[2019] AACR 21

(BK v SSWP (DLA)
SSWP v MM(AA))
[2016] UKUT 547 (AAC)

Judge Jacobs **CDLA/0373/2016**
12 December 2016 **CA/0224/2015**

European Union - Social security - Attendance allowance and disability living allowance - "genuine and sufficient link to the United Kingdom social security system"

The Upper Tribunal considered two appeals which raised questions under Regulation (EC) 883/2004 ('the EU Regulation'). Firstly, whether residence in another member state could be aggregated with presence in the UK to satisfy the domestic past presence test for disability living allowance ('DLA') and attendance allowance ('AA'). Secondly whether the legislation requiring 'a genuine and sufficient link' to the UK's social security system was valid under European Union ('EU') law. The relevant legislation governing entitlement to DLA was set out in section 71(6) of the Social Security Contributions and Benefits Act 1992 (the 'Act') with conditions found in the Social Security (Disability Living Allowance) Regulations 1991 (SI No 2890). The provisions in respect of AA were found in section 64(1) of the Act with conditions set out in regulation 2 and 2A of the Social Security (Attendance Allowance) Regulations 1991 (SI No 2740). Section 84(2) of the Welfare Reform Act 2012 applied to both benefits and required that the UK be the 'competent state' and that the EU Regulation was a relevant EU regulation for the purpose of that section. The first claimant, BK, was a 16 year old Irish national who had lived in Ireland, apart from a break of one year, until 2013 when he returned to the UK with his British mother. His mother had last worked, in Ireland, for four months before he was born and had received a domiciliary care allowance for him there as well as her own carer's allowance. His application for DLA was refused by the Secretary of State on the basis that he did not have a 'genuine and sufficient' link to the UK for a period of 104 weeks out of the previous 156 weeks. The First-tier Tribunal upheld this decision on appeal deciding that he could not aggregate his residence in Ireland with his residence in the UK to satisfy the past presence test. The second claimant MM was a 69 year old German national who came to the UK in 2013 having lived continuously in Germany since 1998. Her claim for AA was refused by the Secretary of State on the basis that she had no UK or other EEA state pension and did not satisfy the conditions of having been present in the UK for 104 weeks out of the last 156 weeks. The First-tier Tribunal allowed her appeal and decided that her residence in Germany could be aggregated with her residence in the UK so that she satisfied the past presence test. BK appealed to the Upper Tribunal with the permission of the First-tier Tribunal and the Secretary of State appealed in MM's case with the permission of the Upper Tribunal.

Held, dismissing, BK's appeal and allowing the Secretary of State's appeal in respect of MM that:

1. Article 6 of the regulation did not allow aggregation of mere residence. *Stewart v Secretary of State for Work and Pensions (C-503/09)* laid down a general principle, derived from Article 21(1) of the Treaty on the Functioning of the European Union ('TFEU'), that a Member State may insist on a claimant demonstrating 'a genuine and sufficient link' with that State as a condition for awarding benefit. It would render that decision nugatory if a claimant's residence in another Member State could be aggregated under Article 6 as Article 6 could not be interpreted in a way that was inconsistent with TFEU.
2. *Stewart* also accepted that it was permissible to have a past presence test, provided it was supplemented by a genuine and sufficient link test for European Union citizens;
3. legislation requiring a genuine and sufficient link to the United Kingdom's social security system was not valid under European Union law and the proper approach for decision makers and the First-tier Tribunal was to apply *Stewart* and to disregard the words 'social security system' in the legislation.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

CDLA/0373/2016

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:
The decision of the First-tier Tribunal under reference SC167/14/00319, made on 25 September 2015 at Aldershot, did not involve the making of an error on a point of law.

CA/0224/2015

As the decision of the First-tier Tribunal (made on 6 August 2014 at Fox Court under reference SC064/14/00290) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: on her claim, treated as made on 19 June 2013 and refused on 19 November 2013, the claimant was not entitled to an attendance allowance.

Permission to appeal to the Court of Appeal

By agreement, I reduce the time within which an application may be made for permission to appeal against my decision to the Court of Appeal to 2 months from the date when this decision is issued to the parties.

As I said at the hearing, I consider that the issues in this case merit the attention of that Court and will give permission if an application is made.

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REASONS FOR DECISION

A. Introduction

1. These are two lead cases on issues that have arisen under Regulation (EC) 883/2004. One issue is whether residence in another Member State can be aggregated with presence here in order to satisfy the domestic past presence test for disability living allowance and attendance allowance. My answer is: no. The other issue is whether the legislation requiring a genuine and sufficient link to the United Kingdom's social security system is valid under EU law. My answer is: no.

B. History and background

BK

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.

3. BK's claim for a disability living allowance was made on 28 June 2013 and refused on 3 September 2013. The grounds for the decision were recorded by the decision-maker:

> It has been decided that he does not have a genuine and sufficient link to the UK as* he has not been present in the UK for a period of 104 weeks out of the previous 156 weeks and therefore is not entitled to DLA from 28/06/13.
>
> * The decision-maker may have meant *and* rather than *as*, which would fit better with the structure of the legislation.

The First-tier Tribunal dismissed the appeal, deciding that neither the claimant nor his mother satisfied the genuine and sufficient link test and that he could not aggregate his residence in Ireland with his residence in this country in order to satisfy the past presence test.

4. The tribunal gave the claimant permission to appeal to the Upper Tribunal.

MM

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. The grounds for the decision were recorded by the decision-maker:

> "The customer has moved to GB on 29/05/13 from an EEA country. They do not have a UK state pension or a pension from an EEA state. She does not satisfy the conditions of being present in the UK for 104 weeks out of the last 156 weeks".

The First-tier Tribunal allowed the appeal, deciding that the claimant's residence in Germany could be aggregated with her residence in this country, with the effect that she satisfied the past presence test.

6. The tribunal refused the Secretary of State permission to appeal to the Upper Tribunal, but I gave the Secretary of State permission.

Concessions

7. The Secretary of State conceded that: (i) both claimants were within the scope of Regulation 883/2004; (ii) they were both habitually resident in Great Britain; and (iii) the United Kingdom was the competent State for the payment of sickness benefits. Neither party challenged the generally accepted view that the care component of disability living allowance and attendance allowance were sickness benefits.

The oral hearing

8. I directed an oral hearing of these appeals, to be heard together. The hearing took place on 4 November 2016. Declan O'Callaghan of counsel appeared for the claimants. Julia Smyth of counsel appeared for the Secretary of State. I am grateful to both of them for their written and oral arguments as well as for the subsequent written submissions that they provided on outstanding issues. As always, the Upper Tribunal is grateful for the support that the Child Poverty Action Group has given by representing both claimants.

C. The legislation

Disability living allowance

9. Disability living allowance is governed by sections 71 to 76 of the Social Security Contributions and Benefits Act 1992. 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.

Those conditions are prescribed by the Social Security (Disability Living Allowance) Regulations 1991 (SI No 2890):

> **2 Conditions as to residence and presence in Great Britain**
>
> (1) Subject to the following provisions of this regulation and regulations 2A and 2B, 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) he is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 or section 115 of that Act does not apply to him for the purposes of entitlement to disability living allowance by virtue of regulation 2 of the Social Security

(Immigration and Asylum) Consequential Amendments Regulations 2000, 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) and regulation 2B, 'relevant EU Regulation' has the meaning given by section 84(2) of the Welfare Reform Act 2012.

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 (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Attendance allowance

10. Attendance allowance is governed by sections 64 to 67 of the Social Security Contributions and Benefits Act 1992. Section 64(1) provides:

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

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

2 Conditions as to residence and presence in Great Britain

(1) Subject to the following provisions of this regulation and regulations 2A and 2B, 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) he is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 or section 115 of

that Act does not apply to him for the purposes of entitlement to disability living allowance by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, 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;

* This refers to the relevant section of the Social Security Act 1975, which has been consolidated into section 64 of the 1992 Act. It is to be read as a reference to section 64 by virtue of section 17(2)(a) of the Interpretation Act 1978.

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) and regulation 2B, 'relevant EU Regulation' has the meaning given by section 84(2) of the Welfare Reform Act 2012.

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

EU - TFEU

11. The parties referred to two provisions of the Treaty on the Functioning of the European Union (TFEU). Article 21(1) provides:

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.

Article 48 provides:

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) aggregation, for the purpose 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.

EU – Regulation 883/2004

12. The parties referred to these recitals to Regulation (EC) 883/2004:

Whereas:

(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

…

(10) However, the principle of treating certain facts or events occurring in the territory of another Member State as if they had taken place in the territory of the Member State whose legislation is applicable should not interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State. Periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods.

(11) The assimilation of facts or events occurring in a Member State can in no way render another Member State competent or its legislation applicable.

…

(13) The coordination rules must guarantee that persons moving within the Community and their dependants and survivors retain the rights and the advantages acquired and in the course of being acquired.

(14) These objectives must be attained in particular by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by providing benefits for the various categories of persons covered by this Regulation.

…

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary, in order to achieve that objective.

13. The parties referred to these provisions of the Regulation:

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

For the purposes of this Regulation:

…

(j) ‘residence’ means the place where a person habitually resides;

…

(v) ‘period of residence’ means periods so defined or recognised by the legislation under which they were completed or considered as completed; …

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 6

Aggregation of periods

Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:

– the acquisition, retention, duration or recovery of the right to benefits,

– the coverage by legislation, or

– the access to or the exemption from compulsory, optional continued or voluntary insurance,

conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

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 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 sub-paragraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

TITLE V

MISCELLANEOUS PROVISIONS

Article 83

Implementation of legislation

Special provisions for implementing the legislation of certain Member States are referred to in Annex XI.

ANNEX XI

SPECIAL PROVISIONS FOR THE APPLICATION OF THE LEGISLATION OF THE MEMBER STATES

UNITED KINGDOM

…

2. For the purposes of applying Article 6 of this Regulation to the provisions governing entitlement to attendance allowance, career’s allowance and disability living allowance, a period of employment, self-employment or residence in the territory of a Member State other than the United Kingdom has be taken into account in so far as is necessary to satisfy conditions as to required periods of presence in the United Kingdom, prior to the day on which entitlement to the benefit first arises.

EU - Regulation 987/2009

14. The parties referred to this recital to Regulation (EC) 987/2009:

Whereas:

(1) Regulation (EC) No 883/2004 modernises the rules on the coordination of Member States’ social security systems, specifying the measures and procedures for implementing them and simplifying them for all the players involved. Implementing rules should be laid down.

15. The parties referred to these provisions of the Regulation:

TITLE 1

GENERAL PROVIONS

CHAPTER III

Other general provisions for the application of the basic Regulation

Article 9

Other procedures between authorities and institutions

1. Two or more Member States, or their competent authorities, may agree procedures other than those provided for by the implementing Regulation, provided that such procedures do not adversely affect the rights or obligations of the persons concerned.

2. Any agreements concluded to this end shall be notified to the Administrative Commission and listed in Annex 1 to the implementing Regulation.

3. Provisions contained in implementing agreements concluded between two or more Member States with the same purpose as, or which are similar to, those referred to in paragraph 2, which are in force on the day preceding the entry into force of the implementing Regulation and are included in Annex 5 to Regulation (EEC) No 574/72, shall continue to apply, for the purposes of relations between those Member States, provided they are also included in Annex 1 to the implementing Regulation.

Article 11

Elements for determining residence

1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom the basic Regulation applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

(a) the duration and continuity of presence on the territory of the Member States concerned;

(b) the person's situation, including:

 (i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;

 (ii) his family status and family ties;

 (iii) the exercise of any non-remunerated activity;

 (iv) in the case of students, the source of their income;

 (v) his housing situation, in particular how permanent it is;

 (vi) the Member State in which the person is deemed to reside for taxation purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that

led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.

Article 12

Aggregation of periods

1. For the purposes of applying Article 6 of the basic Regulation, the competent institution shall contact the institutions of the Member States to whose legislation the person concerned has also been subject in order to determine all the periods completed under their legislation.

2. The respective periods of insurance, employment, self-employment or residence completed under the legislation of a Member State shall be added to those completed under the legislation of any other Member State, insofar as necessary for the purposes of applying Article 6 of the basic Regulation, provided that these periods do not overlap.

3. Where a period of insurance or residence which is completed in accordance with compulsory insurance under the legislation of a Member State coincides with a period of insurance completed on the basis of voluntary insurance or continued optional insurance under the legislation of another Member State, only the period completed on the basis of compulsory insurance shall be taken into account.

4. Where a period of insurance or residence other than an equivalent period completed under the legislation of a Member State coincides with an equivalent period on the basis of the legislation of another Member State, only the period other than an equivalent period shall be taken into account.

5. Any period regarded as equivalent under the legislation of two or more Member States shall be taken into account only by the institution of the Member State to whose legislation the person concerned was last compulsorily subject before that period. In the event that the person concerned was not compulsorily subject to the legislation of a Member State before that period, the latter shall be taken into account by the institution of the Member State to whose legislation the person concerned was compulsorily subject for the first time after that period.

6. In the event that the time in which certain periods of insurance or residence were completed under the legislation of a Member State cannot be determined precisely, it shall be presumed that these periods do not overlap with periods of insurance or residence completed under the legislation of another Member State, and account shall be taken thereof, where advantageous to the person concerned, insofar as they can reasonably be taken into consideration.

D. Stewart v Secretary of State for Work and Pensions Case (C-503/09) ECLI:EU:C:2011:500

16. This case concerned the residence and presence conditions for an award of incapacity benefit in youth to a claimant who lived with her parents in Spain. One of the conditions was that the claimant had been present in Great Britain for not less than 26 weeks in the previous 52 weeks. The Court of Justice of the European Union decided that it was not compatible with EU law, as the condition deterred the claimant's freedom of movement. Its analysis led to the introduction of the genuine and sufficient link for disability living allowance and attendance allowance:

85. 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 is likely, by its very nature, to deter claimants such as the appellant from exercising their right to freedom of movement and residence by leaving the Member State of which they are nationals to take up residence in another Member State. Indeed, while claimants who have not made use of the opportunities offered by the Treaty in relation to freedom of movement and residence can easily satisfy the above-mentioned condition, that is not the case for claimants who have taken advantage of them. It is actually very probable that the latter, because they have taken up residence in another Member State, do not satisfy that condition.

86. Such national legislation, which disadvantages 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 (see *D'Hoop*, paragraph 35; *Pusa*, paragraph 20; *De Cuyper*, paragraph 39; and *Rüffler*, paragraph 73).

87. Such 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 (see *De Cuyper*, paragraph 40; *Tas-Hagen and Tas*, paragraph 33; *Zablocka-Weyhermüller*, paragraph 37; and *Rüffler*, paragraph 74).

88. The United Kingdom Government submits in that regard that there are objective justifications permitting acquisition of the right to short-term incapacity benefit in youth to be made subject to a condition of past presence in the competent Member State. It submits that the national legislation is intended to guarantee, first, the existence of a continuous effective link between that Member State and the recipient of the benefit and, second, the financial balance of the national social security system.

89. The Court has already held 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 (see, to that effect, *D'Hoop Marie-Nathalie D'Hoop v Office national de l'emploi*.Case C-224/98, paragraph 38, and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 67), as well as to guarantee the financial balance of a national social security system (see, to that effect, *Kohll Raymond Kohll v Union des caisses de maladie Case C-158/96*, paragraph 41, and *Petersen Helga Petersen and Peter Petersen v Finanzamt Ludwigshafen* (C-544/11; EU:C:2013:124) paragraph 57).

90. It follows that the objectives of national legislation such as that at issue in the main proceedings 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.

91. The United Kingdom Government argues, further, that the condition of past presence in the competent Member State is proportionate in the light of the objective pursued, since it requires only a short period of presence of 26 weeks in total. In addition, the claimant has to satisfy that condition only on the date on which the claim is made. Moreover, in that government's submission, there is no other means which

enables both the existence of a sufficient link with the United Kingdom to be established and the integrity of the social security system to be protected.

92. In circumstances such as those in the main proceedings, where acquisition of entitlement to a non-contributory benefit is not subject to conditions as regards contributions, it can be considered to be legitimate for a Member State to award such benefit only after it has been established that there was a genuine link between the claimant and the competent State.

93. The existence of such a 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.

94. In this case, the condition of past presence in the competent Member State means, under the national legislation, that, to be eligible for short-term incapacity benefit in youth, the claimant must have 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 the date of the claim. In addition, under Article 16(6) of the SSIBR [regulation 16(6) of the Social Security (Incapacity Benefit) Regulations 1994 (SI No 2946)], as the United Kingdom Government argues, it suffices if that condition of past presence is satisfied on the date on which the claim is made.

95. While the rules for applying that condition do not, in themselves, appear to be unreasonable, none the less that condition is too exclusive in nature. Indeed, 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*, paragraph 39).

96. In fact, [it] is not inconceivable that the existence of such a connection could be established from other representative elements.

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 appellant is already entitled, under United Kingdom legislation, to disability living allowance.

98. Moreover, it is apparent from that decision that the appellant is credited with United Kingdom 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 United Kingdom legislation. In addition, her father worked in

that Member State before retiring, whereas her mother previously received, also under United Kingdom legislation, incapacity benefit.

101. Finally, it is common ground that the appellant, a United Kingdom national, has passed a significant part of her life in the United Kingdom.

102. The elements mentioned in paragraphs 97 to 101 of the present judgment appear to be capable of demonstrating the existence of a genuine and sufficient connection between the appellant and the competent Member State.

103. The foregoing considerations also apply with regard to the objective of guaranteeing the financial balance of the national social security system. In fact, the necessity of establishing a genuine and sufficient connection between the claimant and the competent Member State enables that State to satisfy itself that the economic cost of paying the benefit at issue in the main proceedings does not become unreasonable.

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.

17. The relevant part of the Court's ruling was:

Article 21(1) TFEU precludes a Member State from making the award of such a benefit subject:

— to a condition of past presence of the claimant in that 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, or

— to a condition of presence of the claimant in that State on the date on which the claim is made.

E. Article 6 does not allow aggregation of mere residence

18. I have come to this decision for this reason. As Ms Smyth argued, *Stewart* lays down a general principle that a Member State may insist on a claimant demonstrating a genuine and sufficient link with that State as a condition for awarding benefit. If a claimant's residence in another State could be aggregated under Article 6, it could render the Court's decision nugatory and would do so in these cases. The Court derived that principle from Article 21(1) TFEU, and so it operates independently of Regulation 1408/71 (with which the Court was otherwise concerned) and of Regulation 883/2004. Article 6 cannot be interpreted in a way that is inconsistent with TFEU.

19. This argument was the subject of submissions after the hearing. Mr O'Callaghan argued that the supposed difficulty does not arise as a matter of EU law. It only arises as a result of the structure of the domestic legislation. Ms Smyth replied that *Stewart* accepted that it was permissible to have a past presence test, provided it was supplemented by a genuine and sufficient link test for EU citizens. Mr O'Callaghan's argument does not undermine the ground on which I have made my decision. All States require some kind of connection before awarding benefit. One possibility is an insurance or contribution scheme. The most obvious alternatives are ones based on presence or residence. On Mr O'Callaghan's argument, Article

6 would render any such scheme almost completely irrelevant. It is not possible to magic away the domestic conditions of entitlement as irrelevant, because the use of presence or residence conditions form the background against which the Court reasoned in *Stewart*. One way to read the judgment is that residence or presence together with other elements form a composite test for attaining the objective of requiring a connection with the State in question. The Court accepted at paragraph 93 that a reasonable period of presence could provide a link, but went on to say that it could not be used exclusively in the case of EU citizens. It said at paragraph 96 that the link 'could be established from other representative elements' and went on to apply that approach to the facts of the case. If Article 6 is allowed to operate in a way that will satisfy the presence test without reference to any other element that will bypass the role that other elements play under *Stewart* and by virtue of Article 21(1).

20. I refer to the other arguments put by Ms Smyth. They are, mostly, valid arguments and provide an alternative basis for the decision I have reached.

21. Ms Smyth argued that these general principles applied:

- Regulation 883/2004 was concerned with coordination, not harmonisation.
- Each State was entitled to decide for itself what social security provision to make.
- There was no guarantee that the exercise of freedom movement between member States would be neutral in its effects.
- The Court of Justice of the European Union had recognised that it was legitimate for States to protect their public finances and to prevent the economic cost of the benefit bill becoming unreasonable.

22. Ms Smyth's approach to the aggregation issue was this:

- Mere residence could not be aggregated, only residence that equates to insurance in a Member State.
- The purpose of Article 6 was to preserve accrued rights.
- Its effect was not to aggregate periods of residence, but to aggregate periods of residence 'completed under the legislation of any other Member State'.
- 'Period of residence' was defined by Article 1(v) as meaning 'periods so defined and recognised by the legislation under which they were completed'.
- 'Residence' was defined by Article 1(j) as meaning habitual residence, but that did not apply to 'period of residence'. I am not sure that this is right, but I do not have to decide it.
- Neither claimant had completed any period of residence under relevant legislation in any other Member State.
- Asked whether any Member State had a residence-based insurance system, she said that this provision took account of the position in Sweden and Iceland. That is a matter of evidence and there is no evidence to that effect on either file. I was not referred to any preparatory material relevant to the Regulation.

- Article 12 of Regulation 987/2009 provided for one State to obtain information from another. The Secretary of State did not go behind the information provided. I do not need to decide if that is the correct approach.

- Article 12 would not be necessary if mere residence could be aggregated as claimants themselves could easily provide evidence of residence.

- Annex XI of Regulation 883/2004 was consistent with Article 6. If it was not, it had to give way to the Article, which is the operative provision in the Regulation.

23. Mr O'Callaghan essentially relied on the wording of Article 6 read together with Annex XI.

24. Broadly, I accept Ms Smyth's argument. It produces an interpretation that is consistent with the right of States to insist on a genuine and sufficient link as explained in *Stewart*. It makes sense of the language of Article 6, which refers to periods of residence under the legislation of another State. How does someone accumulate residence under legislation that is not insurance- or contribution-based? There are plenty of examples of provisions that require a claimant to be ordinarily or habitually residence in a country in order to qualify for an award. But that hardly fits the language of the definition in Article 1(v). Just because a person has to be habitually resident to qualify does not mean that this leads to a period of residence being defined, recognised or completed. Indeed, the EU concept of habitual residence (unlike the domestic concept of the same name) allows a person to establish habitual residence so quickly, as the Secretary of State has conceded occurred in these cases, that it is difficult to describe the time involved as a *period*.

25. As to paragraph 2 of Annex XI, this is consistent with Ms Smyth's argument, although not for the reasons she gave. What the paragraph does is to take account of the past *presence* test in domestic legislation. It provides for periods of *residence* in another State to count towards satisfying the *presence* test. This is a necessary supplement to Article 6, which only provides for aggregation of residence abroad with residence here. It does not permit aggregation of residence abroad with presence here. On its own, Article 6 would not assist a claimant who had completed periods of residence under the legislation of another State. The flaw in Mr O'Callaghan's argument is to assume that the purpose of Annex XI is to make clear that disability living allowance and attendance allowance are within Article 6. That is not why the Annex is relevant. What it does is to adjust the application of that Article, when it is satisfied, in order that it can apply to the past presence test.

26. As to the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Garland* [2014] EWCA Civ 1550, the reasoning in that case was concerned with Regulation (EEC) 1408/71. I prefer to rely on the terms of Regulation 883/2004 rather than read across from the similar, but different, provisions of the earlier Regulation.

27. Ms Smyth showed me the forms that are now completed in order to implement Article 12 of Regulation 987/2009. These forms do not assist me with the interpretation of the Article. They assume what Ms Smyth sought to prove – that Article 6 only applies to contributory benefits. But they would be needed for those benefits anyway, even if that Article were not so limited. I have not relied on the forms in coming to my decision on this issue.

F. Stewart permits a link with the member State not with its social security system

28. I accept Mr O'Callaghan's argument on this issue.

29. For both attendance allowance and disability living allowance, the regulations require a claimant to 'demonstrate a genuine and sufficient link to the United Kingdom *social security system*.' Those final words are not authorised by *Stewart*. The Court repeatedly referred to a connection with the Member State without any addition of the words 'social security system'. See paragraphs 90, 92, 95, 100 and 102, and the terms of the Court's ruling. The Court did refer to connection with the social security system in paragraph 97, but only with the qualification 'in the first place'. And having dealt with links with the British social security system in paragraphs 97-99, the opening words of paragraph 100 refer to 'Other elements capable of demonstrating the existence of a genuine link between the claimant and the Member State', which can only mean links other than with the social security system. Finally, the Court mentioned in paragraph 101 that the claimant had spent a significant part of her life in the United Kingdom, which of itself would not be relevant to show a link to the social security system. It is a small point, but I note that my analysis coincides with the way that the Court of Appeal summarised the effect of *Stewart* in *Garland* at [23], where it refers to a link to the Member State, not to its social security system.

30. Ms Smyth relied on the references by the Court to social security benefits. She is right that the Court referred in detail to the social security position of the claimant and her parents. But, as I pointed out at the hearing, that is because that was the information that I had given the Court in the reference. The Court does not, when dealing with a reference, undertake an investigation. It relies on the information provided by the referring court. I had included details of the social security benefits because they were potentially relevant to some of the questions that I had referred, which in the event the Court did not need to answer. I had not anticipated the Court's answer, so I had not undertaken a wider investigation. The reference to the family's benefit history was relevant as a matter of fact in applying the genuine and sufficient link test. The Court did not use it to show that benefits were the only relevant connection.

31. It follows that the proper approach for decision-makers and the First-tier Tribunal is to apply *Stewart* and to disregard the words 'social security system' in the legislation. I note that, despite the language of the legislation, the guidance to decision-makers on genuine and sufficient link that Ms Smyth provided states in paragraph 071787 that they 'need to make a balanced judgement based on all the facts of the case. Among the relevant elements that may be considered are …' The factors that follow are closely based on *Stewart*. That guidance, if applied strictly according to its terms, allows a decision-maker to comply with *Stewart* rather than with the terms of the legislation.

G. Presence as a link

32. I accept Mr O'Callaghan's argument that presence alone may demonstrate a genuine and sufficient link. The longer the period of past presence required in the legislation, the more likely that a case might occur in which a claimant has spent a relatively long period in a country. The past period required in *Stewart* was 26 weeks, which the Court described at paragraph 95 as 'not … unreasonable'. The period required for disability living allowance and attendance allowance is four times as long. There may be an argument that that such a period would be unreasonable. That does not arise here, because both claimants had only just arrived in this country at the time of their claims. It is also doubtful whether that argument is the correct approach. It only arises because the domestic legislation treats the past presence

period and the genuine and sufficient link as separate. That is not how *Stewart* analysed it. The Court said that States were entitled to require a link, that presence for a reasonable period would establish a link, but that other elements had to be considered to prevent an impediment to the freedom of movement. In other words, presence was merely one way of establishing the necessary connection. It might be sufficient on its own (see paragraph 93 of the judgment) or as one of a number of elements (see paragraph 101). The domestic legislation can be reconciled with *Stewart* in its application if decision-makers and tribunals attach greater significance to presence in this country the closer the period comes to satisfying the past presence test.

H. Habitual residence in the genuine and sufficient link test

33. I asked the Secretary of State about the requirement that the claimant be habitually resident in Great Britain. Does the Secretary of State apply the domestic approach to habitual residence or the EU approach? Ms Smyth told me that decision-makers applied the EU approach as this was an EU context. She provided a copy of the guidance to that effect. This is not an issue that arises for decision, but I record it as (so far as I know) it is not generally known that this is the test applied. Article 11 of Regulation 987/2009 sets out the approach to be applied for Regulation 883/2004.

I. There is no need for a reference

34. I consider that the legal position is clear without the need for a reference to the Court of Justice of the European Union. Which is not to say that the issues are not difficult, which is why I have said that I will give permission to appeal to the Court of Appeal if an application is made.

J. Disposal - BK

35. The tribunal was right on the aggregation issue by refusing to apply Article 6 and Annex XI. In his submissions after the hearing, Mr O'Callaghan argued that BK had been ordinarily resident in Ireland in order to be in receipt of domiciliary care allowance and his mother had been habitually resident there in order to be in receipt of carer's allowance. As foreign law, those matters have to be proved as fact. I accept Mr O'Callaghan's submissions as providing that evidence. I reject his argument and rely on one of the arguments put in reply by Ms Smyth. She pointed out that Mr O'Callaghan had not shown that the requirements for Article 6 were satisfied. In particular, he appeared to have overlooked the definition of 'period of residence' in Article 1(v). This has the effect that the periods taken into aggregation must be ones defined or recognised by the legislation. Nothing I have seen shows that the Irish legislation defines or recognises such periods. All that he has shown is that ordinary or habitual residence was a condition of entitlement. That is not the same thing.

36. The tribunal misdirected itself on the genuine and sufficient link issue by limiting its consideration to links with this country's social security system. That raises the issue whether the mistake was material. I have considered Mr O'Callaghan's case for BK but decided that it does not show a sufficient link.

37. This was the case he put in his amended grounds of appeal:

> The Appellant may rely upon his genuine and sufficient link to the United Kingdom at date of decision: a dependence upon his mother, his mother's citizenship, her past residence in England and her entitlement to social security benefits in her own right

under United Kingdom legislation. Also relevant is that his mother returned to the country of which she is a citizen so as to avoid domestic violence, thereby seeking refuge in her own country.

38. 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 tribunal could not properly have come to a different decision even if it had directed itself correctly on the law.

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.

40. That is why I have dismissed BK's appeal.

K. Disposal – MM

41. The tribunal misdirected itself in law by applying Article 6. The claimant did not satisfy the past presence test. 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.

42. For the record, some of the evidence in this case was in German. It was not translated. I told the parties that if either wished to rely on this, it would have to be translated. Neither provided a translation, so I have not been able to rely on it.

43. As to an advance award, MM cannot benefit from this for the same reason as BK.