IN THE UPPER TRIBUNAL **Case No. CG/2034/2016**
ADMINISTRATIVE APPEALS CHAMBER

1. This is an appeal by the Claimant, brought with my permission, against a decision of a First-tier Tribunal (FTT) sitting at Bristol on 15 March 2016. For the reasons set out below I dismiss the appeal.

2. The Claimant is a woman now aged 43 who was born in the Republic of Ireland, but worked and paid national insurance contributions in the UK between 1989 and 17 November 2012, when she went to live in Holland with her Dutch husband. The Claimant worked and paid contributions there between February 2014 and July 2014. Her husband continues to live and work in Holland, but unhappily the marriage broke down and the Claimant returned to the UK on 31 August 2014, and went to live in Bristol with her sister, for whom she cared from 20 November 2014, following her sister's hip operation. Divorce proceedings were commenced in March 2015.

3. The Claimant claimed and was awarded income support in the UK, following her return, presumably on the basis that she was a carer. On 28 November 2014 she claimed carer's allowance (CA), but by a decision made on 28 January 2015 that claim was refused on the ground that Holland and not the UK was the competent state for payment to the Claimant of a cash sickness benefit (which the Department considered CA to be).

4. As it was required to do, the DWP submitted the claim and the DWP's denial of competence to the relevant authority in Holland, which has also refused to award any benefit in the circumstances.

5. The Claimant appealed against the decision of 28 January 2015, contending (among other things) that the UK was the competent state for payment of CA to her, but by the decision now under appeal to me the FTT dismissed that appeal.

6. The Claimant had in fact started work in the UK on 12 July 2015, and therefore presumably ceased to satisfy the domestic conditions of entitlement to CA by then in any event. This appeal therefore in substance only concerns the closed period from around 20 November 2014 to around 12 July 2015. As I understand it, any entitlement to CA would have been treated as income of the Claimant for the purpose of determining her entitlement to income support, but the advantage to the Claimant of being held entitled to CA would have been that she would have become entitled to the carer's premium when calculating her income support entitlement.

7. The Claimant, who is a qualified legal executive, was represented before the FTT by a benefits advisor from the Avon and Bristol Law Centre, who made a number of detailed written submissions to the FTT.

8. I find it convenient to proceed straight to my own analysis of the position, and in the course of doing so to refer where appropriate to the FTT's reasoning and the written submissions before me.

9. It was common ground before the FTT, and has been before me, that CA is a cash "sickness benefit" for the purpose of the classification of benefits in the co-ordinating EC Regulation 883/2004: see *Commission of the European Communities v European Parliament* (C-299/05 [2007] ECR I – 8695 ECJ). (As I pointed out in para. 23 of *SSWP v AH* [2016] UKUT 0148 (AAC), however, CA is in something of an anomalous position in that it is not the claimant who is sick and needs care). In conformity with that understanding, s.70(4A) of the Social Security Contributions and Benefits Act 1992 provides:

> "A person to whom Regulation (EC) No 883/2004 applies shall not be entitled to an allowance under this section for a period unless during that period the UK is competent for payment of sickness benefits in cash to the person for the purposes of chapter 1 of Title III of the Regulation in question."

10. The applicable general co-ordinating rule is that in Art. 11(1)(e) of 883/2004:

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

11. Articles 17 to 35 contain special provisions relating to "sickness, maternity and equivalent paternity benefits". The first sentence of Article 21(1) provides as follows:

> "An insured person and member of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies."

12. In my judgment the FTT was right to hold that the Claimant fell within Article 21(1), in that she was a member of her husband's family and was residing in a Member State other than the "competent Member State", Holland being for the purpose of that provision the insured person's (i.e. the Claimant's husband's) competent state in that he was working and insured there. I accept the Secretary of State's submission, in response to a point which I raised when giving permission to appeal, that Article 21(1) can apply where a member of the family is living in a different state from the insured person – it is not necessary for both of them to be living in a state other than the competent member state.

13. It was contended on behalf of the Claimant before the FTT, and has been contended by her in this appeal, that she was not a "member of [her husband's] family", within the meaning of Article 21(1), in that she was separated from him, and was not dependent on him.

14. "Member of the family" is defined as follows in Article 1 of 883/2004:

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

> (2) If the legislation of the Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family;
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> (3) If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household only if he lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner."

15. In my judgment the part of that definition applicable in this case was sub-paragraph (2), in that (as the Claimant accepts) the domestic carer's allowance legislation no longer defines or recognises any particular persons as members of a family or household, in that the entitlement conditions no longer contain any reference to any such persons. The Claimant refers to and relies on the fact that (i) until 2010 the carer's allowance legislation provided for an adult dependant increase for a spouse, but only if living with the claimant, and (ii) that additional benefit can still be payable on that basis if the claim was made before the change in the legislation in 2010. However, in determining which provision of the definition in Article 1 of 883/04 applies one must in my judgment look at the carer's allowance legislation in force as at the date of the Claimant's claim to carer's allowance. The Claimant's reliance on subparagraph (3) of the definition, with its references to a person living in the same household as the insured person, and to a person mainly dependent on the insured person (which the Claimant was not), is therefore in my judgment clearly misplaced. Subparagraph (3) did not come into play in the present case. Under sub-paragraph (2), which as I have said is the applicable provision, a "spouse" qualifies as a member of the family, whether the two spouses are living together or not.

16. As the Claimant fell within the opening sentence of Article 21(1), the FTT was in my judgment correct to hold that the effect of the qualifying words in Art. 11(1)(e) ("without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States") was simply that this case was taken out of the residual provision in Art 11(1)(e) that the competent state is the state of the Claimant's residence, because under the more specific provision in Article 21 the competent state was (in this case) Holland. That was the view of the effect of the qualifying words taken by Judge White in *SL v SSWP* [2014] UKUT 108 (AAC) and of Judge Jacobs in *SSWP v AK* [2015] AACR 27. The words "guaranteeing him benefits under the legislation of …." in my judgment plainly do not require that the claimant is actually entitled to benefit under the other country's conditions, but simply that another country is rendered the competent state by other provisions of Regulation 884/04.

17. The FTT was therefore in my judgment right to take the view that (i) the Secretary of State was wrong in submitting that there was a need to decide

whether priority should be given to the Claimant's 'derived right' (as a family member of an insured person) under Article 21 and her "independent right" (based on her residence) under Article 11(1)(e); and (ii) that it was therefore unnecessary to consider the Secretary of State's submission that various provisions in Articles 23 to 30 indicated that priority should be given to her derived right. For the same reason it is unnecessary for me to express any view on that particular contention of the Secretary of State.

18. The Claimant contends that on the evidence the FTT should not have found that the relevant Dutch authority had decided that Holland was the competent state, and should have found that it had made no decision as to competence in respect of the period after 31 July 2014, and that in those circumstances she should have been held entitled by virtue of Article 6.2 of Regulation 987/2009 to payment from the UK on a provisional basis, pending resolution of the dispute: see *SSWP v HR* [2015] AACR 26.

19. In my judgment the position was strictly that the FTT had no jurisdiction to decide whether any entitlement to payment on a provisional basis arose under Article 6.2 of Regulation 987/2009 by reason of events occurring after 28 January 2015 (the date of the decision under appeal to the FTT): see s.12(8)(b) of the Social Security Act 1998. However, on the footing that the FTT did have jurisdiction over that matter, in my judgment the FTT was entitled to find that the Dutch authority had accepted that it was the competent state, but had rejected entitlement on the ground that the Claimant did not satisfy the domestic Dutch entitlement conditions; see, in particular, the fact that the box "competent institution" was indicated on the Form E118 (p.166). That was a matter of fact for the FTT to decide, and it did not go wrong in law in finding as it did. On that footing, there was not a "difference of views" between the UK and Dutch authorities "about which institution should provide the benefits …", and the Claimant was not therefore entitled under Article 6.2 of Regulation 987/2009 to payment from the UK on a provisional basis, pending resolution of the dispute.

Charles Turnbull
Judge of the Upper Tribunal
16 January 2017