Neutral Citation Number: [2019] EWCA Civ 272

Case Nos: C3/2017/1052, C3/2017/1056 and C3/2017/1058

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
UTJ Jacobs
CDLA/0373/2016, CA/0224/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE McCOMBE
and
LORD JUSTICE HADDON-CAVE

- -

Between :

Brandon KAVANAGH (1) **Maryam MOHAMED (2)**	**Appellants**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -
- -

Richard Drabble QC (instructed by **Child Poverty Action Group**) for the **First Appellant**
Richard Drabble QC (instructed by **Harrow Law Centre**) for the **Second Appellant**
Gerry Facenna QC and **Julia Smyth** (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date : 7 February 2019

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Approved Judgment

Sir Terence Etherton MR, Lord Justice McCombe and Lord Justice Haddon-Cave :

Introduction

1. This appeal concerns entitlement to non-contributory social security benefits by claimants recently arrived in the UK from another Member State of the European Union ("the EU").

2. Shortly after their respective arrivals in the UK from the EU, Brandon Kavanagh ("BK"), an Irish national and a minor, claimed Disability Living Allowance ("DLA") and Maryam Mohamed ("MM"), a German national, claimed Attendance Allowance ("AA"). The Secretary of State for Work and Pensions ("the SSWP") refused both claims.

3. The Appellants appeal the decision dated 12 December 2016 of Judge Edward Jacobs, sitting as the Upper Tribunal (Administrative Appeals Chamber) ("the UT"), that neither MM nor BK was entitled to the benefits claimed.

The Facts

4. MM was born in Somalia on 30 December 1947. She left Somalia in 1998 for Germany and resided in Germany for 14 years, where she received means-tested benefits and acquired German citizenship. Judge S. E. Pierce, sitting as the First-tier Tribunal (Social Entitlement Chamber) ("the FtT"), found that she came to the UK on 29 May 2013 (then aged 65) with a settled intention of living in the UK. The deterioration in her health meant that she could no longer live on her own and required the care of her daughter in the UK. She gave up her home and family in Germany and had no income from Germany. The FtT was satisfied that she became habitually resident in the UK. She made a claim for AA with effect from 19 June 2013. On 19 November 2013¸ the SSWP refused MM's claim for AA.

5. BK was born on 18 October 2000 and is an Irish national. He lived in Ireland until 26 June 2013, apart from a brief period between 2003 to 2004 when he moved temporarily to the UK with his mother. BK's mother, who is a British national, moved to Ireland when she was 12 years old, briefly returning to the UK in 1998. Judge M. Sutherland Williams, sitting as the FtT, found that she had last worked in the UK in 1998, and had not paid national insurance contributions or tax here. She did not work in Ireland. She claimed domiciliary care allowance for her son and carer's allowance for herself from the Irish welfare system, following her son's diagnosis in 2011 of Asperger's syndrome. She left Ireland following domestic violence. Two days after his arrival in the UK, on 28 June 2013, when BK was 12 years of age, BK made an application for DLA. On 3 September 2013, the SSHD refused BK's application for DLA.

The legal framework

Domestic legislation

Disability living allowance (DLA) - legislation

6. DLA is governed by sections 71 to 76 of the Social Security Contributions and Benefits Act 1992 ("SSCBA"). Section 71(6) provides:

> "(6) A person shall not be entitled to a disability living allowance unless he satisfies prescribed conditions as to residence and presence in Great Britain."

7. Those conditions are prescribed by the Social Security (Disability Living Allowance) Regulations 1991 (SI No 2890) ("the DLA Regulations") which, so far as relevant, are as follows:

> **"2 Conditions as to residence and presence in Great Britain**
>
> (1) Subject to the following provisions of this regulation and regulations 2A, 2B and 2C, the prescribed conditions for the purposes of section 71(6) of the Act as to residence and presence in Great Britain in relation to any person on any day shall be that–
> (a) on that day–
> (i) he is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands; and
> (ib)…, and
> (ii) he is present in Great Britain; and
> (iii) he has been present in Great Britain for a period of, or for periods amounting in the aggregate to, not less than 104 weeks in the 156 weeks immediately preceding that day."
>
> **"2A Persons residing in Great Britain to whom a relevant EU Regulation applies**
>
> (1) Regulation 2(1)(a)(iii) shall not apply where on any day–
> (a) the person is habitually resident in Great Britain;
> (b) a relevant EU Regulation applies; and
> (c) the person can demonstrate a genuine and sufficient link to the United Kingdom social security system.
> (2) For the purpose of paragraph (1)(b) … , 'relevant EU Regulation' has the meaning given by section 84(2) of the Welfare Reform Act 2012."

8. Section 84(2) of the Welfare Reform Act 2012 provides:

> "**82 No entitlement to disability living allowance where UK is not competent state**
> …
> (2) Each of the following is a 'relevant EU Regulation' for the purposes of this section-
> …
> (b) Regulation…. 883/2004 …"

DLA- summary

9. Pursuant to section 71(6) of the SSCBA, a person is not entitled to DLA if, among other things, he or she does not satisfy prescribed conditions as to residence and presence in Great Britain. Those conditions are prescribed by regs. 2 and 2A of the DLA Regulations. So far as is material to this appeal, the applicable conditions are as follows:

   i) habitual residence in the UK, the Republic of Ireland, the Isle of Man or the Channel Islands;

   ii) presence in Great Britain; and

   iii) past presence in Great Britain for a period of, or for periods amounting in the aggregate to, not less than 104 weeks in the 156 weeks immediately preceding that day ("the "past presence test").

10. The "past presence test" does not apply where, on any day (reg. 2A):

   i) a person is habitually resident in Great Britain;

   ii) Regulation (EC) No. 883/2004 of the European Parliament and the Council of 29th April 2004 on the coordination of social security systems ("Regulation 883/2004") applies; and

   iii) the person can demonstrate a genuine and sufficient link to the UK's social security system.

11. Reg. 2A was introduced by the Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Amendment) Regulations 2013, following the decision of the Court of Justice of the European Union ("the ECJ") in *Case C-503/09 Lucy Stewart v SSWP* [2012] 1 CMLR 337 (see further below). Whether or not a person is habitually resident is a question of fact.

AA - legislation

12. AA is governed by sections 64 to 67 of the SSCBA. Section 64(1) provides, so far as relevant:

> "(1) A person shall be entitled to an attendance allowance if …
> he satisfies … prescribed conditions as to residence and presence in Great Britain."

13. Those conditions are prescribed by the Social Security (Attendance Allowance) Regulations 1991 (SI No 2740 ("the AA Regulations)):

> **"2 Conditions as to residence and presence in Great Britain**
> (1) Subject to the following provisions of this regulation and regulations 2A and 2B and 2C, the prescribed conditions for the purposes of section 35(1) of the Act as to residence and presence in Great Britain in relation to any person on any day shall be that–
> (a) on that day–
> (i) he is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands; and

> (ib) …, and
> (ii) he is present in Great Britain; and
> (iii) he has been present in Great Britain for a period of, or for periods amounting in the aggregate to, not less than 104 weeks in the 156 weeks immediately preceding that day."
>
> **"2A Persons residing in Great Britain to whom a relevant EU Regulation applies**
> (1) Regulation 2(1)(a)(iii) shall not apply where on any day–
> (a) the person is habitually resident in Great Britain;
> (b) a relevant EU Regulation applies; and
> (c) the person can demonstrate a genuine and sufficient link to the United Kingdom social security system.
> (2) For the purpose of paragraph (1)(b) …, 'relevant EU Regulation' has the meaning given by section 84(2) of the Welfare Reform Act 2012."

14. Section 84(2) of the Welfare Reform Act 2012 is set out above.

AA- summary

15. Pursuant to section 64(1) of the SSCBA, a person is not entitled to AA if, among other things, he does not satisfy prescribed conditions as to residence and presence in Great Britain.

16. There is no material difference between the relevant conditions applicable to AA and those applicable to DLA in the DLA Regulations (see regs. 2 and 2A of the AA Regulations).

SSWP Guidance

17. The SSWP published guidance for decision-makers on the genuine and sufficient link test, permitting a broad range of factors to be taken into account when determining whether a person has a genuine and sufficient link with the UK's social security system. The guidance states that decision-makers will need "to make a balanced judgment based on all the facts of the case" and that the relevant elements that may be considered are:

    i) personal factors, *e.g.* whether the claimant is receiving a UK benefit;

    ii) periods of residence or work in the UK, *e.g.* whether the claimant has spent a significant part of their life in the UK, or whether the claimant has worked and paid national insurance contributions here;

    iii) if the claimant is a family member within the meaning of reg. 883/2004 (a spouse, child under 18 or dependent child over 18), family factors.

<u>European law</u>

Treaty on the Functioning of the European Union (TFEU)

18. Article 21(1) TFEU provides:

> "21(1). Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

19. Article 48 of the TFEU provides, so far as relevant:

> "48. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self employed migrant workers and their dependants:
> (a)…;
> (b) payment of benefits to persons resident in the territories of Member States."

Reg. 883/2004

20. Reg. 883/2004 provides as follows, so far as relevant:

> Article 1
>
> "Definitions
> For the purposes of this Regulation:
> …
> (j) 'residence' means the place where a person habitually resides;
> …
>
> Article 2
> Persons covered
>
> 1. This Regulation shall apply 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 of more Member States, as well as to the members of their families and to their survivors.
> …
>
> Article 3
> Matters covered
>
> 1. This Regulation shall apply to all legislation covering the following branches of social security:
>
> (a) sickness benefits; …
>
> Article 4
> 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."

EU law - Free Movement

21. The right of EU citizens to reside in other Member States is provided for by Article 21 TFEU. It is not an unconditional right: it is subject to the limitations and conditions in the Treaty and the measures adopted to implement it, in particular Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("Directive 2004/38").

22. Under the scheme established by Directive 2004/38, there are different rights and conditions for residence in another Member State for up to three months, for more than three months and for more than five years.

23. Recital (1) and Article 7(1)(b) have been of particular significance in the jurisprudence relevant to these appeals. Recital (10) is as follows:

> "(10) Persons exercising their rights of residence should not … become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions."

24. Article 7(1)(b) provides as follows:

> "1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) …
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State: or …"

Claiming benefits in a host Member State - summary

25. There are two main types of benefit under EU law:

    i) social *assistance* benefits, which in the UK includes means-tested benefits such as Income Support.

    ii) social *security* benefits, which are subject to special EU law co-ordination and conflict of law rules in reg. 883/2004. Social security benefits may be contributory or non-contributory. It is common ground that DLA and AA are non-contributory social security benefits.

26. In relation to both social assistance and social security benefits, Member States are entitled to set entitlement conditions which are designed to ensure that benefit claimants have a genuine link with that Member State.

The Tribunal decisions

FtT decisions

27. By its decision dated 8 August 2014 the FtT allowed MM's appeal from the decision of the SSWP, on the ground that MM could aggregate her residence in Germany to her residence in the UK pursuant to Article 6 of reg. 883/2004, so as to satisfy the past presence test.

28. On 25 September 2015, the FtT rejected BK's appeal from the decision of the SSWP, on the ground that his residence in Ireland could not be aggregated to his residence in the UK, so as to enable him to meet the past presence test. The FtT also found as a fact that neither BK nor his mother had a "genuine and sufficient link" to the UK's social security system so as to entitle BK to claim DLA.

UT decisions

29. On 10 March 2016, the UT joined MM's case and BK's case, since both cases raised similar issues in relation to the application of the aggregation rule in Article 6 of reg. 883/2004.

30. On 12 December 2016, the UT published its decision that neither MM nor BK was entitled to the benefits claimed. The UT held against MM and BK on four main bases:

    i) First, the UT held that MM and BK were not entitled under reg. 883/2004 to aggregate their residence overseas with their residence in the UK to meet the past presence test (such as to entitle them to benefit under domestic law) on the basis that "mere" residence cannot be aggregated.

    ii) Second, the UT held that neither MM nor BK could demonstrate a genuine and sufficient link to the UK under reg. 2A of the AA Regulations and reg. 2A of the DLA Regulations respectively, such as to entitle them to the benefits claimed.

    iii) Third, the UT held (at [32]) that "presence alone may demonstrate a genuine and sufficient link"; but found on the facts that neither MM nor BK demonstrated such a link by mere presence alone.

    iv) Fourth, the UT held that neither MM nor BK was entitled to an "advance award" under reg. 13A of the Social Security (Claims and Payments) Regulations 1987 ("the 1987 Regulations") because neither could demonstrate qualification within the three month period, absent a change of circumstances.

31. On this appeal, MM and BK challenge the UT's findings (ii) and (iii) above and BK challenges finding (iv). They have abandoned their appeal in respect of (i).

32. The SSWP challenges the UT's statement (in [32] of its decision) that "presence alone may demonstrate a genuine and sufficient link". The SSWP also originally challenged

the UT's decision that the requirement of reg 2A(i)(c) of the DLA Regulations and the AA Regulations that it is necessary to demonstrate a genuine and sufficient link to the UK social security system rather than just the UK was contrary to EU law. This challenge has not been pursued.

The issues on appeal

33. The issues before the Court can conveniently be summarised as follows:

    i) First issue: whether the UT erred in concluding that MM and BK could not demonstrate that at the material time they had a genuine and sufficient link with the UK in that the UT failed to take proper account of all the relevant circumstances in each case, in particular (1) MM's intention to settle permanently in the UK in order to be cared for by her daughter and (2) BK and his mother's reasons for coming to the UK and their links to the UK.

    ii) Second issue: whether the UT erred in concluding that BK did not qualify under the "advance award" provisions of reg. 13A of the 1987 Regulations.

    iii) Third issue: whether presence in the UK, could, by itself, demonstrate a genuine and sufficient link to the UK.

Discussion

The starting point

34. The starting point is that both BK and MM are nationals of a Member State other than the UK. They fall within reg. 883/2004, which is a "relevant EU Regulation" within reg. 2A of the DLA Regulations and reg. 2A of the AA Regulations.

35. It is common ground that, at the date of the initial claim of BK for DLA and of MM for AA, they were both habitually resident in the UK.

36. Provided, therefore, that they can satisfy the "genuine and sufficient link" test in reg. 2A(1)(c), neither BK nor MM was required to satisfy the past presence test in reg 2(1)(a)(iii) of the DLA Regulations and the AA Regulations respectively.

The jurisprudence

37. As stated above, reg. 2A of the DLA Regulations and reg. 2A of the AA Regulations, with their substitution of the "genuine and sufficient link" test for the past presence test for those within a relevant EU regulation, were introduced following the decision of the ECJ in *Stewart*. That case concerned a claim for short-term incapacity benefit in youth pursuant to section 30A(2A) of the SSCBA. By section 30A(2A)(d) of the SSCBA and reg. 16 of the Social Security (Incapacity Benefit) Regulations 1994, the award of the benefit was conditional upon, among other things, the claimant on the day of the claim (1) being ordinarily resident in Great Britain, (2) being present in Great Britain, and (3) having been present in Great Britain for a period of, or for periods amounting in aggregate to, not less than 26 weeks in the 52 weeks immediately preceding that day. That latter condition was, in other words, a past presence condition analogous to reg. 2(1)(a)(iii) of the DLA Regulations and the AA Regulations (although for a considerably shorter period).

38. The claimant in *Stewart* was a British national, who suffered from severe long-term disability. She had moved to Spain with her parents when she was aged 11 and had resided there since then. She had been credited with UK national insurance contributions and received DLA. Her parents both received UK retirement pensions. Her mother claimed short-term incapacity benefit in youth from her 16th birthday. The SSWP rejected the claim on the ground that the claimant was not present in Great Britain on the date of the claim.

39. The UT referred various questions to the ECJ for a preliminary ruling, including the question whether Article 10(1) of Regulation 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, precluded a member state from making the award of an invalidity benefit subject to conditions requiring the claimant's ordinary residence or presence in that member state.

40. Article 10(1) provided, so far as relevant, as follows:

> "Save as otherwise provided in this Regulation, invalidity … cash benefits … 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."

41. The ECJ said that the purpose of Article 10 was to protect the persons concerned against any adverse effects that might arise from the transfer of their residence from one Member State to another. It held, accordingly, that Article 10(1) precluded the acquisition of entitlement to short-term incapacity in youth from being made subject to a condition of ordinary residence in the competent member state.

42. Turning to the past presence condition, the ECJ said (at [77]) that, in exercising their powers to legislate for the conditions for entitlement to benefits, Member States must comply with the law of the EU and, in particular, with TFEU provisions giving every citizen of the EU the right to move and reside within the territory of the Member States. The court pointed out (at [78]) that article 20 TFEU conferred on every person holding the nationality of a Member State the status of citizen of the Union, and (at [80]) that the status of citizen of the Union enables those among such nationals who find themselves in the same situation to receive, as regards the material scope of the Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that regard.

43. The ECJ said (at [86]) that national legislation disadvantaging some nationals of a Member State simply because they have exercised their freedom to move and to reside in another Member State amounts to a restriction on the freedoms conferred by Article 21(1) TFEU on every citizen of the Union, and (at [87]) that

> "[s]uch a restriction can be justified, under EU law, only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions …"

44. The court referred (at [89]) to Case C-224/98 *D'Hoop v Office national de l'emploi* [2004] ICR 137 and Case C-138/02 *Collins v SoS for Work and Pensions* [2005] QB 145 and reiterated, as was said in those cases, that it is legitimate for the national legislature to wish to ensure that there is a genuine link between a claimant to a benefit and the competent Member State, as well as to guarantee the financial balance of a national social security system. It said (at [90]) that the objectives of national legislation which seek to establish a genuine link between a claimant to short-term incapacity benefit in youth and the competent Member State and to preserve the financial balance of the national social security system, constitute, in principle, legitimate objectives capable of justifying restrictions on the rights of freedom of movement and residence under Article 21 TFEU.

45. The ECJ held (at [95]), however, with regard to the specific past presence condition in issue in the case, that it was too exclusive in nature. The ECJ said:

> "… by requiring specific periods of past presence in the competent Member State, the condition of past presence unduly favours an element which is not necessarily representative of the real and effective degree of connection between the claimant to short-term incapacity benefit in youth and that Member State, to the exclusion of all other representative elements. It therefore goes beyond what is necessary to attain the objective pursued (see, by analogy, *D'Hoop's* case …. para 39)."

46. The ECJ then said (at [96]) that such a connection could be established from other representative elements. It proceeded to give examples of such "representative elements" as follows:

> "97. Such elements must be sought, in the first place, in the relationship between the claimant and the social security system of the competent member state. In that regard, the decision making the reference states that the claimant is already entitled, under UK legislation, to disability living allowance.
>
> 98. Moreover, it is apparent from that decision that the claimant is credited with UK national insurance contributions which are added each week to her national insurance account.
>
> 99. It follows that Ms Stewart is already, in a certain way, connected to the national social security system in question.
>
> 100. Other elements capable of demonstrating the existence of a genuine link between the claimant and the competent member state may, secondly, be apparent from the claimant's family circumstances. In the case in the main proceedings, it is common ground that Ms Stewart, who is incapable of acting on her own behalf because of her disability, remains dependent on her parents who care for her and represent her in her relations with the outside world. Both Ms Stewart's mother and her father receive retirement pensions under UK legislation. In

> addition, her father worked in that member state before retiring, whereas her mother previously received, also under UK legislation, incapacity benefit.
>
> 101. Finally, it is common ground that the claimant, a UK national, has passed a significant part of her life in the UK."

47. The ECJ held (at [102]) that those elements of the case were capable of demonstrating the existence of a genuine and sufficient connection between the claimant and the competent Member State.

48. The ECJ's conclusion on the issue of the past presence condition was stated in [104] as follows:

> "104. Consequently, national legislation, such as that at issue in the main proceedings, which makes acquisition of the right to short-term incapacity benefit in youth subject to a condition of past presence in the competent Member State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, goes beyond what is necessary to attain the objective pursued and therefore amounts to an unjustified restriction on the freedoms guaranteed by Article 21(1) TFEU for every citizen of the Union."

49. The nature of the necessary connection between the claimant to a benefit and the competent Members State was variously described by the ECJ in *Stewart* as "a genuine link" (at [89]) and "a real and effective degree of connection" (at [95]) and "a genuine and sufficient connection" (at [102]).

50. We were referred by counsel to *D'Hoop* and *Collins*. They do not add anything significant to *Stewart* itself. *D'Hoop* concerned an application for a Belgian unemployment benefit for young persons. In [38] of its decision, the ECJ said that it was legitimate for the national legislature to wish to ensure that there was "a real link" between the applicant for that allowance and the geographic employment market concerned. At [39] it said that the particular condition in the Belgian legislation in issue (requiring completion of secondary education by a Belgian national at an educational establishment in Belgium) unduly favoured an element which did not necessarily represent "the real and effective degree of connection" between the applicant for the benefit and the geographic employment market, to the exclusion of all other representative elements.

51. *Collins* concerned a claim by a dual United States and Irish national, who had recently returned to the UK, for jobseeker's allowance under the Jobseekers Act 1995. Under the Jobseeker's Allowance Regulations 1996 a person was only qualified to receive this benefit if, among other things, he or she was "habitually" resident in the UK. The ECJ, citing *D'Hoop*, said (at [67]) that it is legitimate for the national legislature to wish to ensure that there is "a genuine link" between an applicant for such a benefit and the geographic employment market in question; and (at [69]) that it may be regarded as legitimate for a Member State to grant a social security benefit only after it is possible to establish that "a genuine link" exists between the person seeking work

and the employment market of that Member State. It said (at [70]) that the existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. It added (at [72]) that, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection,

> "if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. … the period [of residence required] must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host state."

52. There are a number of cases, in addition to *Stewart*, which illustrate that it is legitimate for a Member State to impose proportionate conditions requiring a genuine connection with the Member State as a condition of the right to claim social security benefits in order that such rights should not impose an unreasonable burden on the Member State.

53. In Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2014] 1WLR 108, the principal issue, so far as relevant to the present appeal, was whether Article 7(1)(b) of Directive 2004/38 precluded national legislation in Austria which denied the grant of a benefit - in that case a supplement to German invalidity pension and carer allowance - to a German national who was economically inactive in Austria on the ground that, despite having been issued with a certificate of residence, he did not meet the necessary requirements for obtaining the legal right to reside in the host Member State for a period of longer than three months, the right of residence itself being conditional upon the applicant having sufficient resources not to require the benefit.

54. The ECJ said (at [44]) that it had consistently held that there is nothing to prevent, in principle, the granting of social security benefits to EU citizens who are not economically active being made conditional on those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State, but added (at [45]) that it is important that the requirements for obtaining that right of residence – such as the need to have sufficient resources not to need to apply for the compensatory supplement – are themselves consistent with EU law.

55. The ECJ said (at [57]) that it followed that, while reg. 883/2004 was intended to ensure that EU citizens who made use of the right to freedom of movement for workers retained the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allowed the host Member State to impose legitimate restrictions in connection with the grant of such benefits to EU citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State.

56. Having said (at [64]–[69]) that the competent national authorities must take into account "the personal circumstances" of the applicant, the ECJ said the following (at [72]):

> "72. By making the right of residence for a period of longer than three months conditional on the person concerned not

> becoming an "unreasonable" burden on the social assistance "system" of the host member state, article 7(1)(b) of Directive 2004/38, interpreted in the light of recital (10) to that Directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that member state's social assistance system as a whole. …"

57. The ECJ concluded (at [77]-[80]) that the condition in issue was precluded by, among other things, Article 7(1)(b) of Directive 2004/38 because (as the ECJ put it in [77]) a mechanism, whereby nationals of other member states who are not economically active and whose resources fall short of the reference amount for the grant of that benefit are automatically barred by the host Member State from receiving the benefit:

> " does not enable the competent authorities of the host member state to carry out—in accordance with the requirements under, among other things, articles 7(1)(b) and 8(4) of that Directive and the principle of proportionality—an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned."

58. In Case C-33/13 *Dano v Jobcenter Leipzig* [2015] 1 WLR 2519 the applicants were Romanian nationals, who had resided in Germany for more than three months but less than five years, and so fell within article 7(1)(b) of Directive 2004/38. One of the questions was whether article 24(2) of Directive 2004/38 and article 4 of reg. 883/2004 precluded German legislation under which nationals of other Member States, who were economically inactive, were excluded from entitlement to job seekers' benefits because their right of residence arose solely out of their search for employment. The ECJ held that such German legislation was not precluded by EU provisions.

59. The ECJ reiterated (at [71]) that it is apparent from recital (10) of Directive 2004/38 that the conditions in Article 7(1), in respect of periods of residence longer than three months, are intended, among other things, to prevent persons from becoming an unreasonable burden on the social assistance system of the host Member State.

60. The ECJ said (at [74]) that, to accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State, would run counter to an objective of the Directive, set out in recital (10), namely preventing EU citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State. The ECJ said (at [76]) that Article 7(1)(b) seeks to prevent economically inactive EU citizens from using the host Member State's welfare system to fund their means of subsistence.

61. The ECJ said (at [77]) that any unequal treatment between EU citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence

of Directive 2004/38; and that such potential unequal treatment is founded on the link established by the EU legislature in Article 7 of Directive 2004/38 between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States; and (at [78]) that a Member State must have the possibility, pursuant to Article 7, of refusing to grant social benefits to economically inactive EU citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

62. Case C-308/14 *European Commission v UK* [2016] 1 WLR 5049 concerned a claim for child benefit and child tax credit. The ECJ held that UK legislation which requires persons claiming that benefit to have a right lawfully to reside in the UK was not discrimination prohibited under Article 4 of reg. 883/2004. The ECJ said (at [80]) that it is clear from the ECJ's case law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted, in particular to persons from other Member States who are not economically active, as such a grant could have consequences for the overall level of assistance which may be accorded by that Member State. It said (at [85]) that it had not been shown that the requirement of a right to reside lawfully in the UK does not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protected public finances or that it goes beyond what is necessary to attain that objective.

63. Further guidance on what evidence is relevant to establishing the genuine link may be found in Case C-75/11 *European Commission v Austria* [2013] 1 CMLR 17. In that case the EU Commission brought proceedings against the Austrian Government challenging the legality of imposing on students who were nationals of member states other than Austria, and who were pursuing their studies in Austria, higher fares than Austrian students for use of public transport. The ECJ said (at [61]) that a national scheme requiring a student to provide proof of a genuine link with the host Member State could, in principle, reflect a legitimate objective capable of justifying restrictions on the right to move and reside freely in the territory of the Member States provided for in Article 21 TFEU. It said (at [62]), citing *D'Hoop* and *Stewart*, that the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour an element which is not necessarily representative of the real and effective degree of connection between the claimant to reduced transport fares and the Member State where the claimant pursues his studies, to the exclusion of all other representative elements. It added (at [63]) that the genuine link required between the student claiming a benefit and the host Member State:

> "need not be fixed in a uniform manner for all benefits, but should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes. The objective of the benefit must be analysed according to its results and not according to its formal structure."

64. The Court held (at [65]) that Austria had not established that the Austrian scheme of reduced transport fares for Austrian students was objectively justified.

65. Finally, on the relevant jurisprudence, while the cases show that the test or condition for showing the link must be a proportionate one, there is not a separate and additional requirement of proportionality which must be decided for each individual applicant: see *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, [2016] 1 WLR 481. The decision of the Supreme Court in that case concerned the issue whether a Polish national living in the UK could properly be refused income support because she did not have a right of residence in the UK and also the issue whether an Austrian citizen living in the UK could properly be refused to be housed as a homeless person under part VII of the Housing Act 1996 because he was not eligible for housing assistance as he did not have the right of residence in the UK. The Supreme Court held that the refusal of such benefits and assistance was lawful.

66. The Supreme Court traversed the now familiar ground of freedom of movement of EU nationals and recital (10) and Article 7 of Directive 2004/38. The Supreme Court rejected the submission, made on behalf of both claimants, that consideration needed to be given to the proportionality of refusing each of them social assistance bearing in mind all the circumstances of their respective cases. Lord Neuberger, with whom the other Supreme Court Justices agreed, said (at [69]):

> "Where a national of another member state is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance (as is sadly the position of Ms Mirga and Mr Samin), it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances. It would also place a substantial burden on a host member state if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked."

Summary of principles underlying the ECJ cases

67. We would summarise as follows the principles, relevant to this appeal, to be derived from the jurisprudence we have set out above.

> (1) Notwithstanding the right of EU citizens to freedom of movement within the EU, Member States may specify proportionate conditions limiting the right of nationals of another Member State to social benefits in the host Member State, in order reasonably to limit the financial burden on its social assistance system.
>
> (2) Such a condition may be the requirement that the applicant for the benefit must demonstrate a sufficient link with the host Member State.
>
> (3) Such a link has been described in various terms as a "genuine" link, a "real link", a "real and effective degree of connection", and a "genuine and sufficient connection". Those expressions are all to be interpreted as meaning the same thing.

(4) Where there is a condition requiring such a link or connection, the host Member State must take into account all relevant evidence as to whether it has been established. Such evidence may include the relationship between the applicant and the social security system of the host Member State, family circumstances, and other personal circumstances of the applicant.

(5) There is no requirement for an additional and separate proportionality assessment for each individual applicant.

68. Applying those principles, there can be no doubt that the condition of "a genuine and sufficient link" to the United Kingdom is an appropriate and proportionate condition for limiting the financial burden on the UK of claims to DLA and AA by the nationals of other Member States. On the other hand, it is common ground that, in requiring that link to be to "the United Kingdom social security system", reg. 2A(1)(c) of the DLA Regulations and reg. 2A(1)(c) of the AA Regulations are too narrow and prescriptive to be lawful. They are, therefore, to be interpreted and applied as requiring a genuine and sufficient link to the UK.

69. It is equally clear that, in assessing whether such a genuine and sufficient link is established, objective evidence of the link is plainly critical but evidence of the motives, intentions and expectations of the applicant are not to be ignored if they are relevant to proof of the link and are convincing. Decision makers and, on appeal, the courts are entitled to be cautious about self-serving statements by applicants, especially if the benefits are claimed immediately on or only shortly after arrival in the UK. Such caution is justified not only because self-serving statements as to motives, intentions and expectations may not be genuine but also because, even if they are genuine, actual realisation of the intentions and expectations of the applicant will not have been tested by the passage of time and the realities of the situation.

70. In the cases of BK and MM, their motives for coming to the UK and their intentions and expectations in doing so have not been challenged at any stage. They were simply ignored as irrelevant at every stage by the SSWP, the FtT and the UT.

<u>BK</u>

71. In the case of BK, the UT's statement of the relevant facts was very brief and as follows:

> "2. BK is Irish. He was born on 18 October 2000 and, apart from a break in 2003-2004, lived in Ireland until 26 June 2013, when he came to this country with his mother. She is British and last worked (in Ireland, for four months) before BK was born. While in Ireland, BK received a domiciliary care allowance and his mother received a carer's allowance."

72. The UT recorded (at [7]) the concession of the SSWP that (1) both BK and MM were within the scope of reg. 883/2004; (2) they were both habitually resident in Great Britain; and (3) the UK was the competent State for the payment of sickness benefit.

73. Having stated (at [36]) that the FtT had misdirected itself on the genuine and sufficient link issue by limiting its consideration to links with this country's social

security system, the UT set out (at [38]) its reasons as to why, in any event, it dismissed BK's appeal and his case that he had a genuine and sufficient link to the UK, as follows:

> "I can see no relevance in the fact that the claimant and his mother came to this country to escape domestic violence. It explains why they came here, but it does not show or contribute to showing a sufficient link. I was referred to *PB v Secretary of State for Work and Pensions* [2016] UKUT 0280 (AAC), in which Upper Tribunal Judge Wright explained why he had accepted the Secretary of State's concession that the claimant had established a sufficient link through his sister. On the basis of the judge's reasoning, albeit only set out to explain why he accepted the concession, it is possible to establish a link through someone else. That is consistent with *Stewart* where the Court took account not only of the claimant's links, but also of her parents'. In the case of a child, it is difficult to see how a link could otherwise be established. However, the connections identified with this country essentially rely on inheritance. BK himself has no connection and his mother's connection has been relatively minor, certainly throughout his life. My conclusion is that, on the evidence, the [FtT] could not properly have come to a different decision even if it had directed itself correctly on the law."

74. While we acknowledge the care with which the UT gave its decision, we do not accept that the motives of BK, or rather his mother, for coming to the UK were irrelevant. They both explained and confirmed her settled intention to remain in the UK from the outset of her arrival, and they explained why the various steps that she took pursuant to that intention showed that she, and therefore BK, did have a genuine and sufficient link to the UK at the time of BK's claim for DLA.

75. The FtT and the UT should, therefore, have taken into account, but failed to take into account, the following matters advanced before the FtT in deciding whether or not BK had a genuine and sufficient link: (1) BK's mother relocated to the UK, which was her country of nationality, consequent on domestic violence; (2) she required the support of her own mother, grandmother and two brothers, all of whom resided in England; (3) she did not believe that she could turn to her father for help in the Republic of Ireland as he was a heavy drinker and she did not consider that this was a suitable or safe environment to reside with BK and his two siblings; (4) on coming to England she severed all ties with the Republic of Ireland and had had no intention of returning: she closed her sole bank account in the Republic of Ireland in the week preceding her return to England, took steps to register her children for school in England in July 2013 and they attended school in England from September 2013.

76. The decisions of both the FtT and the UT were, therefore, flawed in principle. We see no point in remitting the matter, as we have all the material facts. We consider, having regard to the matters mentioned in the preceding paragraph, when added to the SSWP's concessions that BK was habitually resident in Great Britain and that the UK was the competent Member State for the payment of sickness benefits, that BK did

have a genuine and sufficient link to the UK at the time of his claim and certainly at the time the decision was taken to reject his claim.

77. The UT held that BK was not assisted by the advance claims and awards provisions in reg. 13A(1) of the 1987 Regulations. The UT said, on this point, as follows:

> "39. A decision-maker and a tribunal should always consider, when appropriate, the possibility of an advance award under regulation 13A of the Social Security (Claims and Payments) Regulations 1987. That regulation cannot assist BK. It only applies if a claimant will qualify within 3 months provided that there is no change of circumstances. Therein lies the problem: the position for BK is the reverse of when regulation 13A applies. He cannot qualify unless and until there is a change of circumstances – either through presence or through a genuine and sufficient link."

78. In view of our decision that there was a genuine and sufficient link between BK and the UK at the material time, the issue whether the UT was correct or wrong on its application of reg. 13A(1) does not arise.

MM

79. Turning to MM, the UT's statement of the relevant facts was, again, very brief and was as follows:

> "5. MM is German. She was born on 30 December 1947 and came to this country on 29 May 2013, having lived continuously in Germany since 1998. Her claim for an attendance allowance was treated as made on 19 June 2013 and refused on 19 November 2013."

80. The UT, having said that the FtT misdirected itself in law in applying Article 6 of reg. 883/2004 (aggregation of periods of residence etc), simply stated, by way of conclusion and reasoning:

> "6. … On the evidence, the tribunal could not properly have found that that her connections with this country were sufficient to show a sufficient link. I have re-made the decision to that effect."

81. As MM's motive, intentions and expectations were relevant, the UT should have taken into account, but failed to take into account, the following matters, which have not been disputed by the SSWP, in deciding whether or not MM had a genuine and sufficient link: (1) she suffered with several physical ailments including osteoporosis, rheumatoid arthritis, incontinence and high blood pressure, and used a catheter and a wheelchair; (2) she required support with mobility, washing, toilet, cooking meals, dressing and administering medication; (3) she moved to the UK to join her daughter, who was a British citizen and would provide daily care for her.

82. Mr Richard Drabble QC, for MM, submitted that a particularly important factor in MM's favour is that her daughter was a British citizen who, at the date of the claim, would have satisfied all the requirements, including residence requirements, for obtaining a carer's allowance pursuant to SSCBA section 70 for looking after MM. In that connection he cited Case 150/85 *Drake v Chief Adjudication Officer* [1987] QB 166. That case concerned the refusal of an application by the claimant, who had given up work to look after her severely disabled mother, for an invalid care allowance, which had been refused on the ground that the Social Security Act 1975 disqualified her, as a married woman living with a husband, for entitlement to the allowance.

83. In the course of its judgment, the ECJ observed (at [23]) that different Member States provided protection against the consequences of the risk of invalidity in various ways, with some, such as the UK, providing two separate allowances, one payable to the disabled person and the other payable to a person who provides care, while other Member States "arrive at the same result" by paying an allowance to the disabled person at a rate equivalent to the sum of those two benefits. The ECJ then referred to the need to ensure that, whichever approach was adopted, the progressive implementation of the principle of equal treatment must be carried out in a harmonious manner throughout the Community. The ECJ also stated (at [24]) that "there is a 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".

84. The essence of Mr Drabble's submission on this point was that it would be a curious and wrong result if an applicant for AA had come to the UK with the settled intention of receiving care from a person entitled to carer's benefit but was refused AA on the basis that the they did not have a genuine and sufficient link to the UK. *Drake's* case is, however, of limited assistance. It does not lay down any rule of law that there will always be a genuine and sufficient link in those circumstances, irrespective of any other circumstances. The fact that MM's daughter would be entitled to carer's benefit is relevant but it is only one of a number of factors to be taken into account in judging whether, in the round, the evidence demonstrates a genuine and sufficient link to the UK.

85. The decision of the UT with regard to MM was, therefore, flawed in principle. As in the case of BK, we see no point in remitting the matter, as we have all the material facts. We consider, having regard to all the relevant matters we have mentioned, including the SSWP's concessions that MM was habitually resident in Great Britain and that the UK was the competent Member State for the payment of the relevant benefits, that MM did have a genuine and sufficient link to the UK at the time of her claim and certainly at the time the decision was taken to reject her claim.

The SSWP's argument that mere presence is never enough

86. The SSWP submitted in its written skeleton argument that the UT was wrong to state (at [32]) that "presence alone may demonstrate a genuine and sufficient link".

87. We understood Mr Gerry Facenna QC, for the SSWP, to accept in his oral submissions that what is in issue here is whether mere presence in the UK short of the period of residence specified in reg. 2(1)(a)(iii) of the DLA Regulations and reg.

2(1)(a)(iii) of the AA Regulations could ever be sufficient to establish a genuine and sufficient link.

88. There was debate before us as to the meaning and significance of the statement of the ECJ in *Stewart* (at [93]) that:

> "The existence of such a [genuine] link could effectively be established, in particular, by a finding that the person in question had been, for a reasonable period, actually present in that member state."

89. In view of our decision that, in the case of both BK and MM, there was a genuine and sufficient link between BK and the UK at the material time, this issue of general principle raised by the SSWP does not arise. It is inappropriate for us to address it as a hypothetical possibility. It seems highly unlikely that a period of residence in the UK will ever be the sole factor relied upon by an applicant for a benefit in seeking to demonstrate a genuine and sufficient link to the UK.

90. The UT's observations on this issue at [32] of its decision do not form part of its essential reasoning or ratio and do not, therefore, create any precedent. Nothing that we have said in this judgment should be taken to be an approval or disapproval of what was said there by the UT.

Conclusion

91. For the reasons we have given above, we allow these appeals of BK and MM.