Neutral Citation Number: [2023] EWCA Civ 433

Case No: CA-2020-000391

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE JACOBS
CDLA/0882/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 April 2023

Before:

LORD JUSTICE BAKER
LADY JUSTICE ANDREWS
and
LORD JUSTICE LEWIS

- -

Between:

AMIRRA HARRINGTON **(by her litigation friend ANNE-MARIE HARRINGTON)**	**Appellant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**
THE AIRE CENTRE	**Intervener**

- -
- -

Adrian Berry and Desmond Rutledge (instructed by **Osbornes**) for the **Appellant**
Galina Ward KC (instructed by **the Government Legal Department**) for the **Respondent**
Thomas de la Mare KC, Ravi Mehta and Eleanor Sibley instructed by
(**Herbert Smith Freehills LLP**) for the **Intervener**

Hearing dates: 22 and 23 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the payment of the care component of disability living allowance. That is a disability benefit payable to children under the age of 16. The appellant is a child who lives with her mother in the United Kingdom. Her father is self-employed and resident in Belgium. The respondent previously paid the care component to the appellant but ceased doing so on 19 May 2015 on the basis that the competent state for the purposes of payment of such cash benefits was Belgium, the state where the father was self-employed. The issue that arises on this appeal is whether the appellant is entitled to rely on the law of the United Kingdom, her state of residence, in order to claim the care component. The answer to that issue depends upon the proper interpretation of the provisions of Regulation (EC) No 883/2004 of the European Parliament and the Council of 29 April 2004 on the co-ordination of social security systems ("the Regulation").

2. The appellant contends that the legislation applicable to her is the United Kingdom legislation as she is an insured person who is resident in the United Kingdom. Consequently, under Article 11(3)(e) of the Regulation, the legislation applicable to her in respect of a cash sickness benefit such as disability living allowance is United Kingdom legislation. The respondent contends that the appellant is only entitled to benefits under the legislation of one state, and that state is Belgium, as she is a family member of a person who is self-employed in Belgium and governed by the social security legislation of Belgium. The respondent contends that the situation is governed by Article 21 of the Regulation.

3. The issue can be easily stated but is complex. I am grateful to all counsel for the very high quality of their written and oral submissions.

THE LEGAL FRAMEWORK

The Domestic Legislation

4. Section 71 of the Social Security Contributions and Benefits Act 1992 ("the Act") provides that disability living allowance shall consist of a care component and a mobility component. There are regulations prescribing that a person shall not be entitled to a disability living allowance unless, amongst other things, he or she resides in Great Britain. A person under 16 is entitled to the care component of a disability living allowance in prescribed circumstances where he or she needs attention or supervision in connection with severe physical or mental disabilities. Section 72(7B) of the Act provides that:

> "(7B) A person to whom either Regulation (EC) 1408/71 or Regulation (EC) No 883/2004 applies shall not be entitled to the care component of a disability living allowance 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 I of Title III of the Regulation in question."

The European Union Legislation

5. Article 45 of the Treaty on the Functioning of the European Union ("TFEU") provides for the free movement of workers. Article 49 provides for the freedom of persons amongst other things to pursue activities as self-employed persons. Article 48 TFEU provides, so far as material, that:

> "The European Parliament and 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) aggregation, for the purposes of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
>
> (b) payment of benefits to persons resident in the territories of Member States."

6. Article 352 TFEU also provides power for the Council, after obtaining the consent of the European Parliament, to adopt appropriate measures to attain one of the objectives of the Treaty on European Union or the TFEU if no other power is available.

7. The co-ordination of the social security schemes of Member States was formerly regulated by Council Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community ("Regulation 1408/71"). Regulation 1408/71 was repealed by, and replaced with, the provisions of the Regulation. It is common ground that the relevant provisions are those contained in the Regulation as they applied as at May 2015, the time that the decision was taken to discontinue payment of the care component of the disability living allowance to the appellant.

8. Recital (3) to the Regulation noted that Regulation 1408/71 had been amended and updated on numerous occasions. It noted that as a result the rules had been complex and lengthy and:

> "Replacing, while modernising and simplifying, these rules is therefore essential to achieve the aim of the free movement of persons."

9. Recital 12 refers to the need to take care to ensure that there are no overlapping benefits of the same kind for the same period. Recitals (15), (16), (17) and (18) are important and provide:

> "(15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable

> provisions of national legislation and the complications which could result therefrom.
>
> (16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.
>
> (17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his activity as an employed or self-employed person.
>
> …..
>
> (18a) The principle of single applicable legislation is of great importance and should be enhanced. This should not mean, however, that the grant of a benefit alone, in accordance with this Regulation and comprising the payment of insurance contributions or insurance coverage for the beneficiary, renders the legislation of the Member State, whose institution has granted that benefit, the applicable legislation for that person.

10. Recital (35) provides that:

> "In order to avoid unwarranted overlapping of benefits, there is a need to lay down rules of priority in the case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of the members of the family."

11. The Regulation is structured in the following way. Title I contains definitions and general provisions. Title II, comprising articles 11 to 16, is headed "Determination of the Legislation Applicable". Title III contains special provisions concerning the various categories of benefits.

12. Article 1 of the Regulation contains key definitions. They include Article 1(c) which defines an insured person as follows:

> "'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".

13. 'Competent Member State' is defined in Article 1(s) as "the Member State in which the competent institution is situated". 'Institution' is defined by article 1(p) as

meaning in respect of each Member State, "the body or authority responsible for applying all or part of the legislation." 'Competent institution' is defined in article 1(q) as

> "(i) the institution with which the person concerned is insured at the time of the application for benefit; or
>
> (ii) the institution from which the person concerned is or would be entitled to benefits if he/she or a member or members of his/her family resided in the Member State in which the institution is situated; or
>
> (iii) the institution designated by the competent authority of the Member State concerned; or
>
> (iv) in the case of a scheme relating to an employer's obligations in respect of the benefits set out in Article 3(1), either the employer or the insurer involved or, in default thereof, the body or authority designated by the competent authority of the Member State concerned."

14. Article 2 provides that the Regulation applies to, amongst other persons, nationals of a Member State who are or have been subject to the legislation of one or more Member States. Article 3 provides that the Regulation applies to specified branches of social security including, amongst others, "sickness benefits". It applies to general and special social security schemes whether contributory or non-contributory. Article 10 provides:

> "**Article 10 Prevention of overlapping benefits**
>
> Unless otherwise specified, this Regulation shall neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance."

15. Title II of the Regulation deals with the determination of the legislation applicable. The principal article is article 11 which provides so far as material that:

> "**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. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.
>
> 3.Subject to Articles 12 to 16:

> (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) a civil servant shall be subject to the legislation of the Member State to which the administration employing him/her is subject;
>
> (c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;
>
> (d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
>
> (e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.
>
> ….."

16. Title III of the Regulation deals with special provisions concerning the various categories of benefits. For the purposes of this appeal, the material provision is Article 21 which deals with cash benefits. The care component of disability living allowance is classified as a cash benefit for the purposes of the Regulation, notwithstanding that it is a non-contributory benefit payable to the child. Article 21 provides that:

> "**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. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.
>
> 2. The competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation.

> 3.The competent institution of a Member State whose legislation provides that the calculation of cash benefits shall be based on standard income shall take into account exclusively the standard income or, where appropriate, the average of standard incomes for the periods completed under the said legislation.
>
> 4. Paragraphs 2 and 3 shall apply *mutatis mutandis* to cases where the legislation applied by the competent institution lays down a specific reference period which corresponds in the case in question either wholly or partly to the periods which the person concerned has completed under the legislation of one or more other Member States."

17. It is not necessary for present purposes to consider the other provisions of the Regulation in detail save for two others. These deal with the provision of benefits in kind, that is the provision of benefits such as hospital treatment, to an employed or self-employed person and his or her family members. There is specific provision where the employed or self-employed person is working in one Member State but the insured person, and his family members, reside in a different Member State. Article 17 of the Regulation provides that the insured person and the family member are entitled to the benefits in kind in the state of residence. Article 32 then deals with determining which state (the state where the person is working or the state of residence) is responsible for paying for those benefits. Those articles provide as follows:

> **"Article 17 Residence in a Member State other than the competent Member State**
>
> An insured person or members of his/her family who reside in a Member State other than the competent Member State shall receive in the Member State of residence benefits in kind provided, on behalf of the competent institution, by the institution of the place of residence, in accordance with the provisions of the legislation it applies, as though they were insured under the said legislation."

And

> **"Article 32 Prioritising of the right to benefits in kind — special rule for the right of members of the family to benefits in the Member State of residence**
>
> 1. An independent right to benefits in kind based on the legislation of a Member State or on this Chapter shall take priority over a derivative right to benefits for members of a family. A derivative right to benefits in kind shall, however, take priority over independent rights, where the independent right in the Member State of residence exists directly and solely on the basis of the residence of the person concerned in that Member State.

> 2. Where the members of the family of an insured person reside in a Member State under whose legislation the right to benefits in kind is not subject to conditions of insurance or activity as an employed or self-employed person, benefits in kind shall be provided at the expense of the competent institution in the Member State in which they reside, if the spouse or the person caring for the children of the insured person pursues an activity as an employed or self-employed person in the said Member State or receives a pension from that Member State on the basis of an activity as an employed or self-employed person."

THE FACTUAL BACKGROUND

The Appellant and her family

18. The appellant's mother and father are both British nationals born in the United Kingdom. In the summer of 2004, they moved to Austria for work. The appellant was born in Austria in 2009. She is a British national. In August 2012, the family moved to Kent in the United Kingdom. In September 2012, the appellant's father left the family and went to live in Belgium where he is a self-employed English teacher. The appellant's mother, the appellant and her sibling remained in the United Kingdom. The appellant's mother is, herself, in receipt of state benefits. The appellant's parents are separated but not divorced.

The claim for disability living allowance

19. On 30 October 2013 a claim was made by the appellant (with her mother acting as appointee) for disability living allowance. On 29 January 2014, the respondent made an award of the care component to the appellant. On 19 May 2015, the respondent revised that decision and decided that the appellant was not entitled to claim the care component. The basis of that decision was that the appellant was a family member of a person working and contributing in Belgium and that, therefore, Belgium was the competent state for the purpose of claiming sickness benefits.

20. There was an appeal to the First-tier Tribunal. That decided that there was a "difference of view" between the United Kingdom and Belgium as to which was the competent state in respect of the appellant within the meaning of Article 6 of Regulation (EC) No 987/2009 of the European Parliament and the Council of 16 September 2009 laying down the procedure for implementing Regulation EC No 883/2004 on the co-ordination of social security systems ("the Implementing Regulation"). Consequently, in its view, the appellant was entitled to receive the care component until that difference of view was resolved. The First-tier Tribunal, therefore, allowed the appeal and set aside the decision of 19 May 2015.

The Decision of the Upper Tribunal

21. The respondent appealed to the Upper Tribunal (Administrative Appeals Chamber). Upper Tribunal Judge Jacobs found that the First-tier Tribunal was wrong to find that there was a difference of view between the United Kingdom and Belgium and set aside the decision of the First-tier Tribunal. He then reconsidered the matter. He decided that the appellant was not entitled to a disability living allowance.

22. The reasoning of the Upper Tribunal was as follows. The appellant's father was pursuing activity as a self-employed person in Belgium. He fell within article 11(3)(a) of the Regulation and the legislation applicable to him was the legislation of Belgium. So far as the appellant, and her mother, were concerned, neither pursued an activity as an employed or self-employed person within the meaning of article 11(3)(a) of the Regulation and they did not fall within article 11(3)(b) to (d). Consequently, they fell within article 11(3)(e) as they were resident in the United Kingdom, and it was the relevant United Kingdom legislation which applied to each of them.

23. The Upper Tribunal then considered whether the appellant was entitled to benefits in her own right in accordance with the United Kingdom legislation or whether she was limited to claiming benefits under Belgian legislation as a member of her father's family. The Upper Tribunal held that Article 21 of the Regulation took priority over, or overrode any entitlement under United Kingdom legislation, for the following reasons:

> "33. First, there is the importance of a claimant being subject to the legislation of one State only. Article 11(1) so provides, Recital (15) refers to the need to avoid the complications of overlapping provisions, and Recital (18a) says that the principle is of great importance and should be enhanced. Second, this is especially important when a family is not habitually resident in the competent State: see Recital (20). Third, when a member of the family is pursuing employment in a State, it is possible that that State will make provision, through insurance or contributions, for sickness benefits to be payable not only to that person but also the members of their family. As I have said, I do not read Article 21 as limited to that situation, but it is fair to take account of that possibility when considering how the Article was designed to work.
>
> 34. Fourth, it is instructive to compare Article 21 with Article 19 of the Regulation 1408/71. Under Article 19, (self-) employed persons were entitled to cash sickness benefits from the competent State even if they were habitually resident in another State. The same applied to members of their families unless they were entitled to benefits in the State where they were habitually resident. The point to note is the (self-) employed and their family members were treated differently and the wording of the Article leaves no doubt about it. In other words, the competent State for the (self-) employed was their place of work, whereas the competent State for their family members was their place of residence, with the place of work as a fall-back if there was no entitlement there The structure of Article 21 and the wording of Article 19(2) provided a precedent to use if Article 21 was to allow a claimant's right under the legislation of the insured person's place of work, but it was not followed. Although this is not a decisive point, I regard it as significant that the precedent available was not followed. It is at least consistent with

> residence not overriding the place of (self-) employment and even suggestive that this is indeed the position."

The Administrative Commission

24. Permission was granted to the appellant to appeal to the Court of Appeal. Prior to that appeal being heard, it was accepted that there was a difference of view between the Belgian and the United Kingdom authorities. There is provision in those circumstances for the matter to be brought before a body known as the Administrative Commission pursuant to Article 6 of the Implementing Regulation. In accordance with Article 6(2) of the Implementing Regulation, the respondent agreed to pay the appellant the care component of disability living allowance on a provisional basis with effect from 20 July 2021, and to make a back payment in respect of provisional payments due from the period beginning on 4 March 2021. The appeal to the Court of Appeal was stayed pending the outcome of the consideration of the matter by the Administrative Commission.

25. The matter was considered first by a conciliation board. They had presentations from the Belgian and British delegations of their respective points of view. The appellant had no ability to play any role in the process. The board recorded the substance of each government's case. The board noted that it was agreed by both parties that the appellant was a family member of the father who was insured in Belgium and for whom Belgium was the competent member state pursuant to Article 11(3)(a) of the Regulation. The appellant was also a family member of the mother who was not economically active and who, therefore, fell within the scope of Article 11(3)(e) of the Regulation so that the legislation of the state of residence (the United Kingdom) was applicable to her. It noted that it was common ground that the residence of the mother and the child in a state other than the competent Member State of the father did not preclude them from potential rights to cash sickness benefits under Belgian law as the insured person (the father) and his family member residing in a Member State other than the competent Member State may be entitled to cash sickness benefits provided by the competent institution under the legislation of the competent state.

26. Having identified the common ground in that way, the board identified the two questions as:

> "The dispute therefore concerns the questions
>
> (a) whether Belgium is competent by priority for the provision of cash sickness benefits in accordance with Article 21 of Regulation (EC) No 883/2004 because the father is the only economically active family member and,
>
> (b) in the affirmative. whether the principle that persons falling within the scope *ratione personae* of Regulation (EC) no 883/2004 shall be subject to the social security scheme of only one single Member State precludes a concurrent right to cash sickness benefits under the legislation of another Member State, to which the child may otherwise be entitled."

27. On the first question, the board considered that the provisions of Title II of the Regulation provided a complete and uniform system of conflict rules intended to

prevent the simultaneous application of a number of national legislative systems and to ensure that a person was not left without social security because no legislation is applicable to them. It considered that the overall scheme of the Regulation prioritised the rights based on economic activity over those of residence. It noted, however, that under the previous legislation (Article 19 of Regulation 1408/71) sickness benefit was to be provided on behalf of the competent institution by the institution of the place of residence in accordance with its own legislation. On the basis of the previous legislation, the appellant would have been entitled to cash sickness benefit from the United Kingdom and there would have been no entitlement to benefits from Belgium. Under the Regulation, there was a rule of priority governing benefits in kind but no express rule governing cash benefits. It considered that there was what it described as "a legislative gap" as to which legislation took priority in the case of cash benefits. That gap could be closed in one of two ways: either the Administrative Commission could take what it decided as an interpretative decision explaining which legislation of which state took priority. Or the European institutions could amend the Regulation.

28. Without itself deciding the issue, the board considered that there was a case that Belgium was the competent Member State for the provision of cash sickness benefits under Article 21 of the Regulation. On the assumption that that was the case, the board then considered if that would preclude concurrent entitlements, i.e. cash sickness benefits being payable under the United Kingdom legislation (on the basis of residence) and Belgian legislation (under Article 21 on the basis of the right of the appellant, as the family member of a self-employed person insured in Belgium). Its essential conclusion on that issue, based on the assumption that Belgium was the competent state, was:

> "However, the principle of application of the legislation of only one single Member State does not preclude that a person may be simultaneously entitled to benefits under the legislation of more than one Member State. A person may, for instance, be insured under the social security scheme of one Member State while receiving, from another Member State, in which he/she is not insured, a benefit determined on the basis of the rights which he/she has previously acquired in that Member State. Likewise, it may occur that a person is entitled to individual benefits on his or her own right and to the same kind of benefits derived from the social security scheme of another member of the family. Any ambiguity in that respect has now been removed by Article 11(3)(e) Regulation (EC) No 883/2004 which expressly provides that the conflict rule which it lays down is to apply *'without prejudice to other provisions of this Regulation guaranteeing [the persons concerned] benefits under the legislation of one or more other Member States'*. Accordingly, as stated in Recital 18a of Regulation (EC) No 883/2004, the principle of a single applicable legislation does not mean that the grant of a benefit alone … renders the legislation of the Member State, whose institution has granted that benefit, the [only] applicable legislation for that person."

29. The conclusions of the conciliation board were as follows:

> "Article 21 of Regulation (EC) No 883/2004 providing inter alia for the grant of cash sickness benefits by the competent institution to members of the family of the insured person residing in another Member State, must be interpreted in the light of Article 45 TFEU and does not deprive the members of the family of the person concerned from entitlement to a sickness benefit such as the care component of the Disability Living Allowance, where such an entitlement exists under the legislation of the Member State of residence.
>
> In order to clarify which legislation shall apply by priority in situations, where members of the same family are entitled to benefits under the legislation of different Member States, and in view of the fact that Article 32 of Regulation (EC) No 883/2004 explicitly deals solely with benefits in kind, the Conciliation Board suggests to establish in Regulation (EC) No 883/2004 also appropriate priority rules for cash sickness benefits to which a person may be entitled under the legislations of more than one Member State. The Administrative Commission could also consider adopting an interpretative decision, taking into account the wording of the relevant provisions in Regulations (EEC) No 1408/71 and (EC) No 883/2004."

30. In other words, the board did not definitively decide the question of which legislation was applicable, and took priority, in the present case. The Administrative Commission simply adopted the opinion of the Board.

THE APPEAL AND THE SUBMISSIONS

31. There are four grounds of appeal. The first three are that the Upper Tribunal:

    (1) misdirected itself in considering that any derivative rights the appellant obtained through her father under Article 21 of the Regulation took priority over the derivative rights she had through her mother who was resident in the United Kingdom;

    (2) misdirected itself in considering that any derivative right the appellant had through her father under Article 21 took priority over her own independent right to benefit under domestic law;

    (3) erred in relying on Article 19 of Regulation 1408/71.

32. The fourth ground of appeal was that the Upper Tribunal had erred in finding that there was no difference of view between Belgium and the United Kingdom such that, provisionally, the United Kingdom would have to pay the care component of disability living allowance until that difference was resolved. That issue has become academic as it was subsequently accepted that there was a difference of view and the cash benefit has been paid on a provisional basis. It is not necessary, nor appropriate, to deal with that ground of appeal. All parties agreed that it was no longer necessary for this Court to deal with ground 4.

33. Mr Berry, with Mr Rutledge, for the appellant submitted that on ground 1, the appellant's mother was an insured person. She fell within Article 11(3)(e) of the Regulation and was subject to the legislation of the United Kingdom as that was the legislation of her residence. There was no reason why any of the appellant's derivative rights from her father under Article 21 should take priority over any rights derived from her mother. Rather, priority should be given to the legislation of the state of the parent with whom the child resides. On grounds 2 and 3, Mr Berry submitted that the appellant was herself an insured person and fell within Article 11(3)(e) of the Regulation. That provision determined which was the applicable legislation in the appellant's case and it was the legislation of the state of residence, here the United Kingdom. Article 21 was not expressed as giving priority to any rights derived from the father over the appellant's own rights under the legislation applicable to her. Further, Article 11(3)(e) determining that the legislation of state of residence was applicable was expressed as being without prejudice to other provisions of the Regulation guaranteeing benefits under the legislation of one or more other Member States. That, Mr Berry submitted, indicated that the appellant had concurrent rights, that is rights under the legislation of her state of residence and also derivative rights through her father under Article 21. He submitted that the Upper Tribunal had been wrong to regard the change in wording between Article 19 of Regulation 1408/71 and the Regulation as signalling a shift in legislative policy. He further submitted that such an interpretation was consistent with article 3 and 9.1 of the United Nations Convention on the Rights of the Child, and articles 1, 7, 19 and 23 of the United Nations Conventions on the Rights of Persons with Disabilities.

34. Mr de la Mare KC, with Mr Mehta and Ms Sibley, was granted permission to make written and oral submissions on behalf of the Aire Centre. He submitted that the appellant had an independent entitlement to cash sickness benefits under United Kingdom legislation, as the legislation of her state of residence, by virtue of Article 11(3)(e) of the Regulation. The Upper Tribunal had been wrong to apply a rule of priority based on a derivative right derived from Article 21 to override the appellant's own rights under the legislation applicable to her. No such rule of priority existed. Mr de la Mare submitted that the Regulation must be interpreted in accordance with Article 24 of the European Union Charter of Fundamental Rights ("the Charter") and the two United Nations Conventions relied upon by the appellant. That required the Regulation to be construed in a way which gave primary consideration to the best interests of the child and therefore to provide substantial and effective protection to the child and to recognise the reality of the family unit particularly where one parent is no longer present.

35. Ms Ward KC, for the respondent, submitted that the Regulation was a complete and uniform system of conflict rules intended to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue from such a state of affairs. The principle that persons to whom the Regulation applies should at any given time be subject to the legislation of only one Member State was of central importance. That necessitated priority rules. The scheme of the Regulation prioritised the state of economic activity over that based on residence. Here the appellant fell within Article 11(3)(e) and the legislation applicable to her would be that of her state of residence, namely the United Kingdom. However, the appellant's father was self-employed in Belgium and she had rights derived from him as a family member under Article 21 of the Regulation. The legislation of the state where

economic activity was being carried out took priority over the residual, or fall-back, category of the legislation of the state of residence under Article 11(3)(e). The appellant could, therefore, only claim sickness benefits under Belgian legislation and could not rely on United Kingdom legislation to claim the care component of disability living allowance. Further, the Upper Tribunal was correct to have regard to the fact that Regulation 1408/71 had specifically provided that the legislation of the state of residence took priority in relation to cash benefits and that rule had not been reproduced in the Regulation.

DISCUSSION

The Proper Interpretation of the Regulation

36. It is convenient to take the second and third grounds of appeal together. Those grounds concern the proper interpretation of the provisions of European Union legislation, namely the Regulation, as at 2015. The precise language used is important but care must be taken not to adopt too literal an approach to the words used in one language version of the Regulation. Rather, the correct approach is to consider each provision of the Regulation in context and in the light of the relevant European Union law as a whole, having regard to the objectives of the Regulation and European Union law.

37. The aim underlying the Regulation is the co-ordination of social security systems with a view to enabling free movement for workers and the self-employed. The 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 complications 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": see paragraph 46 of the judgment of the Court of Justice of the European Union in Case C-135/19 *Pensionsversicheringanstalt v CW* [2020] ECR 177, cited by this Court in *Konevod v Secretary of State for Work and Pensions* [2020] EWCA Civ 809, [2020] 1 WLR at paragraph 7. Within that context, the starting point will be that there is a single legislative system which will be applicable to an insured person and the provisions of Title II, and Article 11 in particular, will determine which is the applicable legislation for a particular insured person. The importance of subjecting a person to the legislation of a single Member State appears from recital 15 to the Regulation and the opening words of Article 11 of the Regulation which provide that persons to whom the Regulation applies "shall be subject to the legislation of a single Member State".

38. The structure of the Regulation is that Title I provides definitions of key terms and general provisions. Title II provides rules for determining which state's legislation is applicable. Title III contains special provisions concerning the various categories of benefits.

The Position of the Appellant

39. The appellant is a person who falls within the scope of the Regulation. She is a person to whom the Regulation applies by reason of Article 2 as at the material time she was a national of a Member State who was or had been subject to the legislation of the

United Kingdom. The Regulation applies to the care component of disability living allowance as it is a "sickness benefit" within the meaning of Article 3.1(a).

40. I consider first whether the appellant is "an insured person" within the meaning of Article 1(c) of the Regulation, that is whether she is a "person satisfying the conditions required under the legislation of the Member State competent under Title II to have the right to benefits". The care component of disability living allowance is a non-contributory sickness benefit which, unusually, is payable under the conditions of the legislation of the United Kingdom to children under 16 years of age. If the United Kingdom is the competent Member State under Title II, the appellant satisfies the conditions of the legislation of the United Kingdom for entitlement to that benefit.

41. The question of which state is "the Member State competent under Title II" is determined by the application of Article 11(3) of the Regulation. The appellant is not a person pursuing an activity as an employed or self-employed person in a Member State and does not fall within Article 11(3)(a) of the Regulation. Nor does she fall within Article 11(3)(b) to (d). Rather, the appellant falls within Article 11(3)(e) and she is subject to the legislation of the Member State of residence, that is the United Kingdom. The appellant is, therefore, an insured person as she satisfies the conditions required under the legislation of the competent Member State (the United Kingdom) to have the right to benefits.

42. The next question is whether there is any rule of priority as a result of which the appellant is to be made subject to the legislation of another Member State. The respondent contends that Article 21 has that effect and means that the legislation applicable to her is that of Belgium, the state where her father is economically active, and where she has rights derived from the fact that she is a family member who is resident in a state other than Belgium.

43. I accept that the basic principle is that there is to be a single Member State whose legislation is applicable. That is inherent in the opening words of Article 11 of, and recital 35 to, the Regulation. I do not, however, accept that the provisions of Article 21 operate to take priority over the applicability of the legislation of the United Kingdom to the appellant, as an insured person, as that legislation is applicable to her by virtue of Article 11(3)(e). I reach that conclusion for the following reasons.

The Wording and Purpose of Article 21

44. The wording and purpose of Article 21 do not suggest that that article was intended as a rule of priority which displaces the legislation that would otherwise be applicable applying Article 11 of the Regulation. Article 21 is not expressed as a rule of priority unlike other articles of the Regulation such as, for example, Article 32. Rather, Article 21 is intended to prevent an insured person, and his or her family members, from being denied cash benefits because they are resident in a state "other than the competent State". Thus, for example, if an insured person is employed in one Member State, so that is the competent state, that person and his or family members will be entitled to sickness benefits under the legislation of that state. They do not lose their entitlement under the legislation of that state because the insured person, or the family members, are resident in a different state. The competent state remains responsible for providing the cash benefits payable in accordance with its legislation.

The History of the Legislative Provisions

45. I consider that the history of the legislative provisions also indicates that it is the legislation of the state of residence that has priority in cases involving payment of cash sickness benefits such as the care component of disability living allowance. Previously, the position was governed by Article 19 of Regulation 1408/71 which dealt both with cash benefits and benefits in kind. Further, that regulation was structured so as to deal with the applicability of the legislation to workers and the self-employed and their family members. Article 19 provided so far as material as follows:

> "Section 2
>
> **Employed or self-employed persons and members of their families.**
>
> Article 19
>
> **Residence in a Member State other than the competent State – General rules**
>
> 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, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:
>
> (a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;
>
> (b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However by agreement between the competent institution and the institutions of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.
>
> 2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside.
>
> Where the members of the family reside in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, benefits in kind which they receive shall be considered as being paid on behalf of the institution with which the employed or self-employed person is insured, unless the

> spouse or the person looking after the children pursue a professional or trade activity in the territory of the said Member State."

46. Article 19 dealt with a number of situations. First, it dealt with the rights of the worker or the self-employed person to (a) cash benefits and (b) benefits in kind. The provisions for that group of persons in relation to those benefits are regulated now by Article 21 and Articles 17 and 32 of the Regulation.

47. Secondly, Article 19 dealt with the ability of family members to receive benefits in kind. That situation is now dealt with by Article 17 (they may receive benefits in kind in the state of residence) and responsibility for payment of those benefits is to be determined by the application of Article 32 of the Regulation.

48. The third situation is the one that is relevant here, namely payment of cash sickness benefits to a worker's or self-employed person's family members who are resident in a state other than the competent state of the worker or self-employed person. Their position was governed by the opening paragraph of Article 19(2). If such family members were entitled to cash benefits under the legislation of the state where they resided, they would be entitled to receive benefits under the legislation of that state. Only if they were not so entitled, would they be entitled to cash benefits from the competent state (that is the state where the employed or self-employed was economically active and whose legislation applied to that person).

49. There is nothing to indicate that the European Union legislature wished to bring about a significant change in that position. In particular, there is nothing to indicate that the European Union legislature was intending to effect a significant shift so that a family member would no longer be entitled to receive cash benefits in the state where he or she resided (as was formerly the case) but instead would receive cash benefits from the state where the parent worked or was self-employed. Indeed, the recitals indicate the contrary. Recital 3 indicates the purpose was to replace while modernising and simplifying the rules in order to achieve the aim of free movement of workers.

50. An interpretation of the Regulation which maintains the position that previously obtained under Regulation 1408/71 is possible and consistent with the wording and structure of the Regulation itself. Now, "insured persons" include not only the economically active but also the economically inactive such as children who are entitled under the legislation of a member state to receive certain social security benefits. The state whose legislation is applicable to such insured persons is determined by Article 11 of the Regulation. Thus, a family member resident in a state other than the competent state of an economically active parent is now entitled under the legislation of the state where the family member resides by virtue of a combination of Article 1(c) and Article 11 of the Regulation (whereas formerly such rights were derived from the first paragraph of Article 19(2) of Regulation 1408/71). Formerly, the priority of the legislation of the state of residence was expressly confirmed in Article 19(2) (by the route of saying that they would only be able to entitled to benefits under Article 19(1)(b) if they were not entitled under the legislation of the state of residence). There is no express rule to this effect in the Regulation. But the priority of the state of residence in respect of the entitlement of family members to benefits is preserved because the applicability of the legislation of

the state of residence comes from Article 11(3)(e) of the Regulation – and there is no provision of the Regulation which displaces that priority.

Additional Considerations

51. That interpretation is also consistent with ensuring free movement of workers and the self-employed. A parent may be deterred from leaving one Member State in order to go to work in another Member State if one of the consequences would be that a child who remained in the first state ceased to be entitled under the legislation of that state to disability living allowance. That is particularly likely to be the case in relation to cash benefits for disabled children. We were told that in most European Union Member States, provision was made for disabled children by way of social assistance not social security. Social assistance is not governed by the Regulation and, we were told, is frequently provided only to those resident in the state. The United Kingdom is unusual in providing a cash benefit payable to the child. If a child living in the United Kingdom were to lose his or her disability living allowance if the parent moved to Belgium or another Member State for work, that could act as a disincentive to free movement particularly where (as here in the case of Belgium) the other Member State did not provide cash benefits for disabled children.

52. That interpretation also reflects the nature and purpose of the cash sickness benefit in this case. The benefit is, unusually, a non-contributory disability benefit payable to a child to assist with the payment for services needed to cope with the disability. The amount of the care component will be fixed at a level that reflects costs in the Member State. It would not, therefore, be unusual for the applicable legislation to be that of the state of residence, where the child lives and the costs are incurred, rather than the state where the father works.

The Importance of the Single Legislative System

53. The interpretation that I consider is correct will respect the principle that an insured person is subject to the legislation of a single State. It is simply that the competent state will be the state of residence of economically inactive insured persons in the circumstances of this case. I recognise that "as a general rule" the legislation applicable to a person is the legislation of the Member State where he or she is economically active as is recognised by recital 17 to the Regulation. That is, however, a general rule. It is not necessarily applicable in cases where the insured person is economically inactive. Further, there are good reasons why the nature of a cash benefit such as a disability living allowance payable to a child should be governed by the legislation of the state where the insured person, that is the child, is resident. It is meant to reflect the additional costs, incurred in that state, to address the child's disability.

54. The interpretation I consider correct also gives meaning to the qualification in Article 11(3)(e), namely that the applicable legislation will be 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". I do not read that qualification as providing for concurrent rights in the sense that an insured person is entitled, generally, to claim concurrent rights under both the legislation of the state of residence and of other Member States. Rather it is a provision which is intended to provide that the legislation of the state of residence

applies unless there are other provisions of the Regulation which determine that the legislation of a different Member State applies. Thus, for example, there may be specific provisions governing particular benefits which provide that the legislation of a different Member State, not the state of residence, is the applicable residence. The words are intended to ensure that a person is not deprived of benefits in those situations. Furthermore, those words reflect the position in relation to cash sickness benefits that previously applied under Article 19(2) of Regulation 1408/71. An insured person will be entitled to those benefits under the legislation of the state of residence if such benefits are payable under that legislation. If not, and if benefits are payable under the legislation of the state where the parent works or is self-employed, then the child may rely on that legislation. The caveat is not intended to mean that an insured person has concurrent rights resulting from the application of the legislation of two or more Member States.

Ancillary Matters

55. Mr Berry relied upon the provisions of two United Nations Conventions as an aid to interpreting the provisions of the Regulation. Mr de la Mare also relied upon the first sentence of Article 24 of the Charter as an aid to interpreting the Regulation. That sentence provides that children shall have "the right to such protection and care as is necessary for their well-being".

56. I have accepted that, on a proper interpretation of the Regulation, the appellant is entitled to the care component of disability living allowance as the legislation of the United Kingdom is the applicable legislation in relation to that benefit. That is the legislation of the state where the appellant, who is an insured person, resides. It is not, therefore, necessary to express any concluded view on the arguments advanced by Mr Berry and Mr de la Mare on whether the provisions relied upon assist in the interpretation of the Regulation. I would make the following observations. First, the provisions of the two United Nations Conventions would in any event have to be relied upon in relation to the interpretation of the Regulation generally. It cannot be the case that the relevant provisions of the Regulation would be given one meaning on the facts of a particular case because that would be in the best interests of that particular child but a different interpretation given to the same provision in a different case because that would be in the best interests of that particular child. Mr Berry accepted that. Secondly, I doubt that the provision of article 3 of the United Nations Convention on the Rights of the Child, or the provisions of the Convention on the Rights of Persons with Disabilities would be of much, if any, assistance in this case. The Regulation is legislation which seeks to balance a range of considerations in devising a complete code for the co-ordination of social security schemes. It is unlikely that the provision of particular UN Conventions on particular groups of persons would assist in interpreting the legislative code. Thirdly, I doubt that the provision in Article 24 of the Charter is sufficiently specific or clear to offer any assistance on the interpretation of the Regulation.

57. I do not consider that the Opinion of the Administrative Commission assists. The Opinion recognises that either a decision on the interpretation of the Regulation needed to be adopted or that the Regulation should be amended. The Administrative Commission did not adopt a decision on interpretation and it necessarily falls to this Court to interpret the Regulation in order to resolve the dispute before it. Further, the Administrative Commission proceeded on the assumption that Belgium was the

competent state for the provision of cash sickness benefits (under Article 21 of the Regulation) and considered whether there was concurrent entitlement by reason of Article 11(3)(e) principally by reasons of the caveat that that was without prejudice to other provisions of the Regulation. However, on my analysis, the position is different. The appellant is subject to the United Kingdom legislation on cash sickness benefits. There is no provision giving priority to any other state's legislation. If the appellant had no entitlement under the legislation of her state of residence (the United Kingdom), then she would be entitled to any benefits to which she was entitled under Belgian legislation by virtue of Article 21 of the Regulation (as was formerly the case with Article 19(2) of Regulation 1408/71). It is not necessary, and not consistent with the legislative scheme or its history, to create concurrent entitlements where more than one state's legislative is applicable.

Ground 1

58. For completeness I deal with ground 1. Mr Berry submitted that the appellant's mother was also an insured person and that the legislation of the United Kingdom applied to her by reason of Article 11(3)(e) of the Regulation. He submitted that any rights derived by the appellant from her mother, with whom she resides, should take priority over any rights derived from her father under Article 21 of the Regulation.

59. In the present case, however, the issue concerns payment of the care component of disability living allowance. Under domestic law, that is a benefit payable to the appellant herself. On the fact of this case, I consider that the relevant applicable legislation is that of the United Kingdom for the reasons given above and that Belgian legislation does not take priority by reason of Article 21 of the Regulation. In those circumstances, it is not necessary to decide ground 1 of the appeal as the issue does not need to be determined on the facts of this case.

CONCLUSION

60. I would allow this appeal. The appellant is entitled in her own right to payment of the care component of disability living allowance under the relevant provisions of the United Kingdom legislation. That is the applicable legislation in her case applying Article 11 of the Regulation. There is no basis for giving priority to any rights she may derive from her father under the legislation of the state where her father is self-employed.

LADY JUSTICE ANDREWS

61. I agree.

LORD JUSTICE BAKER

62. I also agree.