



Neutral Citation Number: [2020] EWCA Civ 809

Case No:C3/2019/2251

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Jacobs
[2019] UKUT 87 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2020

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE SIMLER
and
SIR STEPHEN RICHARDS

Between :

George Konevod	<u>Appellant</u>
- and -	
Secretary of State for Work and Pensions	<u>Respondent</u>

Tim Buley QC and Eleanor Mitchell (appearing *pro bono* through the **Free Representation Unit**, assisted by the **Anti-Trafficking and Labour Exploitation Unit**) for the **Appellant**
Julia Smyth (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 17 June 2020

Approved Judgment

Covid-19 Protocol:

This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:30am on Tuesday 30 June 2020.

Sir Stephen Richards :

1. This appeal concerns the application of *Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems* (“Regulation 883/2004”) to a claim for a UK non-contributory sickness benefit in circumstances where the claimant had formerly lived and worked in the United Kingdom but was resident in another EU Member State at the time when the claim was made. The case is one of a small number of lead cases chosen to resolve issues arising out of the judgment of the Court of Justice of the European Communities (“the CJEU”) in *Tolley v Secretary of State for Work and Pensions* (Case C-430/15) [2017] 1 WLR 1201 (“*Tolley*”). *Tolley* related to the predecessor legislation, *Council Regulation (EC) No 1408/71* (“Regulation 1408/71”), and to a different factual circumstance in that the claimant was in receipt of a non-contributory sickness benefit while resident in the United Kingdom and sought to “export” that benefit when she moved to another EU Member State. The extent to which the judgment in *Tolley* helps to answer the issues in the appeal is itself a matter in dispute.
2. The present case relates to a claim for carer’s allowance for care provided to Ms Sally Ozturk. Ms Ozturk had been awarded an attendance allowance in November 2014 and was in receipt of a UK state pension. She had retired to Cyprus. It is common ground that she was entitled to continued receipt of her attendance allowance. The appellant was a friend of Ms Ozturk. He had lived and worked in the United Kingdom, making national insurance contributions sufficient to entitle him in due course to an old-age pension. He moved to Cyprus in December 2014, to act as Ms Ozturk’s carer. Some months later, in April 2015, he applied to the respondent Secretary of State for Work and Pensions (“the SSWP”) for a carer’s allowance from 17 December 2014 on the basis that he provided at least 35 hours of voluntary care to Ms Ozturk each week. At the time of his application he did not work in or receive benefits from either the United Kingdom or Cyprus.
3. In June 2015 the SSWP refused the application. Following a mandatory reconsideration, the decision was maintained in June 2016. Save for the period from 17 December 2014 to 21 January 2015, in respect of which the claim was out of time, the basis of refusal was that in the appellant’s circumstances the state responsible for payment of sickness benefits was Cyprus, not the United Kingdom.
4. The appellant was unsuccessful in an appeal to the First-tier Tribunal and a further appeal to the Upper Tribunal (“the UT”), where this was one of five cases under Regulation 1408/71 or Regulation 883/2004 heard at around the same time by Upper Tribunal Judge Jacobs. The appeal to this court from the UT’s decision is brought with permission granted by Simon LJ.

Domestic law

5. Carer’s allowance is a non-contributory benefit governed by s.70 of the Social Security (Contributions and Benefits) Act 1972 and by the Social Security (Invalid Care Allowance) Regulations 1976. The eligibility criteria are, in summary, that (i) the claimant must regularly provide at least 35 hours a week of care for a “severely disabled person”, which is defined to include a person in respect of whom an attendance allowance is payable (s.70(1)-(2) with reg. 4); and (ii) the claimant must satisfy prescribed requirements as to residence or presence in Great Britain (s.70(4))

with reg. 9), save that those requirements do not apply where on any day he or she is habitually resident in another EEA state, a relevant EU regulation (including Regulation 883/2004) applies and he or she can demonstrate a genuine and sufficient link to the UK social security system.

6. In addition to those criteria, s.70(4A) of the 1972 Act provides:

“A person to whom either Regulation (EC) No 1408/71 or Regulation (EC) No 883/2004 applies shall not be entitled to an allowance under this section for a period unless during that period the United Kingdom is competent for payment of sickness benefits in cash to the person for the purposes of Chapter 1 of Title III of the Regulation in question.”

That provision underlay the SSWP’s refusal of the appellant’s application for benefit. The ultimate question in the case is whether in the appellant’s circumstances the United Kingdom is the competent state for the purposes of Chapter 1 of Title III of Regulation 883/2004. The UT held that the competent state is Cyprus, not the United Kingdom.

Regulation 883/2004

7. Regulation 883/2004 is concerned with the *coordination*, not with the harmonisation, of social security systems within the European Union. Its central provisions “constitute a complete and uniform system of conflict rules which are intended not only to prevent the simultaneous application of a number of national legislative systems and the complication which might ensue, but also to ensure that the persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them” (*Pensionsversicherungsanstalt v. CW* (Case C-135/19), judgment of the CJEU of 5 March 2020, §46). The basic rule is that persons to whom the Regulation applies are at any given time subject to the legislation of only one Member State, determined in accordance with the Regulation. This is “the principle of single applicable legislation”, described in recital 18a to the Regulation as being one of great importance.
8. The persons covered by the Regulation are widely defined. By Article 2(1), the Regulation applies to “nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors”.
9. The relevant provisions of the Regulation fall into three parts: Title I (“General provisions”), comprising Articles 1 to 10; Title II (“Determination of the legislation applicable”), comprising Articles 11 to 16; and Title III (“Special provisions concerning the various categories of benefits”), comprising Articles 17 to 70.
10. The rules giving effect to the principle of single applicable legislation are contained in Title II and in particular in Article 11:

“Article 11

General rules.

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

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

3. Subject to Articles 12 to 16 [which contain special rules and exceptions that are not material to the present case]:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

(b) [civil servants];

(c) [persons receiving unemployment benefits];

(d) [persons serving in the armed forces etc];

(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.”

“Residence” is defined in Article 1(j) as meaning the place where a person habitually resides.

11. The appellant does not come within any of the categories in Article 11(3)(a)-(d). By Article 11(3)(e), therefore, he is subject to the legislation of the Member State of residence, namely Cyprus, but without prejudice to any other provision of the Regulation that guarantees him benefits under the legislation of another Member State. He relies on Article 21, in Title III, as providing him with such a guarantee in respect of carer’s allowance under the legislation of the United Kingdom.
12. Title III is divided into chapters. Chapter 1 relates to sickness, maternity and equivalent paternity benefits. It is common ground that a carer’s allowance is a sickness benefit within the meaning of the Regulation. Section 1 of Chapter 1 concerns “insured persons” and members of their families, except pensioners and members of their families (who are dealt with in Section 2). It covers various situations in which an insured person or a member of his family resides or stays in or travels to a Member State other than the “competent Member State”. Within that context, Article 21 relates specifically to cash benefits. It is common ground that a carer’s allowance is a cash benefit for this purpose. Article 21(1) provides:

“Article 21

Cash benefits

1. An insured person and members of his/her 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”

13. Article 1 includes definitions of “insured person”, “competent Member State” and “competent institution” which are of central relevance to the interpretation and effect of that provision:

“Article 1

Definitions

(c) ‘insured person’, in relation to the social security branches covered by Title III, Chapters 1 and 3, means any person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits, taking into account the provisions of this Regulation;

...

(q) ‘competent institution’ means:

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

...

(s) ‘competent Member State’ means the Member State in which the competent institution is based.”

Regulation 1408/71 and Tolley

14. Although the appeal concerns the position under Regulation 883/2004, it is necessary to consider Regulation 1408/71 as well, in particular because of the reliance placed by the appellant on decisions under it.
15. Regulation 1408//71 had a long history and was amended from time to time before it was superseded by Regulation 883/2004. I will focus on the final version of the Regulation, as considered in *Tolley*, making only brief reference to a material difference between that version and the earlier version or versions considered in some of the other authorities cited to us.
16. Regulation 1408/71 was narrower in scope *ratione personae* than Regulation 883/2004. By Article 2(1), it applied primarily to “employed or self-employed persons who are or have been subject to the legislation of one or more Member States” and who met various other conditions. “Employed person” and “self-employed person” were defined *inter alia* as “any person who is insured ... for one or more of the contingencies covered by the branches of a social security scheme for

employed or self-employed persons” (Article 1(a)(i)). There were definitions of “competent institution” and “competent State” (Article 1(o) and (q)) which were materially the same as the corresponding definitions in Regulation 883/2004. There was no equivalent to the term “insured person” as contained in Regulation 883/2004.

17. At the heart of the Regulation, as in the case of Regulation 883/2004, was the principle of single applicable legislation. Title II (Articles 13-17) dealt with the “determination of the legislation applicable”. Article 13(1) laid down that persons to whom the Regulation applied were to be subject to the legislation of a single Member State, and Article 13(2) contained general rules for determining the legislation applicable. Article 13(2)(a)-(e) covered respectively the employed, the self-employed, sailors, civil servants and members of the armed forces etc. Article 13(2)(f) contained a fall-back provision in the following terms:

“(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 subparagraphs 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”.

That provision was added by Council Regulation (EEC) No 2195/91 to solve problems created by earlier case-law on the interpretation of Article 13(2)(a), to the effect that a person who was employed in one Member State and then moved to another Member State without taking up employment there remained subject to the legislation of the state in which he or she was last employed. Regulation 883/2004 deals with the problems in a different way which it is unnecessary to consider; and as set out above, Article 11(3)(e) of Regulation 883/2004, the provision corresponding to Article 13(2)(f) of Regulation 1408/71, is in simpler terms.

18. Title III of Regulation 1408/71 contained special provisions relating to the various categories of benefits. Chapter 1 of Title III related to sickness and maternity benefits; and Section 2 of Chapter 1 dealt with “employed or self-employed persons and members of their families”. The two relevant provisions of Section 2 were Article 19(1) and Article 22. Article 19(1) was similar to Article 21 of Regulation 883/2004, whilst Article 22 had no equivalent in Regulation 883/2004. They provided as follows:

“Article 19

Residence in a Member State other than the competent State – General rules

1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits ... shall receive in the State in which he is resident:

...

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers”

“Article 22

... Return to or transfer of residence to another Member State during sickness or maternity ...

1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits ... and:

...

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or 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”

19. I turn to consider how Regulation 1408/71 was held to apply in the case of *Tolley*. Mrs Tolley lived and worked in the United Kingdom for many years, making national insurance contributions that entitled her to an old-age pension. From 1993 she was awarded the care component of disability living allowance (“DLA”), a non-contributory benefit. In 2002 she moved to Spain to live there permanently. Under the UK national legislation, which provided that a person was not entitled to the care component of DLA unless he or she satisfied conditions as to residence and presence in Great Britain, she lost her entitlement to the benefit upon her move to Spain. The question was whether she was covered by Regulation 1408/71 and, if so, whether it entitled her in effect to “export” her award of the benefit to Spain. The matter came before the CJEU on a reference by the UK Supreme Court.
20. The court decided as a preliminary point that Mrs Tolley fell within the scope of the Regulation, having the status of an “employed or self-employed person” within Article 1(a) because during her time in the United Kingdom she had been insured under a social security scheme against the risk of old age, which was one of the contingencies covered by the Regulation (§§36-42). The court decided next that the care component of DLA was a “sickness benefit” within the meaning of the Regulation (§§43-55).
21. The court went on to consider whether the fact that Mrs Tolley had acquired rights to an old-age pension under the United Kingdom’s social security scheme precluded the

UK legislation from subsequently ceasing to be applicable to her, within the meaning of Article 13(2)(f). It held that the conditions under which the legislation of a Member State ceased to be applicable to a person were not defined by Article 13(2)(f) and that it was for the national court to determine, in the light of the circumstances of the case before it and of the provisions of the applicable national law, when that legislation ceased to be applicable to that person” (§§56-69). That issue arose out of the specific language of Article 13(2)(f) and does not arise under Regulation 883/2004. Nevertheless it is helpful to quote some observations of the Advocate General when considering this issue, because of the distinction he drew between, on the one hand, the designation of the applicable legislation and, on the other hand, the retention of acquired rights on a move to another Member State:

“65. The designation, as applicable legislation, of the legislation of a Member State (known as the competent state or the state of insurance) means that the social security scheme of that Member State will apply to the worker concerned. Where appropriate, that worker will pay social contributions in that state and/or receive benefits there if one of the risks covered by that scheme materialises. In accordance with the principle that a single law is applicable, laid down in Article 13(1) of Regulation No 1408/71, every worker is subject to one, and to only one, national legislation in social security matters ...

66. The retention of acquired rights refers essentially to the retention of entitlement to a social security benefit following the transfer of the worker’s residence to a Member State other than that under whose legislation he acquired (or is in the process of acquiring) entitlement to such a benefit.

67. A number of provisions of Regulation No 1408/71 thus seek to ensure that rights acquired or in the process of being acquired are retained even when, following the transfer of the worker’s residence, the legislation applicable to him changes. In particular, Article 10 of that Regulation provides for the right to maintain, in particular, invalidity and old-age cash benefits. As regards sickness benefits, to my mind Articles 19 and 22(1)(b) of that Regulation also enshrine such a right ...

68. A worker may therefore be insured under the social security scheme of one Member State while receiving, from another Member State in which he is not insured, a benefit determined on the basis of the rights which he has previously acquired in that Member State”

22. That provides a link to the next question considered by the court, which was whether Article 19(1) or Article 22(1)(b) was to be interpreted as preventing national legislation from making Mrs Tolley’s entitlement to DLA subject to a condition as to residence and presence in the United Kingdom.
23. Mrs Tolley’s situation was held not to fall within Article 19(1), since “that provision relates only to situations in which an employed or self-employed person who applies

to the competent institution of a Member State for a sickness benefit resides in another Member State on the date of the application” (§72), whereas “Mrs Tolley was still residing in the United Kingdom when she applied to the competent institutions of that Member State” for the relevant benefit (§73).

24. Her situation was held, however, to fall within Article 22(1)(b). In reaching that conclusion the court rejected an argument by the UK Government that its national legislation ceased to be applicable to her when she moved to Spain and that pursuant to Article 13(2)(f) she was subject to the legislation of Spain which was therefore the competent State for the purposes of Article 22(1)(b):

“82. As to those 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 institutions 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.”

25. The Advocate General gave lengthy reasons for reaching the same conclusion. At the core of his reasoning was this passage:

“101. Under Article 1(o)(i) in conjunction with Article 1(q) of Regulation No 1408/71, the ‘competent State’ means, in particular, the Member State in which the institution with which the worker is insured ‘at the time of the application for benefit’ is situated.

102. In accordance with that definition the ‘competent State’ to which Article 22(1)(b) of that Regulation refers means, in my view, the Member State which was competent, on the basis of

the provisions of Title II, *at the time of acquisition of entitlement* to the benefits whose export is requested. In the present case, that is the United Kingdom, since Mrs Tolley submitted her application for the benefit at issue in the main proceedings in that Member State several years before transferring her residence to Spain” (original emphasis).

26. The court went on to hold that Article 22(1)(b) prevented the competent state from making retention of entitlement to the benefit subject to a condition as to residence and presence in its territory. It noted further, however, that the article required authorisation for the transfer of residence to have been obtained from the competent institution, though by Article 22(2) authorisation could be refused only in narrow circumstances. It concluded that “Article 22(1)(b) and Article 22(2) ... must be interpreted as meaning that a person in a situation such as that in issue in the main proceedings retains the right to receive the benefits referred to in Article 22(1)(b) after transferring his residence to a Member State other than the competent State, provided that he has obtained authorisation for the purpose” (§93).

The Upper Tribunal decision in the present case

27. Upper Tribunal Judge Jacobs held that in the circumstances of the present case the competent Member State for the purposes of Article 21 of Regulation 883/2004 is Cyprus, not the United Kingdom. His chain of reasoning was as follows:
- (1) Title II of the Regulation is comprehensive in identifying the applicable legislation; Title III makes further provision consequent upon the decision taken under Title II; so, before Article 21 can apply, there must already be a competent state which will have been identified pursuant to Article 11 (§§6-7).
 - (2) It does not matter whether the appellant is an insured person in the United Kingdom. In *KR v Secretary of State for Work and Pensions* [2019] UKUT 85 (AAC), a case concerning the export of a sickness benefit under Regulation 883/2004, the SSWP conceded that the claimant remained entitled to the benefit by virtue of Article 7 or alternatively Article 21 in conjunction with *Tolley*. The concession was limited to cases involving the export of sickness benefits and was argued not to apply to new claims. The judge considered it strictly unnecessary to decide the point in the present case, but he could see no way in which a claimant could be an insured person for an export case but not for a new claim; and he therefore decided “to proceed on the basis that the claimant is an insured person on the ground that this is the only way that I can interpret Article 21 consistently with the Secretary of State’s concession, but leave the issue open for further analysis in a case in which it affects the outcome” (§§8-11).
 - (3) The competent institution and therefore the competent Member State are not identified by the terms of Article 21 but have to be fixed by the chain of definitions beginning with the legislation applicable under Title II (§12).
 - (4) Article 11 identifies the applicable legislation. It takes a geographical approach by reference to the claimant’s place of work or place of habitual residence. Article 11(3)(a) lays down the place of work rule, which is

qualified by Article 11(3)(b)-(d). On the facts, the place of work rule does not apply to the appellant. Article 11(3)(e) lays down the place of residence rule which applies when the place of work rule does not apply. It is subject to an exception where the claimant is residing in one state but has an acquired right to a contributory benefit from another state. That cannot help the appellant, however, as he has no acquired right to a carer's allowance. The place of residence rule therefore applies, so that the legislation applicable is that of the state of residence, namely Cyprus (§§13-17).

- (5) The competent institution must be one that applies the legislation identified under Article 11, which is that of Cyprus. The judge found the subparagraphs of the definition of competent institution in Article 1(q) difficult to interpret, but he held that none of them operated to locate the competent institution in the United Kingdom. In relation to Article 1(q)(i), which applies where there has been a claim for benefit, he stated: "The claimant is insured in the United Kingdom, but none of the institutions of this country apply the law of Cyprus. If the claimant is insured in Cyprus, this head will apply and the institution will be the relevant body in Cyprus" (§§18-26).
- (6) Cyprus is the competent Member State, being the state where the competent institution is situated (§27).
- (7) The appellant cannot be entitled to a carer's allowance under UK domestic law, that possibility being precluded by s.70(4A) of the Social Security Contributions and Benefits Act 1992 (§28).
- (8) EU law does not impose a duty on the United Kingdom to provide a carer's allowance despite s.70(4A). Regulation 883/2004 provides for coordination, not harmonisation. The principle of free movement may prevent Member States from removing rights that have been earned when the claimant moves to another Member State, but EU law cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned (§§29-31).
- (9) Attendance allowance and carer's allowance cannot be treated as a single benefit. The close relationship between them is not a reason to disrupt the coordination system. They are separate benefits, require separate claims, are governed by different legislation and have to be claimed by different people. It would be surprising if EU law did not accept their separate nature in domestic law. Whilst "person concerned" in Article 1(q)(i), the definition of competent institution, is vague enough to cover the disabled person in respect of whom the claim for carer's allowance is made, the competent institution has to be identified by reference to the legislation identified as applicable under Article 11, and Article 11 has to be applied before the definitions in Article 1 can operate (§§32-34).

The case for the appellant

28. For the appellant, Mr Tim Buley QC advances two grounds of appeal: (1) that the UT was wrong to hold that the United Kingdom is not the competent Member State under Article 21, viewing the appellant's claim to carer's allowance in its own right;

alternatively, (2) that the UT was wrong to reject the argument that the close link between carer's allowance and attendance allowance renders the United Kingdom competent for payment of carer's allowance when it is competent for payment of the related attendance allowance.

29. As to ground 1, Mr Buley puts forward an analysis which in his submission follows clearly from the language of the provisions of Regulation 883/2004 read, in so far as there might otherwise be any doubt about their effect, in the light of relevant case-law, in particular the judgment in *Tolley*. The analysis proceeds as follows:
- (1) Following his move to Cyprus the appellant became subject for most purposes to the legislation of Cyprus as the Member State of residence, pursuant to Article 11(3)(e).
 - (2) As the wording of Article 11(3)(e) makes clear, however, that is subject to provisions elsewhere in Regulation 883/2004 which guarantee the right to benefits other than under the legislation of the Member State of residence. Article 21 is such a provision.
 - (3) The appellant, having worked and paid national insurance contributions in the United Kingdom prior to his move to Cyprus, is insured under the UK social security legislation, being entitled to an old-age pension under that legislation. In the light of *Tolley* there is no question of being insured under UK legislation for some purposes but not others.
 - (4) Since the appellant is insured under the social security legislation of the United Kingdom, not Cyprus, the "institution with which [he] is insured at the time of the application for benefit" (Article 1(q)(i)) is the relevant UK institution, namely the Department for Work and Pensions ("the DWP"). That department is therefore the "competent institution" in relation to the appellant.
 - (5) On that basis the United Kingdom is the "competent Member State" (Article 1(s)).
 - (6) *Tolley* is said to support those submissions by showing that one ascertains the "competent institution" and "competent State" on the basis of the wording of the definitions, not by reference to the state of applicable legislation under Title II.
 - (7) The result is said also to be supported by *Coppola v Insurance Officer* (Case C-150/82) [1983] 3 CMLR 586 and *Chief Adjudication Officer v Twomey* (Case C-215/90) [1992] 2 CMLR 571.
 - (8) It follows that under Article 21 the appellant is entitled to payment of UK carer's allowance, as an insured person seeking payment of a cash benefit for whom the competent Member State is the United Kingdom and who is residing in another Member State.
30. Mr Buley submits that the UT's conclusion to contrary effect, that save in cases involving the export of acquired rights the competent Member State for the purposes of Article 21 must be the state whose legislation is applicable under Article 11, was

flawed for its rejection of that analysis and for other reasons including conflict with the reasoning in *Tolley*.

31. Under ground 2 Mr Buley submits in the alternative that the UT should have found the United Kingdom to be the competent Member State for the payment of carer's allowance to the appellant in the light of the close relationship between that benefit and the attendance allowance payable to Ms Ozturk (where there is no dispute that the United Kingdom is the competent Member State). This result is said to reflect the language of the key provisions and to be supported by purposive considerations. In particular, "competent institution" is defined in Article 1(q)(i) as the institution with which the "person concerned" is insured at the time of the application for benefit; and in a case such as this the "person concerned" should be read as referring to the severely disabled person for whom the care is provided, rather than to the formal claimant for the care allowance. In support of his submissions on this ground Mr Buley drew particular attention to *Commission v European Parliament and Council of the European Union* (Case C-299/05) [2007] ECR I-8695, §67; *Slanina v Unabhängiger Finanzsenat Aussenstelle Wien* (Case C-368/08), judgment of 26 November 2009, §31; and *Drake v Chief Adjudication Officer* (Case C-150/85) [1987] 1 QB 166, §§23-24.

The case for the respondent

32. For the SSWP, Ms Julia Smyth submits that the conclusion reached by the UT was clearly correct. She puts at the forefront of her submissions the principle of single applicable legislation under Title II of Regulation 883/2004, underlining the importance of that principle by reference to *Bosmann v Bundesagentur für Arbeit – Familienkasse Achen* (Case C-352/06) [2008] 3 CMLR 3, §§16-33; *Hudzinski v Agentur für Arbeit Wesel – Familienkasse* (Case C-611/10) [2012] 3 CMLR 23, §§41-45 and §§66-67; and *Sociale Verzekeringsbank v van den Berg and others* (Joined Cases C-95/18 and C-96/18), judgment of 19 September 2019, §§49-64.
33. In relation to ground 1 Ms Smyth submits that one starts with the state of applicable legislation which in this case, pursuant to Article 11(3)(e) of Regulation 883/2004, was Cyprus. The court in *Coppola v Insurance Officer* and *Twomey v Chief Adjudication Officer* was looking for the competent state by reference to the state whose legislation was applicable under Article 13 of Regulation 1408/71. The same applied in *Hosse v Land Salzburg* (Case C286/03) [2006] 2 CMLR 52, the only other decision concerning Article 19 of Regulation 1408/71. *Tolley* was concerned with the altogether different situation of the export of an existing benefit on moving to another Member State, not with a new claim following a move; but the reasoning nevertheless supports the Secretary of State's case. In any event those cases were all under Regulation 1408/71 whereas the present case is under Regulation 883/2004 where the position is submitted to be crystal clear:
 - (1) Article 21 applies to an "insured person", defined by Article 1(c) in terms of satisfaction of the conditions required under the legislation of the Member State competent under Title II. That state is the competent Member State for the purposes of Article 21; and entitlement to cash benefits under the article is to the benefits provided by the competent institution of that Member State in accordance with the legislation it applies.

- (2) Thus Article 21 is clearly directed at persons residing in a Member State other than the Member State the legislation of which is applicable under Title II. It covers, in particular, the classic cross-border situation where a person works in one Member State (the state of applicable legislation by reason of Article 11(3)(a), and therefore the competent Member State) but resides in another Member State. It does not cover a person in the position of the appellant who resides in the same state as the state of applicable legislation. The appellant is not an “insured person” in respect of his claim to benefit under the legislation of the United Kingdom. The United Kingdom is not the competent Member State.
- (3) Ms Smyth cites the recent judgment of the CJEU in *Pensionversicherungsanstalt v CW* (see §7 above) as a paradigm analysis of the correct position under Regulation 883/2004 where a person resides in the state of applicable legislation.
34. I should mention that Ms Smyth’s argument that the appellant is not an “insured person” in respect of his claim to benefit under the legislation of the United Kingdom is raised by way of respondent’s notice. The UT, as I have said, proceeded on the basis that the appellant *is* an insured person for the purposes of Article 21. Whilst there was some discussion in the written submissions as to whether the insured person issue had been the subject of a relevant concession by the SSWP in the UT, Mr Buley very sensibly did not pursue any objection at the hearing of the appeal but addressed the substantive issue fully in his oral submissions. He submitted that the expression “insured person” in Regulation 883/2004 is doing essentially the same job as that done in Regulation 1408/71 by the expression “employed person”, which was defined in terms of being “insured” for relevant contingencies. The natural inference, in his submission, is that Regulation 883/2004 was not intended to constitute a radical change; whereas to apply the definition of “insured person” narrowly would be to drive a coach and horses through the scheme of the Regulation.
35. As to ground 2 of the appeal, Ms Smyth submits that the appellant’s contention that, because of the link between the benefits, the competent Member State in respect of his claim for carer’s allowance must be the same as the competent Member State in respect of Ms Ozturk’s attendance allowance is wrong for three principal reasons: it is not what the legislation says; it is contrary to fundamental principle, and it has no support in the case-law. Article 21 applies to an insured person and to members of his or her family residing or staying in a Member State other than the competent Member State: it spells out when something should happen and goes no further than that. The legislature was well aware of the related nature of the benefits (see *Commission v Parliament and Council*, cited above) but has not included provision that the competent Member State for one benefit must be the same as for the other benefit. Regulation 883/2004 is a conflict of laws regulation and it cannot be right that, as the appellant contends, the question of competence for a particular benefit is determined by the relationship between it and another benefit in domestic law. It is submitted that the cases relied on by the appellant do not advance the appellant’s case.

Discussion

36. Not for the first time, the court is faced with rival sets of submissions leading to opposite conclusions but where the route to each conclusion is said to be clear. For

my part, I am satisfied that the route down which Ms Smyth has sought to lead us is the correct one.

37. I take as my starting point the principle of single applicable legislation and the rules under Title II of Regulation 883/2004 for determining which state's legislation applies. It is common ground that the appellant falls within Article 11(3)(e) and is subject to the legislation of Cyprus, as the state of residence. To express the same point in another way, Cyprus is in his case the state of applicable legislation under Title II.
38. As its wording makes clear and as is again common ground, Article 11(3)(e) is without prejudice to other provisions of the Regulation guaranteeing benefits under the legislation of another Member State. The only other provision relied on by the appellant is Article 21.
39. Article 21 applies to an "insured person" and members of his or her family. Since the definition of "insured person" in Article 1(c) relates in terms to the use of that expression in Chapters 1 and 3 of Title III, and Article 21 is part of Chapter 1 of Title III, I think it inescapable that the first question to be asked under Article 21 is whether, in respect of his claim to UK benefit, the appellant falls within that definition. To fall within it, he would have to meet the requisite conditions for benefit "under the legislation of the Member State competent under Title II". The "Member State competent under Title II" must mean the Member State to the legislation of which he is subject by virtue of the rules under Title II, i.e. the state of applicable legislation under Title II. That state is Cyprus, not the United Kingdom. It follows that the appellant does not get off the ground in his attempt to bring his claim to UK benefit within Article 21.
40. The definition of "insured person" also informs the interpretation of the rest of Article 21. The article applies to an insured person or members of his or her family "residing or staying in a Member State other than the competent Member State". Again, the "competent Member State" must be the state of applicable legislation under Title II.
41. Even without the definition of "insured person", I would hold that the "competent Member State" within Article 21 is the state of applicable legislation under Title II. That seems to me to be the natural interpretation of the expression within the Regulation as a whole. It fits with the way in which the expression is used in recital 17a to the Regulation, which states:

"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."

And as explained below, in my view the case-law cited to us supports that interpretation rather than the approach contended for by Mr Buley.

42. That interpretation gives Article 21 a perfectly sensible meaning and effect. Where, for example, a person works in Member State A (the state of applicable legislation under Title II by virtue of Article 11(3)(a), and therefore the competent Member

State) but resides in Member State B, he and members of his family can rely on Article 21 for cash benefits under the legislation of Member State A notwithstanding the fact that they reside in another Member State.

43. I do not accept Mr Buley's submission that if one starts with the definition of "competent institution" in Article 1(q)(i), one reaches a different conclusion under Article 21, that the competent Member State at the time of the application for benefit was the United Kingdom. The argument not only fails to give proper effect to the definition of "insured person" in Article 1(c) but it also proceeds on the erroneous basis that because the appellant was entitled to an old-age pension under the legislation of the United Kingdom he was "insured" for all relevant purposes with the DWP at the time of the application for benefit, so that the DWP is the competent institution and the United Kingdom is the competent Member State. Such an approach cuts across the basic scheme of the Regulation.
44. Mr Buley relies on *Tolley*, but it seems to me that when the court stated that because Mrs Tolley was "insured under the social security system of [the United Kingdom]" at the time of her application for benefit, the United Kingdom was the competent state for the purposes of Article 22(1)(b) of Regulation 1408/71 (see judgment §§82-84, quoted at §24 above), the substance of the point was that the United Kingdom was the state of applicable legislation at the relevant time. This emerges clearly from the Opinion of the Advocate General in support of the same conclusion, when he states that under Article 1(o)(i) in conjunction with Article 1(q) of the Regulation "the 'competent State' means ... the Member State in which the institution with which the worker is insured 'at the time of the application for benefit' is situated" and that in accordance with that definition "the 'competent State' to which Article 22(1)(b) of that Regulation refers means ... *the Member State which was competent on the basis of the provisions of Title II*, at the time of acquisition of entitlement to the benefits whose export is requested" (Opinion §§101-102, quoted at §25 above, but with original emphasis removed and replaced by my emphasis). That also fits with the earlier passage in his Opinion in which he stated that "[t]he designation, as applicable legislation, of the legislation of a Member State (known as the competent state or the state of insurance) means that the social security scheme of that Member State will apply to the worker concerned" (Opinion §65, quoted at §21 above).
45. *Tolley* is otherwise of little assistance in the present case. There are material differences between Regulation 883/2004 and Regulation 1408/71. Article 19 of Regulation 1408/71 was similar to Article 21 of Regulation 883/2004 (though the introduction of the defined expression "insured person" in Article 21 is a material difference); but Article 19 was held not to apply on the facts of Mrs Tolley's case and was not the subject of substantive consideration (see §23 above). Article 22(1) of Regulation 1408/71, on which the decision in *Tolley* turned, has no equivalent in Regulation 883/2004. Moreover the present case does not involve the export of existing benefits or accrued rights, which is subject to different considerations and to a separate concession by the SSWP, based on Article 7 of Regulation 883/2004 (see §27(2) above, referring to the case of *KR v Secretary of State for Work and Pensions*).
46. The earlier cases under Regulation 1408/71 are of little assistance. *Coppola v Insurance Officer* was decided under the original version of Regulation 1408/71, before the introduction of Article 13(2)(f) (see §17 above). Mr Coppola had worked in Italy and then in the United Kingdom before returning to Italy. Article 18 of

Regulation 1408/71, an aggregation provision which is otherwise irrelevant to the present case, provided for “the competent institution” of a Member State to take certain periods of insurance into account. The court referred to the definition of “competent institution” in Article 1(o) and continued:

“10. That definition must be applied within the framework of Article 18(1), in the light of the general rule contained in Article 13 of Regulation 1408/71, with regard to determination of the applicable legislation Article 13(2)(a) provides that ‘a worker employed in the territory of one Member State shall be subject to the legislation of the State even if he resides in the territory of another Member State.

11. By virtue of that provision ... only the legislation of the State in whose territory the worker is employed is therefore applicable. Although that provision does not expressly mention the case of a worker who is not employed when he seeks sickness benefit, it is appropriate to interpret it as meaning that, where necessary, it refers to the legislation of the State in whose territory the work was last employed.

12. It follows from the fact that, by virtue of Article 13(2)(a), the legislation of only one Member State is applicable, that the institution or institutions of a single Member State, namely the State in whose territory the worker is or was last employed, must be considered competent for the purpose of the application of Article 18(1)”

47. *Coppola* appears to have been the origin of the “place of last work” rule subsequently developed in *Ten Holder v Nieuwe Algemene Bedrijfsvereniging* (Case 302/84) [1987] 2 CMLR 208. But that rule did not survive the introduction of Article 13(2)(f) (see §17 above), following which a different analysis would plainly be required; nor does it apply on the different wording of Regulation 883/2004. It is, however, to be noted that the court in *Coppola* regarded the competent institution for the purposes of Article 18(1) as the institution of the Member State the legislation of which was applicable under Article 13. That supports the view I take about competent Member State under Article 21 of Regulation 883/2004.
48. *Twomey v Chief Adjudication Officer* was another case decided before the introduction of Article 13(2)(f). The claimant had worked for a short time in the United Kingdom before moving to Ireland where she had never been in employment. Following her move she applied for a UK sickness benefit. The court held that Article 19 of Regulation 1408/71 applied to her. It is evident, however, from the judgment, in particular at §§9-10, that the reason why the United Kingdom was considered to be the competent state for the purposes of Article 19 was that the claimant fell within Article 13(2)(a) (as interpreted at the time) as someone who had worked there and had not taken up employment after her move to another Member State. It follows that the United Kingdom was the state of applicable legislation under Title II and that the approach of the court again supports my view about Article 21 of Regulation 883/2004.

49. The only other case on Article 19 of Regulation 1408/71 to which we were referred is *Hosse v Land Salzburg*. The judgment in that case again supports the link between “competent State” and state of applicable legislation, stating in §53 that the purpose of Article 19 “is precisely to guarantee the worker and the members of the family residing in a Member State other than the competent State the grant of the sickness benefits provided for by the applicable legislation, in so far as the members of the family are not entitled to those benefits under the legislation of the State in whose territory they reside”.
50. *Pensionsversicherungsanstalt v CW*, upon which Ms Smyth relies, was decided under Regulation 883/2004. The claimant had lived and worked in Austria before moving to Germany. She was said to be no longer insured under the Austrian social security system since moving to Germany. Her application for an Austrian sickness benefit was refused. The relevant question for the court was whether the Regulation precluded such a refusal. The court referred to the principle of single applicable legislation, determined in accordance with Title II. It held that the claimant fell within Article 11(3)(e) and that the national legislation applicable was therefore that of the Member State of residence, namely Germany. The reasoning of the court is consistent with my analysis under Article 21 but does not provide any real assistance since Article 21 was not addressed and it cannot be inferred that it was considered and dismissed by the court.
51. I have said enough to explain why I would reject ground 1 of the appeal.
52. As to the alternative argument in ground 2, there is certainly a close relationship between carer’s allowance and attendance allowance but they remain separate benefits with different conditions of entitlement and have to be claimed by, and are payable to, different people. It is artificial to contend that in the case of a claim for carer’s allowance the “competent Member State” under Article 21 is the state that is competent in relation to the attendance allowance payable to the severely disabled person for whom the care is provided, rather than the state that is otherwise competent in relation to claims by the insured person. There is nothing in the language of Article 21 or the related definitions to support such an interpretation of the article. I do not accept that in this one situation the “person concerned” in the definition of “competent institution” (Article 1(o)(i)) is to be read as referring not to the person claiming the benefit but to the person for whom the care is provided. The natural meaning and effect of an EU instrument such as Regulation 883/2004 are not to be distorted by reference to a particular feature of national law. If the exceptional result for which the appellant contends had been intended by the EU legislature, it would have been the subject of express provision.
53. The authorities relied on by Mr Buley provide very limited support for his case on ground 2 and do not begin to persuade me that the case is well founded. The court in *Commission v Parliament and Council* described carer’s allowance as “complementary” to DLA and attendance allowance, and as constituting a “supplementary benefit” for the claimant in receipt of DLA or attendance allowance, but did so only as reasons for holding that carer’s allowance was a “sickness benefit” falling within Article 4(1)(a) of Regulation 1408/71. *Slanina* related to a very different situation concerning entitlement to family benefits under Article 73 when a divorced woman and her child moved to a different Member State from that in which her ex-husband lived. *Drake* did concern invalidity benefit paid to the carer of a

disabled person, but it did so in the very different context of Council Directive 79/7/EEC on equal treatment in matters of social security; and although the court took into account in that context the “clear economic link between the benefit and the disabled person, since the disabled person derives an advantage from the fact that an allowance is paid to the person caring for him” (§24), such reasoning cannot produce the result for which Mr Buley contends under Article 21 of Regulation 883/2004. I would add that although *Drake* is referred to in *Kavanagh v Secretary of State for Work and Pensions* [2019] EWCA Civ 272, [2019] 1 WLR 3655, §§82-84, cited to us by Ms Smyth, I do not think that *Kavanagh* takes matters any further.

54. I would therefore reject ground 2 as well.
55. It follows that in the circumstances of this case it is Cyprus, not the United Kingdom, that is the competent Member State under Article 21 of Regulation 883/2004. No other provision in Chapter I of Title III has been relied on by the appellant. In answer to the ultimate question in the case (see §6 above), I am therefore satisfied that the United Kingdom is not the competent state for the purposes of Chapter 1 of Title III and that s.70(4A) of the 1972 Act applies to exclude the appellant from entitlement to benefit.
56. I have reached the same result as the UT on the issues raised in the appeal but my route to that result has been to some extent different. In particular, the UT was in my view wrong to proceed on the basis that the appellant was an “insured person” for the purposes of Article 21, and I think that some of the UT’s analysis involved unnecessary complexity. It will be apparent from my reasoning, however, that I agree with much of what the UT said and that I consider the UT’s overall conclusion to be correct. Accordingly, I would dismiss this appeal.

Lady Justice Simler :

57. I agree.

Lord Justice Moylan :

58. I also agree.