several of which I have already noted) to Article 10. By virtue of Article 2(1), the persons covered by the Regulation are nationals of a Member State, stateless persons and refugees residing in a Member State, as well as members of their families and their survivors. Article 3(1) lists the branches of social security to which the Regulation applies, including sickness benefits and family benefits. Article 4 states the central principle of equality of treatment:

> "Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof."

45. Article 7, headed "Waiving of residence rules", is the crucial article upon which the Upper Tribunal relied in ruling that Mrs Carrington was entitled to continue receiving child benefit after her move to Spain. For convenience, I will set it out again:

> "Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated. "

46. Article 10 is headed "Prevention of overlapping of benefits", and states that:

> "Unless otherwise specified, this Regulation shall neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance."

47. Title II (Articles 11 to 16) deals with "Determination of the legislation applicable". I have already referred to the general rules in Article 11. So far as material, they provide that:

> "1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.
>
> 2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.
>
> 3. Subject to Articles 12 to 16 [*none of which apply*]:

> (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;
>
> …
>
> (e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States."

48. Title III then contains special provisions relating to the various categories of benefits covered by the Regulation. They are set out in nine Chapters, running from Articles 17 to 70. We are particularly concerned with Chapter 8, which deals with family benefits in Articles 67 to 69.

49. Article 67 is headed "Members of the family residing in another Member State". It provides that:

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

50. Article 68 then sets out complex priority rules which apply in the event of overlapping benefits being provided during the same period for the same family members, under the legislation of more than one Member State. In outline, there are different rules depending on whether the competing benefits are payable on the same, or different, bases. Once the order of priority has been ascertained, family benefits are to be provided in accordance with the legislation which has priority, and the competing entitlements are suspended up to the level provided by the legislation which has priority, save for a differential supplement to make up any difference in amount.

51. I do not need to set out any other provisions of the Regulation at this stage, although, as I have already noted, Chapter 9 (comprising Article 70) contains general provisions relating to "special non-contributory cash benefits". These are defined (by reference to Annex X) in a way which includes the mobility competent of DLA. The effect of Article 70 is that the mobility component of DLA, unlike the care component to which T was entitled, must be provided exclusively in the Member State in which the recipient resides, in accordance with its legislation, and Article 7 is expressly disapplied.

52. Although the Regulation was adopted on 29 April 2004, Article 91 provided that it would apply only from the date of entry into force of the Implementing Regulation. In the event, that date was just over six years later, on 1 May 2010.

(2) The Implementing Regulation

53. I can deal much more briefly with the Implementing Regulation. Chapter VI of Title III (Articles 58 to 61) covers family benefits. HMRC rely upon Article 59, which provides as follows:

> **"Rules applicable where the applicable legislation and/or competence to grant family benefits changes**
>
> 1. Where the applicable legislation and/or the competence to grant family benefits change between Member States during a calendar month, irrespective of the payment dates of family benefits under the legislation of those Member States, the institution which has paid the family benefits by virtue of the legislation under which the benefits have been granted at the beginning of that month shall continue to do so until the end of the month in progress.
>
> 2. It shall inform the institution of the other Member State or Member States concerned of the date on which it ceases to pay the family benefits in question. Payment of benefits from the other Member State or Member States concerned shall take effect from that date."

54. Article 60 then sets out the procedure for applying Articles 67 and 68 of Regulation 883/2004.

EU case law

55. In considering the guidance that can be derived from the case law of the CJEU, I will begin with Case C-308/14, European Commission v United Kingdom [2016] 1 WLR 5049. These were infraction proceedings, brought by the European Commission against the UK for alleged failure to fulfil its obligations under Regulation 883/2004 by imposing a right of residence test on persons claiming social security benefits which were "family benefits" within Articles 1(z) and 3(1)(j). The action was dismissed, on the grounds that (a) EU law did not preclude a national provision which made entitlement to family benefits conditional upon the claimant having a right to reside lawfully in the Member State concerned, and (b) the indirect discrimination occasioned by the relevant legislation was justified by the need to protect the finances of the host Member State. For present purposes, the judgment of the CJEU is helpful in two respects.

56. First, the judgment confirms that child benefit under section 141 of SSCBA must be classified as a social security benefit within the scope of Regulation 883/2004: see paragraphs 54 to 61. As the court explained in paragraph 60:

> "According to the court's case law, benefits which are granted automatically to families that meet certain objective criteria relating in particular to their size, income and capital resources,

> without any individual and discretionary assessment of personal needs, and which are intended to meet family expenses must be regarded as social security benefits…"

57. Secondly, the court explained why the "right to reside" test in the relevant UK legislation was not incompatible with the default test for determination of the legislation applicable under Article 11(3)(e):

> "63. Article 11(3)(e) of Regulation No 883/2004, upon which the commission relies, sets out a "conflicts rule" for determining the national legislation applicable to payment of the social security benefits listed in article 3(1) of the Regulation-which include family benefits-that may be claimed by persons other than those to whom article 11(3)(a)(d) applies, that is to say, in particular, economically inactive persons.
>
> 64. Article 11(3)(e)… is intended not only to prevent the concurrent application of a number of national legislative systems to a given situation and the complications which may ensue, but also to ensure that persons covered by that Regulation are not left without social security cover because there is no legislation which is applicable to them: see *Brey's* case, para 40 and the case law cited.
>
> 65. On the other hand, that provision as such is not intended to lay down the conditions creating the right to social security benefits. It is in principle for the legislation of each member state to lay down those conditions: see *Brey's* case [2014] 1 WLR 1080, para 41 and the case law cited and *Dano's* case [2015] 1 WLR 2519, para 89.
>
> 66. It cannot therefore be inferred from article 11(3)(e) of Regulation No 883/2004, read in conjunction with article 1(j) thereof, that EU law precludes a national provision under which entitlement to social benefits, such as the social benefits at issue, is conditional upon the claimant having a right to reside lawfully in the member state concerned.
>
> 67. Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the co-ordination of those schemes in order to guarantee effective exercise of freedom of movement for persons. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue of either national law alone or of national law supplemented, where necessary, by EU law: *Brey's* case, para 43.
>
> 68. It is clear from the court's case law that there is nothing to prevent, in principle, the grant of social benefits to Union

> citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host member state…
>
> …
>
> 71. Such a situation is not different from the situation of a claimant who does not satisfy for any other reason one of the conditions that must be met in order to be eligible for a family benefit and who, on that basis, is not in fact entitled to such a benefit in any member state. That would be due not to the fact that no law of a member state is applicable to him, but to the fact that he does not satisfy the substantive conditions laid down by the member state whose legislation is applicable to him by virtue of the conflicts rules."

58. Thus, when Mrs Carrington moved to Spain in 2011, on a natural reading of the Regulation, and Article 11 in particular, the legislation applicable to her became Spanish law, as the law of her new Member State of habitual residence: see Article 11(3)(e) and Article 1(j) (which defines "residence" as "the place where a person habitually resides"). There is no suggestion that any of sub-paragraphs (a) to (d) of Article 11 (3) applied to her following her move to Spain, so the default provision in sub-paragraph (e) took effect. Furthermore, it seems equally clear that Mrs Carrington and T thereupon ceased to satisfy the residence condition for receipt of child benefit in the UK, because they were no longer ordinarily resident in Great Britain: see [29] and [30] above. As the reasoning of the court in Commission v UK shows, there is nothing objectionable in principle about national legislation which imposes a substantive requirement of residence as a condition of eligibility to receive child benefit.

59. On the other hand, the wording of Article 11(3)(e) itself expressly recognises that Mrs Carrington's subjection to the legislation of Spain as her Member State of residence was without prejudice to other provisions of Regulation 883/2004 "guaranteeing… her benefits under the legislation of one or more other Member States". Hence the focus in the Upper Tribunal, and in the arguments for Mrs Carrington advanced on this appeal, on the provisions of Article 7, and the question whether it guaranteed her the right to continue receiving UK child benefit despite her change of residence.

60. Another significant point which emerges from the EU case law is the principle that a change of residence from one Member State to another will not necessarily be financially neutral in terms of social security for the person concerned. For example, in Case C-272/17, K. M. Zyla v Staatssecretaris van Financiën EU:C:2019:49 (23 January 2019), on a request for a preliminary ruling by the Supreme Court of the Netherlands, the court said in paragraph 45 of its judgment:

> "However, primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 34 and

> the case-law cited). EU law guarantees only that workers active in a Member State other than the Member State of origin are subject to the same conditions as workers of that other State."

61. Accordingly, had Mrs Carrington taken a job, or claimed social security benefits, in Spain, she would have been entitled to equality of treatment with Spanish nationals (by virtue of Article 4 of Regulation 883/2004), but there would have been no guarantee that any benefits to which she became entitled would be equivalent in nature or amount to those which she had previously received in the UK. Again, however, this principle takes effect subject to any express preservation of existing UK benefits to which she may have continued to be entitled.

62. Another theme on which Ms Smyth placed repeated emphasis in her submissions for HMRC is the central importance of the "one applicable legislation principle" in the structure and operation of Regulation 883/2004. This is recognised in the Regulation itself: see recitals (15) and (18a), the latter of which describes it as a principle "of great importance" which "should be enhanced". At a high level, the importance of the principle is obvious. It provides for a person to be subject to a single system of national law within the EU at any given time, and thereby reduces (although it does not eliminate) the scope for overlapping entitlements to different social security benefits in different Member States at one and the same time. Furthermore, the potency of the principle is such that it may prevent a Member State from applying its own legislation if the legislation of another Member State is applicable. This was clearly recognised by the CJEU in the European Commission case, loc. cit., where the court said in paragraph 32 of its judgment:

> "The purpose of article 11 of Regulation No 883/2004 is not to harmonise member states' substantive law but, rather, to provide a system of conflicts rules the effect of which is to divest the national legislator of the power to determine the ambit and the conditions for the application of its own national legislation on the matter. That system therefore has the aim, on the one hand, of ensuring that only one national system of social security is applicable and, on the other hand, of guaranteeing that persons covered by Regulation No 883/2004 are not left without social security cover because there is no legislation which is applicable to them."

63. A relatively early example of the operation of the principle is provided by Case C-302/02, Effing [2005] 1 C.M.L.R. 43, the facts of which were helpfully summarised by Ms Smyth in her written submissions:

> "Effing ("E") was an Austrian child living with his mother in Austria. His father was a German national, who had worked in Austria and to whom Austrian legislation applied. E's father committed a crime and was imprisoned in Austria, and E's mother received a special type of family benefit for him from Austria as a result. However, E's father then requested to be moved to a German prison, where he worked. As a result, the legislation applicable to him changed to German legislation, and

> Austria terminated payment of the benefit because E's father was no longer in its territory."

64. The Regulation which governed the position was the predecessor Regulation 1408/71. The court upheld Austria's decision, even though E remained living with his mother in Austria and even though the legislation applicable to the father had been that of Austria while he worked there, and while he was imprisoned in Austria. After holding that Austrian law could not continue to apply to the father after his move to a German prison, the court said at paragraph 45:

> "In those circumstances, the legislation applicable can only be that of the Member State in which the person in question is serving the remainder of his sentence. This finding alone suffices to resolve the issue in the main proceedings…"

To avoid possible confusion, it should be noted that the claimant for the relevant benefit was E, not his mother, and the only capacity in which he was entitled to claim the benefit was as a member of his father's family: see paragraph 39 of the judgment.

65. A further point determined by Effing is that nothing in the Regulation would have prevented Germany from adopting legislation which provided for equivalent benefits to be paid to E in Austria while his father remained in prison in Germany or otherwise maintained his residence there: see the judgment at paragraphs 46 to 52 and the *dispositif*. This aspect of the court's reasoning was followed by the Grand Chamber of the CJEU in Case C-352/06, Bosmann v Bundesagentur für Arbeit-Familienkasse Aachen [2008] 3 C.M.L.R.3. The position in that case, shortly stated, was that Mrs Bosmann was a Belgian national resident in Germany who had two children who also lived in Germany and were students. Initially, she was in receipt of German child benefits. She then took up employment in the Netherlands, and was refused payment of those benefits on the grounds that the legislation applicable to her was now that of the Netherlands. Under Dutch law, however, she could not be entitled to corresponding child benefits, because the relevant legislation did not provide for them to be granted for children aged over 18.

66. On a reference for a preliminary ruling by the German Finance Court, the Grand Chamber upheld the principle that Germany was not required to pay benefits to Mrs Bosmann because her applicable law had changed: see the judgment at paragraphs 16 to 27. Nevertheless, it remained possible that she might be entitled to continued receipt of the benefits on the basis of her continued residence in Germany. The change in her applicable law had been brought about by her employment in the Netherlands, under the equivalent of what is now Article 11(3)(a), and not by a change in her place of habitual residence. So the possibility that she might still be entitled to benefits payable on the basis of her German residence could not be excluded: see the judgment at paragraphs 28 to 33.

67. The complexities which I have just outlined are enough to show that, even with the benefit of the conflict rules in Regulation 883/2004 and its predecessor, this remains a highly technical area of law, and that much may depend, even where there has been a change in the law applicable to a person, on which limb of what is now Article 11(3) is engaged. In the present case, however, it is common ground that the relevant limb is

sub-paragraph (e), because Mrs Carrington has never pursued any activity as an employed or self-employed person in Spain within sub-paragraph (a).

68. Still further complexities are illustrated by two further cases to which Ms Smyth referred us in her oral submissions, but I do not think it necessary to refer to them in any detail since they do not seem to me to establish any further general principles which will help us to resolve the present case. For the record, the cases were Case C-394/13, Ministerstvo práce a sociálních věcí v B, ECLI: EU:C:214:2199 and Joined Cases C-611/10 and C-612/10, Hudziński v Agentur für Arbeit Wesel-Familienkasse, [2012] 3 C.M.L.R. 23.

69. I will, however, mention an early case, indeed the earliest to which we were referred, on which Mr Habteslasie placed some reliance on behalf of Mrs Carrington, namely Case C-275/96, Anne Kuusijärvi v Riksförsäkringsverket [1998] ECR I-3419. The facts, briefly, were that Mrs Kuusijärvi, a Finnish national, worked in Sweden for seven months until February 1993 and she then drew unemployment benefit until the birth of her child in February 1994, when she became entitled to a Swedish child allowance and parental benefit. In July 1994 she moved to Finland, where she remained unemployed. She was removed from the Swedish social insurance register on the day after her departure, and parental benefit stopped being paid to her with effect from that date. Her application to continue to draw Swedish parental benefit after moving to Finland was rejected by the Swedish authorities and the Swedish administrative court. She then appealed to the Administrative Court of Appeal, which referred three questions on the interpretation of Regulation 1408/71 to the Court of Justice. Differing from the Advocate General, the court considered that the relevant benefits were to be classified as family benefits for the purposes of the Regulation, with the consequence that they did not fall within the ambit of Article 22 which expressly preserved certain cash benefits payable during sickness or maternity upon a change of residence from one Member State to another. A further consequence was that the benefits fell outside the scope of Article 10 of Regulation 1408/71, which was the predecessor of, but narrower in its scope than, Article 7 of Regulation 883/2004.

70. Articles 73 and 74 of Regulation 1408/71 made specific provision in relation to family benefits, but the Court held in paragraph 71 of its judgment that Ms Kuusijärvi did not satisfy the requirements of either Article. The Court then said:

> "72. It is also important to note that Article 10 of Regulation No 1408/71, which provides that certain benefits acquired under the legislation of one or more Member State may not be the subject of any withdrawal by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated, applies only to the benefits expressly mentioned therein, which do not include family benefits.
>
> 73. In light of the foregoing considerations, the reply to the third question must be that Regulation No 1408/71 does not preclude the legislation of a Member State from providing that a person who has ceased all occupational activity in its territory loses the right to continued payment of family benefits paid under that legislation on the ground that he has transferred residence to

> another Member State where he lives with the members of his family."

71. I confess that I do not find the reasoning in this part of the judgment at all easy to follow, but I understood Mr Habteslasie to submit that the reason why Ms Kuusijarvi did not succeed was that the parental benefit in question did not fall within the scope of Article 10, with the consequence that the prohibition in Article 10 on removing benefits because of a change of residence did not apply. Accordingly, Sweden was not precluded from adopting the legislation in issue. In the present case, by contrast, child benefit does fall within the scope of the equivalent article, Article 7, so the prohibition does now apply, the UK cannot remove Mrs Carrington's entitlement to the benefit on the grounds of her change of residence, and her case should therefore succeed. The court in Kuusijarvi, however, was not dealing with the present version of the Regulation, and it was not concerned with the operation of the differently worded Article 7, nor its relationship with Article 11. In my judgment it cannot be appropriate simply to translate the observations of the court in a different factual and legal context to the present case. The question for us is to determine the proper scope of Article 7, which I deal with in [80] and following below.

72. I come now to the important decision of the CJEU in Tolley. The relevant facts, and the procedural history, are conveniently summarised in the headnote at [2017] 1WLR 1261:

> "The Claimant, a British national, since deceased, paid and was credited for national insurance contributions up to some 20 years before her state retirement age. She was subsequently awarded the care component of [DLA] on an indefinite basis. Nine years later she permanently moved to Spain, where she did not work. Five years after moving, the [SSWP] decided, pursuant to [SSCBA], that the claimant's entitlement to the care component had ceased on her arrival in Spain. The First-tier Tribunal allowed the claimant's appeal against that decision. The Upper Tribunal dismissed the Secretary of State's appeal on the ground that the claimant was entitled to the care component by virtue of article 22 of [Regulation 1408/71], as amended, since she was an "employed person" within the meaning of that Regulation by reason of her national insurance contributions, which provided insurance against the risk of old age. The Court of Appeal dismissed the Secretary of State's appeal. On the Secretary of State's further appeal the Supreme Court referred to the [CJEU] for a preliminary ruling the questions, in essence: (i) whether a benefit such as the care component of [DLA] was a sickness or invalidity benefit for the purposes of the Regulation; (ii) whether the national legislation had ceased to be applicable to the claimant, within the meaning of the conflicts of law rule in article 13(2)(f) of the Regulation, following the transfer of her residence to Spain, so that she was subject to the Spanish legislation; and (iii) if the United Kingdom legislation had ceased to apply to the claimant following the transfer of her residence, she was nonetheless entitled to the care component on the basis of, inter alia, article 22(1)(b) of the Regulation, which laid down the right

> for an employed or self-employed person who satisfied the conditions of the legislation of the competent state, to receive cash benefits after he had transferred his residence to another member state subject to the condition that he had obtained authorisation for the transfer."

73. The answer given by the CJEU to the above questions was, in short, as follows:

(a) Mrs Tolley was an "employed person" within the meaning of the Regulation, and the care component of DLA was a sickness benefit for the purposes of the Regulation;

(b) nothing in Article 13(2)(f) of the Regulation precluded the legislation of the UK, which had applied to Mrs Tolley while she was an employed person, from subsequently ceasing to apply to her when she moved to Spain;

(c) the term "employed or self-employed person" in Article 22(1) of the Regulation covered persons who had definitively ceased all occupational activity, such as Mrs Tolley;

(d) the United Kingdom was the competent State for the purposes of Article 22 (1)(b) even if the national legislation had ceased to apply to her by virtue of Article 13(2)(f), because she had been insured under the UK's social security system at the time when she had first applied for DLA; and accordingly

(e) her situation fell within Article 22(1)(b), which precluded a State from making the retention of entitlement to a benefit such as the care component of DLA subject to a condition of residence and presence in that State.

It followed from these conclusions that Mrs Tolley retained the right to receive the care component of her DLA following her move to Spain, provided that she had obtained authorisation for that purpose, which was a requirement of Article 22.

74. The relevant provisions of Article 22 of Regulation 1408/71, which have no precise counterpart in Regulation 883/2004, provided as follows:

> "(1) An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:
>
> …
>
> (b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution… to transfer his residence to the territory of another Member State;
>
> …
>
> shall be entitled:
>
> …

> (ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers.
>
> …
>
> (2) The authorisation required under paragraph 1 (b) may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment."

75. It can be seen, therefore, that Mrs Tolley's ultimate success turned on her ability to satisfy the special conditions relating to transfer of residence in Article 22, which was contained in the chapter of the Regulation dealing with sickness and maternity benefits. Family benefits were dealt with in a separate chapter (Chapter 7) and were not subject to any special provision similar to that contained in Article 22 for sickness benefits. Nor did they fall within the scope of Article 10, which was the predecessor of Article 7 of Regulation 883/2004, because the scope of that article was expressly confined to certain categories of benefits which did not include either sickness or family benefits. Article 10 (1) provided:

> "Save as otherwise provided in this Regulation invalidity, old-age or survivors' cash benefits, pension for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated. "

76. The article of Regulation 1408/71 containing general rules for determination of the legislation applicable, i.e. the precursor of Article 11 of Regulation 883/2004, was Article 13. The general structure of the two articles was similar, but Article 13 contained no equivalent of Article 11(2), and there are also significant differences between the orders of priority set out in paragraph (2) of Article 13 and paragraph (3) of Article 11. In particular, the residual residence-based criterion in Article 13(2)(f) did not contain a general saving equivalent to that in Article 11(3)(e), but read as follows:

> "(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing sub-paragraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone."

77. In its judgment in Tolley, the CJEU gave the following reasons for concluding that Mrs Tolley fell within the scope of Article 22(1)(b) of the Regulation following her move to Spain:

> "81. The United Kingdom Government contends, secondly, that the legislation of the United Kingdom ceased to be applicable to Mrs Tolley when she moved to Spain and that, pursuant to article 13(2)(f) of Regulation No 1408/71, she was subject to the legislation of the latter member state, which is therefore the competent state for the purposes of article 22(1)(b) of the Regulation.
>
> 82. As to these submissions, it is apparent on reading article 1 (o) (i) of Regulation No 1408/71 in conjunction with article 1 (q) that the term "competent state" means, inter alia, the member state where the institution with which the employed or self-employed person is insured at the time of the application for benefit is situated.
>
> 83. Furthermore, it is apparent from the scheme of article 22 (1) of Regulation No 1408/71, which lays down the conditions for the continued provision of benefits to which an employed or self-employed person is entitled under the legislation of the competent state inter alia if he transfers his residence "to the territory of another member state", that, in respect of that situation, the "competent state", for the purposes of that provision, is necessarily the member state which was competent to grant those benefits before the transfer of residence.
>
> 84. As regards the main proceedings, it is clear from the judgment of the referring court that, when Mrs Tolley applied to the competent institution of the United Kingdom for DLA, she was insured under the social security scheme of that member state. Consequently, even if the legislation of the United Kingdom ceased subsequently to be applicable to her, as provided for in article 13 (2) (f) of Regulation No 1408/71, it is the United Kingdom which is the competent state for the purposes of article 22 (1) (b) of the Regulation.
>
> …
>
> 87. That provision lays down the right, for an employed or self-employed person who satisfies the conditions of the legislation of the competent state, to receive cash benefits provided by the competent institution after he has transferred his residence to the territory of another member state."

78. The CJEU went on to reject the UK's argument that it was open to a Member State to lay down a residence condition for provision of the cash benefits referred to in Article 22(1)(b) of the Regulation. As the court said in paragraph 88:

> "such an interpretation, by permitting the entitlement conferred by article 22(1)(b) to be defeated by a national residence requirement, would render that provision entirely devoid of purpose."

79. Mrs Carrington relies on the above reasoning for its emphasis on the role of the UK as the competent state at the time when Mrs Tolley made her first application for DLA, and for Mrs Tolley's consequential right to continue receiving the care component of DLA even after her transfer of residence to Spain. This is a point to which I will need to return, but it should be noted, at this stage, that there are important differences between the situations of Mrs Tolley and Mrs Carrington. In the first place, Mrs Tolley's entitlement arose under the predecessor Regulation 1408/71, not Regulation 883/2004. Secondly, DLA is a sickness benefit, not a family benefit, for the purposes of both Regulations, and separate provision is made in each Regulation for those two categories of benefit. Thirdly, we are in this case directly concerned with Mrs Carrington's entitlement to child benefit in respect of T, not with T's own entitlement to the care component of DLA. Fourthly, Mrs Tolley's continuing entitlement to receive the care component of DLA after her move to Spain turned on the express provisions of Article 22 of Regulation 1408/71. Those provisions had no counterpart in relation to child benefit under that Regulation; and under Regulation 883/2004, Mrs Carrington's continuing entitlement to receive child benefit must be found, if at all, in the provisions of Article 7, which unlike its predecessor (Article 10 of Regulation 1408/71) does encompass family benefits paid in cash. Moreover, if the possible impact of Article 7 is left out of account, there is ample European authority in the cases which I have reviewed for the proposition that the UK was at liberty to impose a residence requirement on entitlement to child benefit. In short, and subject to any argument founded on Article 7, there is no equivalent in the present context to the express provisions in Article 22 of Regulation 1408/71 upon which Mrs Tolley successfully relied.

Ground 1: the meaning and effect of Article 7 of Regulation 883/2004

80. Ground 1 raises the question of the meaning and effect of Article 7 of Regulation 883/2004. In particular, did Article 7, correctly interpreted, have the effect of preserving Mrs Carrington's entitlement to child benefit for T following her change of habitual residence from the UK to Spain at the end of August 2011? The Upper Tribunal held that it did. In so concluding, Judge Jacobs accepted HMRC's then submission that the article applied; and in the absence of any express provision to the contrary, he could understandably see no reason for implying an exception of family benefits from the general scope and language of the article: see [13] above.

81. The arguments that HMRC now advance were for the most part not run below, but (as I have explained) HMRC were given permission to advance them at the preliminary hearing in February 2021.

82. The starting point, according to HMRC, is the potency of the principle of "single applicable legislation" ascertained in accordance with Article 11. On the facts of this case, there can be no doubt that the legislation applicable to Mrs Carrington when she first claimed child benefit, and until her departure for Spain in 2011, was the law of the UK. This was the Member State of both her employment and her residence. But it is equally clear, submit HMRC, that when she retired and moved permanently to Spain, her applicable law became Spanish law, as the law of her new Member State of habitual residence: see Article 11(3)(e).

83. Against that background, HMRC next submit that, in a case of the present type, Article 7 can be given two alternative interpretations in the context of family benefits. The first is the interpretation given to it by the Upper Tribunal, namely that where a family benefit has been in payment by State A before a person leaves that State to reside in State B, State A is automatically required to continue paying that family benefit even if the legislation of State B becomes applicable to that person. The second, and narrower, interpretation is that it prevents a State whose legislation applies, or which is required to pay a family benefit pursuant to a specific provision elsewhere in the Regulation, from avoiding payment of that benefit on the sole basis that the recipient does not reside in that State.

84. HMRC now submit that the second interpretation must be correct, for a number of separate reasons. First, Article 7 needs to be read subject to Article 67, which makes it clear that family benefits are the responsibility of the competent State ("A person shall be entitled to family benefits in accordance with the legislation of the competent Member State…"). That must mean the State whose legislation is applicable: see Frans Pennings, European Social Security Law, sixth edition (2015), at p.256.

85. Secondly, the first interpretation is contrary to the express terms of Article 59 of the Implementing Regulation, which is drafted on the basis that a change of the applicable law for family benefits will result in a change of the paying State. The effect of that article, it will be recalled, is that the former Member State will continue paying the benefits until the end of the month during which the change occurred and shall inform the competent institution of the other Member State of the date on which it ceases to pay the benefits, after which "Payment of benefits from the other Member State… shall take effect": see [53] above.

86. Thirdly, if the first interpretation is correct, Article 7 introduced an unheralded new right for a person moving from State A to State B to keep a family benefit awarded by State A, notwithstanding a change of applicable law. In contrast to sickness benefits, no such right was included in Regulation 1408/71. In the course of her submissions Ms Smyth referred us to some of the main *travaux préparatoires* relating to Article 7, in order to make good the point that no intention to make a change of this nature was manifested on the part of either the European Commission or the European Parliament, in the context of both Regulation 883/2004 and the Implementing Regulation. In those circumstances, submit HMRC, it is most unlikely that the Regulations would have brought about such a major change without, at the very least, an express acknowledgment that they were intended to do so.

87. With regard to Tolley, HMRC emphasise that it was a case about a sickness benefit, not a family benefit, and that it turned on the specific provisions of Article 22 of Regulation 1408/71. They acknowledge that Article 7 preserves the effect of Article 22 of the earlier Regulation in relation to sickness benefits, including the care component of DLA, but they submit that the nature of the two types of benefit, and the context in which they are paid, are fundamentally different. In general, sickness benefits are short-term benefits paid in respect of sickness which has arisen in a particular Member State. This explains why the Supreme Court in Tolley asked the CJEU whether the UK's sickness benefits should be classified differently for the purposes of Regulation 1408/71. In contrast, family benefits include benefits attributable to the cost of having a child, which is generally incurred over a much longer period, and also reflects a

central aspect of family life. In relation to sickness benefits, HMRC point out that the Advocate General in Tolley said, in paragraph 115 of his opinion, that:

> "The interpretation which I support seems to me… to be consistent with other provisions of Regulation No 1408/71 that demonstrate the legislator's intention to avoid placing the burden of the costs of certain sickness benefits on the member state of residence of a person who has never worked there. "

88. This reasoning, say HMRC, cannot simply be read across to family benefits. There is no intelligible reason why the State where family benefits happen to have been first paid should remain responsible for their payment on an ongoing basis, until the children reach adulthood, despite a change of applicable law (or possibly more than one change of applicable law, if the family moves more than once). This point gains added force when it is remembered that the cost of raising a child may vary very considerably between different Member States. It would therefore be surprising if child benefits payable in State A, where such costs are high, should remain payable for many years following a change of residence to State B, where such costs are far lower. Indeed, in such a situation, there might well be an economic incentive for the person in receipt of child benefit not to make an application for an equivalent benefit in State B, precisely because it would be payable at a lower rate reflecting the local costs of living.

89. Finally, HMRC criticise the brief reasoning of the Upper Tribunal in relation to Article 59 of the Implementing Regulation. Judge Jacobs rejected HMRC's argument based on Article 59 in paragraph 10 of the UT Decision, where he said:

> "If [HMRC] were right, this Article would override Article 7 and the decisions that I have cited. The simple answer to the argument is that Article 59 only applies when the applicable legislation changes. When Article 7 applies, as it does here, that legislation remains the same."

HMRC submit that there is a clear error of law in this passage, because it is wrong to say that, when Article 7 applies, the applicable legislation must remain the same. Article 7 is concerned with the preservation of certain benefits following a change of residence. Where it applies, the competent institution in State A will remain liable to pay the benefit in question, but that does not prevent a change in the recipient's applicable legislation in accordance with the provisions of Article 11. In my judgment, this criticism is correct. There is no necessary correlation between the circumstances in which Article 7 applies, and the legislation applicable to the person in receipt of the relevant cash benefits. I also agree with HMRC that this error may have led the Upper Tribunal to underestimate the anomalous nature of the consequences which may follow if a person who moves his residence from State A to State B can continue to receive family benefits from State A indefinitely, even though his applicable law is now that of State B.

90. I now turn to the submissions for Mrs Carrington, which were cogently developed both by Mr Habteslasie and by the Advocate to the court in her written submissions.

91. To a significant extent, the submissions accord prominence to the concept of the competent Member State in Regulation 883/2004. As I have already explained, the

competent Member State is defined in Article 1(s) as "the Member State in which the competent institution is situated", while Article 1 (q) defines "competent institution" as meaning:

> "(i) the institution with which the person concerned is insured at the time of the application for benefit."

Although the definition is somewhat indirect, it is reasonably clear that the competent State must be the State whose legislation applies at the time of the application for the benefit: see Pennings at p.82.

92. The next step in the argument is that Regulation 883/2004, like its predecessor Regulation 1408/71, clearly makes provision for the protection of certain acquired rights: see in particular recitals (13) and (37), and Articles 6 and 7. Thus, where a person has moved between Member States, the scheme of the Regulation provides for the possibility of multiple competent States in respect of different benefits acquired at different times. This does not conflict with the one applicable legislation principle, but simply reflects the facts that (a) the applicable legislation has to be identified at a fixed point in time, and (b) the Regulation provides for the "export" of certain benefits on moving residence from one Member State to another. Reliance is also placed on various provisions of the Regulation which indicate that making entitlement to a benefit dependent on residence in a particular State may be considered an obstacle to free movement: see, in particular, recital (16) ("Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned") and Articles 5 (b), 6 and 7.

93. With these guiding principles in mind, Mrs Carrington submits that the Upper Tribunal was correct to hold that Article 7 entitled her to continue receiving child benefit after her move to Spain. The UK is the competent State in relation to her child benefit, because the legislation of the UK applied to her when she first applied for it. Her case therefore falls within the clear words of Article 7: as a cash benefit payable under the legislation of the UK, it "shall not be subject to any reduction, amendment, suspension, withdrawal, or confiscation" on account of the fact that Mrs Carrington or members of her family "reside in a Member State other than that in which the institution responsible for providing benefits is situated."

94. Mrs Carrington further submits that the interpretation of Article 7 for which she contends is consistent with the approach of the CJEU in Tolley, and with the subsequent concession by the SSWP in the Upper Tribunal case of KR v Secretary of State for Work and Pensions (DLA) [2019] UKUT 85 (AAC) that the care competent of DLA may be "exported" under Regulation 883/2004: see the judgment in the latter case of UT Judge Jacobs at [18] to [20]. See further the opinion of the Advocate General in Tolley at paragraph 106, where he referred explicitly to the position under Regulation 883/2004, saying:

> "…retention of entitlement to a cash sickness benefit from a member state even where the transfer of the residence of the recipient to another member state entails a change of the applicable legislation corresponds to the situation which now prevails under Regulation No 883/2004. That Regulation does not contain a specific provision on the maintenance of sickness

> benefits comparable to article 22(1)(b) of Regulation No 1408/71; on the other hand, it contains, in article 7, a provision on the waiving of residence rules which covers all social security cash benefits (and no longer only those listed in article 10 of Regulation No 1408/71)."

95. With regard to Article 59 of the Implementing Regulation, Mrs Carrington submits that it provides no support for HMRC's case. Since she has not applied for any benefit in Spain, there was no "payment of benefits" from Spain which could take effect on the expiry of the month of her move to Spain, or at any subsequent date. More generally, she submits that there are no grounds for distinguishing between sickness benefit and child benefit in the context of Article 7, and that since the right to continued receipt of the care component of DLA under that article is now conceded, the same should also be true of child benefit. The force of this point is said to be strengthened by the fact that both benefits are designed to reflect the extra costs likely to be incurred in the UK as a result of the claimant's disability (DLA) or responsibility for bringing up a child (child benefit). In the light of this structural similarity, it would be irrational to distinguish between the exportability of the two benefits.

Discussion

96. Although this is a difficult case, I have come to the conclusion that the submissions of HMRC should prevail.

97. In the first place, I do not consider that the concept of the "competent Member State" can carry the special significance which the submissions for Mrs Carrington would attach to it. In my view, the concept is best regarded as a facet, or reflection, of the primary concept of single applicable legislation, with the focus being on the institution which has responsibility for provision of the benefit in question under that legislation. Mr Habteslasie accepted, in response to questions from the court, that in order to identify the "competent institution" for the purposes of Article 1(q), one must first identify the legislation applicable under Title II, beginning with the general rules set out in Article 11. This shows, to my mind, that the two concepts (competence and applicable legislation) are essentially two sides of the same coin, and it is not in general helpful to attach particular significance to the concept which is employed in different contexts within the Regulation.

98. This point was well illustrated when Mr Habteslasie sought to draw a distinction between the language of competence in Article 67 of Regulation 883/2004 ("A person shall be entitled to family benefits in accordance with the legislation of the *competent* Member State…") and the language of applicable legislation in the predecessor Article 73 of Regulation 1408/71, which stated that:

> "An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State… "

The difficulty with that submission, however, is that the heading of Article 73 uses the language of competence: "Employed or self-employed persons the members of whose

families reside in a Member State other than *the competent State*" (emphasis supplied). Moreover, the congruence between the two concepts is shown, in the context of Chapter 8 of Title III of Regulation 883/2004 (Family benefits), by Article 68(3), which begins with these words:

> "If, under Article 67, an application for family benefits is submitted to the competent institution of a Member State whose legislation is applicable…"

99. The next point I would emphasise is that Article 7 is a general provision which, in the absence of contrary provision, applies to all "cash benefits payable under the legislation of one or more Member States or under this Regulation". This language indicates to me that the article presupposes the existence of an entitlement to the cash benefits in question, and that its purpose is merely to prevent any reduction etc in those benefits because the beneficiary or members of his or her family "reside in a Member State other than that in which the institution responsible for providing benefits is situated." That appears to me to be a reference to the competent institution, in a situation where there has been no change in the applicable legislation referred to in the first limb of the article. Thus, for example, a person resident in the UK who claims and is paid child benefit for a child X would not lose it if X were sent to a boarding school in another Member State, or if the family went to live in another Member State without thereby changing the legislation applicable to them. But if there is a change in the applicable legislation, I agree with HMRC that Article 7 cannot be invoked to provide an independent basis for the continued payment of UK child benefit. The correct analysis in such a case is that the UK child benefit ceases to be payable as a result of national law, and its cessation is not overridden by Article 7 because the underlying reason for the cessation is not the change of residence, but the change in applicable law.

100. The correctness of this interpretation of Article 7 gains support, in my judgment, from two further matters relied upon by HMRC. The first is the surprising consequences which would follow if an entitlement to UK child benefit were preserved indefinitely following a change in the legislation applicable to the recipient of the benefit after a change of residence. The second is that one would expect such a change to have been discussed in the *travaux préparatoires*, and probably also mentioned in one or more of the recitals to Regulation 883/2004, given that the precursor Article 10 of Regulation 1408/71 did not include family benefits, nor did the earlier Regulation contain any equivalent to Article 22 (which related only to sickness benefits) for family benefits. The force of this last point is not blunted by the fact that Article 22 of the earlier Regulation was subsumed in the wider wording of Article 7 in Regulation 883/2004. The important point is, not that a different way was found of replicating the effect of Article 22 for sickness benefits, but rather that under Regulation 1408/71 there was nothing which preserved the effect of family benefits payable in State A following a change of residence and applicable law to State B. If that was indeed the effect of Article 7 in relation to family benefits, it happened by a side wind.

101. It is true, if HMRC are right, that Article 7 preserves entitlement to the care competent of DLA, but not entitlement to child benefit, following a change of residence accompanied by a change of applicable legislation. This is perhaps Mrs Carrington's strongest point, particularly as both benefits reflect the cost of living in the UK. The difference in treatment is also thrown into high relief by the facts of the present case, because it so happens that Mrs Carrington was in receipt of both benefits (although, in

the case of DLA, the entitlement was strictly T's). It is easy to understand, and sympathise with, her probable feeling of bemusement on being told that her entitlement to child benefit came to an end, but T's entitlement to the care component of DLA continued, after the family moved to Spain. As I have explained, however, sickness benefits and family benefits are dealt with by separate rules under the Regulation, and the two types of benefit do generally have significant differences (although the difference is blurred in the present context by the relatively long-term nature, in many cases, of the care component of DLA). It cannot therefore be assumed that the result will necessarily be the same in relation to each type of benefit upon a change of residence and applicable legislation.

102. Lastly, I accept HMRC's submission that Article 59 of the Implementing Regulation is both consistent with, and supportive of, HMRC's interpretation of Article 7. Regulation 883/2004 and the Implementing Regulation were designed to, and did, come into effect at the same time, even though separated by six years. It is therefore appropriate to construe them together so as to produce a coherent whole. Viewed in that light, it is my judgment significant that Article 59 appears to be drafted on the assumption that, upon a change of applicable legislation and/or the competence to grant family benefits, payment of benefits from the first State will cease and payment of benefits from the other State (if claimed) will take effect from that date. If the payment of family benefits under the previously applicable legislation of the former State were automatically continued by Article 7, there would be no occasion for a transitional provision of this nature. It is also notable that the wording of Article 59, as well as its heading, treat changes to the applicable legislation and changes to the competence to grant family benefits in the same way, without distinguishing between them. This in turn is consistent with what I have already said about the complementary nature of those two concepts.

103. For these reasons, I conclude that the Upper Tribunal erred in law in holding that Article 7 applied to Mrs Carrington's entitlement to UK child benefit, and that HMRC's appeal on ground 1 should therefore be allowed.

104. It is a further advantage of HMRC's interpretation, to my mind, that it accords with the domestic law of child benefit in the UK. As I have explained, child benefit is payable on a weekly basis, and is subject to a requirement of ordinary residence in Great Britain which must be satisfied by both the child and the parent or other person who receives the benefit. Since the social security systems of Member States have never been harmonised, I consider it desirable, where reasonably possible, to construe a Regulation which is essentially concerned with resolving conflicts of law in a way which, while ensuring compatibility with EU law, causes the minimum interference with the substantive content of national law.

Grounds 2 and 3

105. Grounds 2 and 3 arise only if HMRC fail to succeed on ground 1. Since I understand that the other members of the court agree with my conclusions on ground 1, it follows that HMRC's success on that ground is enough to determine the appeal in HMRC's favour. Anything which we said in relation to grounds 2 or 3 would therefore be obiter. Although I appreciate the wish of HMRC to obtain authoritative guidance on all the grounds of appeal which they have obtained permission to advance, I consider that it

would be unwise for us to embark upon a discussion of issues in such a technical and difficult area of law where our reasoning would have no binding force.

106. This reluctance is reinforced, in relation to ground 2, by the fact that HMRC's argument on the correct interpretation of Article 68 of Regulation 883/2004 starts from the premise that Spain had at the material time one or more benefits equivalent to UK child benefit. This may be a reasonable working assumption to make in many contexts, but as I have already pointed out there is no evidential basis at all for such an assumption in the present case. Accordingly, any argument based upon that premise would inevitably rest on a hypothetical foundation. I am firmly of the opinion that any potential issues as to overlapping entitlement to child benefits in different Member States should be decided in a case where the necessary factual foundation has been properly established by appropriate evidence.

Overall conclusions

107. For all the reasons which I have given, I would allow HMRC's appeal on ground 1 and set aside the UT Decision.

Lord Justice Lewis:

108. I agree.

Lady Justice Carr:

109. I also agree.