Neutral Citation Number: [2024] EWCA Civ 419

Case No: CA-2023-001197

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE JACOBS
[2023] UKUT 44 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2024

Before :

LORD JUSTICE GREEN
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE LEWISON

- -

Between :

MICHAELA SIMKOVA	**Appellant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -
- -

Thomas de la Mare KC and **Jack Castle** (instructed by **Leigh Day**) for the Appellant
Julia Smyth and **Barney McCay** (instructed by **Government Legal Department**) for the Secretary of State

Hearing dates 13 & 14 March 2024:

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Green:-

A. Introduction

The issue

1. Universal Credit or "*UC*" is a single, composite and blended, benefit paid to recipients which is intended to cover a range of different social security needs. It was brought into being by the Welfare Reform Act 2012 ("*WRA 2012"*) which amounted to a radical reform of the social welfare system and moved from a system of multiple, individualised, benefits to one of single application. The nub of the present appeal is whether, in order to establish an entitlement to benefit addressing a particular need (in this case an element of child amount), it is possible to break UC up into its constituent parts each of which becomes capable of giving rise to a discrete, legally enforceable, entitlement. Put another way can the individual components of UC be severed from the whole? The First-Tier Tribunal ("*FTT*") held that they could; the Upper Tribunal ("*UT*") held that they could not.

2. The answer to this question turns upon the interpretation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 "*on the coordination of social security systems*" ("*Regulation 883/2004*") and the unravelling of a series of judgments of the CJEU on this regulation and its predecessor. It is common ground that at the time of the disputed decision (to refuse the appellant child benefit of UC) Regulation 883/2004 was in full force in the United Kingdom. When the UK subsequently departed the EU the rights contained in that measure were given continued effect in the UK by virtue of an international law treaty concluded between the UK and EU of 19 October 2019. This is the "*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*" ("*the Withdrawal Agreement*"). Rights and obligations in the Withdrawal Agreement, which included those rights under Regulation 883/2004, were implemented into the domestic law of the UK by Section 7A European Union (Withdrawal) Act 2018 ("*EU(W)A 2018*").

The facts

3. The appellant, Michaela Simkova ("MS"), is a Slovakian national resident in England. Her son was born on 30 September 2002. He is resident in Slovakia. He started a course of non-advanced education in Slovakia on 5 September 2018, aged 15, and continued it to completion on 30 June 2022, aged 19. MS applied for UC on 26 July 2017. On 1 September 2017 MS was awarded UC standard allowance with a housing and child element to be determined. The Secretary of State was aware that the appellant's son was being schooled in Slovakia and had been since 2 January 2012. On 26 September 2017 MS was awarded the child element in respect of her son and arrears were paid reflecting the appellant's entitlement as from 26 July 2017. However, on 17 October 2019, entitlement to UC was revised. It is this decision which is the subject of this appeal.

4. MS appealed successfully to the FTT on 17 February 2020. The Secretary of State appealed that judgment to the UT which allowed the appeal in a judgment handed down on 21 February 2023. The UT disagreed with the appellant's argument that MS had any entitlement in law to a child element of her UC. This argument was based

upon an erroneous interpretation of the Regulation 883/2004 which did not, it was held, incorporate any test of severability.

The approach to be taken to the appeal: Decide or refer to CJEU?

5. The appellant contends that the law is clear in her favour; however, if it is not then it is at the least arguable and this Court should make a reference to the CJEU under the terms of Article 158 Withdrawal Agreement. Under that article the CJEU is selected as the dispute resolution forum for disagreements arising between the UK and the EU under the Withdrawal Agreement. The central question for the Court is therefore whether the answer to the issue is clear. If it is, then there is no need to consider whether to make a reference. It is only if it is unclear that the Court has to grapple with the question whether to make a reference. I therefore approach this appeal from the perspective of determining whether the position is sufficiently clear that it can be resolved without there being a need to consider seeking a ruling on the issue of interpretation arising from the CJEU.

B. The legislative framework

6. I turn now to the legislative framework. This is of considerable complexity and I set out below only those provisions which assist in understanding the legal issues arising. I start with the domestic law before considering the relevant provisions of EU law. I then set out the relevant provisions of the Withdrawal Agreement which bring Regulation 883/2004 into domestic law.

Domestic law

7. UC is governed by the WRA 2012. Section 1 identifies the concept of "*Universal Credit*" and sets out the broad parameters for its calculation:

> 1. **Universal credit**
>
> (1) A benefit known as universal credit is payable in accordance with this Part.
>
> (2) Universal credit may, subject as follows, be awarded to—
>
> (a) an individual who is not a member of a couple (a 'single person'), or
>
> (b) members of a couple jointly.
>
> (3) An award of universal credit is, subject as follows, calculated by reference to—
>
> (a) a standard allowance,
>
> (b) an amount for responsibility for children or young persons,
>
> (c) an amount for housing, and

(d) amounts for other particular needs or circumstances.

8. Section 8 provides further detail as to calculation:

> "8. **Calculation of awards**
>
> (1) The amount of an award of universal credit is to be the balance of—
>
> (a) the maximum amount (see subsection (2)), less
>
> (b) the amounts to be deducted (see subsection (3)).
>
> (2) The maximum amount is the total of—
>
> (a) any amount included under section 9 (standard allowance),
>
> (b) any amount included under section 10 (responsibility for children and young persons),
>
> (c) any amount included under section 11 (housing costs), and
>
> (d) any amount included under section 12 (other particular needs or circumstances).
>
> (3) The amounts to be deducted are—
>
> (a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and
>
> (b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).
>
> (4) In subsection (3)(a) and (b) the references to income are—
>
> (a) in the case of a single claimant, to income of the claimant, and
>
> (b) in the case of joint claimants, to combined income of the claimants."

9. Section 10(1) stipulates that the calculation must include an "*amount*" for each child for whom a claimant is responsible:

> "10 **Responsibility for children and young persons**
>
> (1) The calculation of an award for universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible."

10. Schedule 1 contains supplementary regulation-making powers. Paragraph 5(1) of the Schedule empowers the making of regulations addressing when a person is responsible for a child or young person:

> "5 **Responsibility for children etc**
>
> (1) Regulations may for any purpose of this Part specify circumstances in which a person is or is not responsible for a child or young person."

11. Regulation 4 of the Universal Credit Regulations 2013 (SI No 376) ("*the UCR*") is made under the authority of paragraph 5(1) of the Schedule and further fleshes out when a person is responsible for a child or young person:

> "
>
> (1) Whether a person is responsible for a child or qualifying young person for the purposes of Part 1 of the Act and these Regulations is determined as follows.
>
> (2) A person is responsible for a child or qualifying young person who normally lives with them.
>
> …
>
> (4) Where a child or qualifying young person normally lives with two or more persons who are not a couple, only one of them is to be treated as responsible and that is the person who has the main responsibility."

12. It is relevant, albeit briefly, to make reference to the law relating to child tax credit ("*CTC"*). It suffices to record that CTC was subsumed into UC by the WRA 2012. A basic entitlement to CTC was set out in sections 3 and 8 Tax Credits Act 2002. Regulations made thereunder provided further details. Section 36 and paragraph 1 of Schedule 6 WRA 2012 made provision for the "*replacement*" of benefits by UC. Paragraph 6 of Schedule 6 made explicit provision as to the "*replacement of … child tax credit with universal credit*…".

EU law

13. The first relevant EU regulation is Regulation EEC No 1408/ 71 of the Council of 14 June 1971 which concerned the "*application of social security schemes to employed persons and their families moving within the Community*" ("*Regulation 1408/71*"). It is relevant because most of the important jurisprudence of the CJEU relates to this measure. This replaced Council Regulation No 3 on Social Security for migrant workers. Both regulations were adopted pursuant to Articles 2, 7 and 51 of the Treaty of Rome. Article 51 thereof empowered the Council to adopt such measures in the field of social security as were necessary to provide freedom of movement for workers and to make arrangements to secure for such workers and their dependents: (a) aggregation for the purpose of acquiring and retaining the rights to benefit and of calculating the amount of benefit of all periods taken into account under the law of

several countries; and (b), payment of benefits to persons resident in the territories of member states. Both measures concerned what was referred to as "*coordination*".

14. Article 4 of Regulation 1408/71 set out a list of the matters covered. It included "*family benefits*" in subparagraph (1)(h). "*Social assistance*" was excluded from the scope of the Regulation by Article 4(4):

> "**Article 4**
>
> **Matters covered**
>
> 1. This Regulation shall apply to all legislation concerning the following branches of social security:
>
> (a) sickness and maternity benefits;
>
> (b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
>
> (c) old-age benefits;
>
> (d) survivors' benefits;
>
> (e) benefits in respect of accidents at work and occupational diseases;
>
> (f) death grants;
>
> (g) unemployment benefits;
>
> (h) family benefits.
>
> 2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.
>
> 3. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a ship owner's liability.
>
> 4. This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such."

15. In Case C-503/09 *Stewart v SSWP* [2012] CMLR 13 at paragraphs [75] and [76] the CJEU emphasised that coordination was not the same as harmonisation, citing a long line of consistent case law:

> "75. It must be pointed out, in that regard, that Regulation No 1408/71 does not set up a common scheme of social security,

> but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes (Case 21/87 *Borowitz* [1988] ECR 3715, paragraph 23; Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27; and *Petersen*, paragraph 41). Thus, according to settled case-law, Member States retain the power to organise their social security schemes (see, to that effect, Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 43).
>
> 76. Therefore, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits (Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 18 and the case-law cited)."

16. This Regulation also made provision for "*Special non-contributory cash benefits*" to which discrete rules applied. They were subject to various conditions one of which was that they had to be listed in Annex IIa to the Regulation.

17. Regulation 1408/71 was replaced and brought up to date by Regulation 883/2004. Recitals 1-5 provide as follows:

> "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.
>
> (2) The Treaty does not provide powers other than those of Article 308 to take appropriate measures within the field of social security for persons other than employed persons.
>
> (3) Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community has been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level. Such factors have played their part in making the Community coordination rules complex and lengthy. Replacing, while modernising and simplifying, these rules is therefore essential to achieve the aim of the free movement of persons.

> (4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.
>
> (5) It is necessary, within the framework of such coordination, to guarantee within the Community equality of treatment under the different national legislation for the persons concerned."

18. Recital 3 made clear that its remit was to modify and simplify the rules on coordination, but not to change the purpose of the legislation from coordination to harmonisation. Recital 4 is also of importance reinforcing two core principles. First, that the legislature respected the special characteristics of national social security legislation; and secondly, and as a consequence of the first, that the Regulation was limited to drawing up "*only a system of coordination*". The word "*only*" is significant.

19. There are three main types of benefit referred to under the Regulation:

    i) "*Social security*" benefits which are benefits subject to the EU rules on co-ordination under Regulation 883/2004 and they are subject to being exported. These are set out in Article 3.

    ii) "*Social assistance*" benefits which are excluded from the Regulation by Article 3(5).

    iii) "*Special non-contributory benefits*" ("*SNCB"*) which combine features of social security and social assistance: Articles 3(3) and 70. Such benefits are provided exclusively in a claimant's state of residence, and are not therefore "*exportable*". To qualify as an SNCB a benefit had to meet certain conditions and be listed in Annex X to the Regulation: see paragraph [25] below.

20. Article 1(i) defines '*member of the family'*:

> "member of the family" means
>
> (1)(i) any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided;
>
> (ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;
>
> (2) If the legislation of a Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family;

> (3) If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household only if he lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner; …

21. Article 1 (j) and (z) defines "*residence*" and "*family benefit*":

> (j) 'residence' means the place where a person habitually resides;
>
> …
>
> (z) 'family benefit' means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintain payments and special childbirth and adoption allowances mentioned in Annex I.

22. Article 3 deals with "*matters covered*". It is the successor to Article 4 of Regulation 1408/71. Article 3(1)(j) establishes that "*family benefits*" are within the "*matters covered*" by the Regulation. Article 3(5) excludes "*social assistance*" from the scope of the Regulation:

> "**Article 3**
>
> **Matters covered**
>
> 1. This Regulation shall apply to all legislation concerning the following branches of social security:
>
> (a) Sickness benefits;
>
> (b) Maternity and equivalent paternity benefits;
>
> (c) Invalidity benefits;
>
> (d) Old age benefits;
>
> (e) Survivors' benefits;
>
> (f) Benefits in respect of accidents at work and occupational diseases;
>
> (g) Death grants;
>
> (h) Unemployment benefits;
>
> (i) Pre-retirement benefits;
>
> (j) Family benefits.

> 2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.
>
> 3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.
>
> 4. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a shipowner's obligations.
>
> 5. This Regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences."

23. It follows from the above that for a benefit to fall within Regulation 883/2004 as a social security benefit, it must: (i) not be a "*social assistance*" benefit; and (ii) fall within the definition of "*social security benefit*" which requires that it is granted, without any individual and discretionary assessment of personal need, to recipients upon the basis of a legally defined position. Further it must concern one of the risks "*expressly listed*" in Article 3. This is well established in the case law. For instance the Grand Chamber in Case C-406/04 *De Cuyper v ONEM* (18 July 2006) [2006] ECR I-6971, at paragraph [22] held:

> "As far as concerns social security benefits the Court has, on several occasions, discussed the factors to be taken into consideration for the purposes of ascertaining the legal nature of such benefits. Thus, the Court has stated that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, inter alia, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14, and Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15)."

24. Article 67, so far as relevant, deals with family benefits:

> "**Article 67**
>
> Members of the family residing in another Member State
>
> A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State."

25. Article 70, in Chapter 9, is entitled "*Special non-contributory cash benefits*". They are defined as "…*special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for*

entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance." Under Article 70(2) a SNCB refers to benefits which, in broad outline: (a) are intended to provide supplementary, substitute or ancillary cover and which "*guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned*" or (b) constitute specific protection for the disabled, closely linked to the person's social environment. In both cases the benefit must be financed "*exclusively*" from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits must not depend on any contribution in respect of the beneficiary. All such benefits had to be listed in Annex X.

Incorporated international law

26. Article 31(1) of the Withdrawal Agreement, under the heading "*Social security coordination rules*", incorporates Regulation 883/2004 by cross-reference:

> "The rules and objectives set out in Article 48 TFEU, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council shall apply to the persons covered by this Title."

The rights and obligations in the Withdrawal Agreement were implemented into the domestic law of the UK by Section 7A of the EU(W)A 2018. The Explanatory Notes say this:

> "31. The approach in the Act is intended to give effect to Withdrawal Agreement law in a similar way to the manner in which EU Treaties and secondary legislation were given effect through section 2 of the ECA. Although the ECA gives effect to EU Treaties and secondary legislation, it is not the originating source of that law but merely the 'conduit pipe' by which it is introduced into UK domestic law. Further, section 2 of the ECA can only apply to those rights and remedies etc that are capable of being 'given legal effect or used' or 'enjoyed'.
>
> 32. The approach in the Act to give effect to Article 4 is to mimic this 'conduit pipe' so that the provisions of the Withdrawal Agreement will flow into domestic law through this Act, in accordance with the UK's obligations under Article 4. The approach also provides for the disapplication of inconsistent or incompatible domestic legislation where it conflicts with the Withdrawal Agreement. This ensures that all rights and remedies etc arising under the Withdrawal Agreement are available in domestic law."

C. **Parties' submissions**

The appellant

27. The argument of the appellant proceeds in stages:

a) A "*Child Element*" is payable under section 10 WRA 2012 and Regulation 4 UCR for a child or qualifying young person who "*normally lives with*" the UC recipient.

b) Article 3 Regulation 883/2004 lists "*family benefits*" as a branch of social security and this includes the Child Element otherwise payable as a component of UC.

c) That component of UC is severable from the generality of UC and once severed the component amounts to a "*family benefit*" as classified in Article 3 of Regulation 883/2004. This applies even if UC does not, legally, constitute a social security benefit and would, otherwise, be defined as "*social assistance*".

d) It is severable because: (i) it is calculated separately under section 8 (see paragraph [8] above); (ii) historically it gave rise to a discrete entitlement as tax credit (see paragraph [12] above) and has moved seamlessly into UC and accordingly it pre-existed UC as a discrete social security benefit; (iii) it otherwise meets the conditions of a social security benefit under the case law; and (iv) it is not excluded "*social assistance*" or an SNCB (see paragraph [19] above).

e) Under Article 67 "*family benefits*" (as classified under Article 3) are "*exportable*" meaning that, where otherwise payable according to the law of the competent member state, they are payable where the relevant family member is resident abroad (whatever national law might otherwise say).

f) This is buttressed by Article 1(i)(3) of Regulation 883/2004 which defines "*family member*" and provides, in relation to any domestic law provision under which a person is considered a member of the family or member of the household *only* if he/she lives in the same household as the insured person or pensioner, that "*this condition shall be considered satisfied if the person in question is mainly dependent on the insured person*".

g) The test for entitlement to the child element of UC is therefore whether the child or qualifying young person is "*mainly dependent*" on the UC recipient, regardless of residency and as to this it is clear on the undisputed facts (as found by the FTT) that the appellant's son would be "*mainly dependent*" on her, and his Slovakian residency would no longer be of relevance.

h) It follows that the Secretary of State erred in failing to provide, on a continuing basis, family benefit.

The respondent

28. The Secretary of State disagrees. The flaw in the appellant's case is that Regulation 883/2004 does not apply to generalised, blended, benefits systems. UC is a single, working-age, non-contributory benefit. It was introduced to simplify the benefits

system by creating an integrated, means-tested, benefit for people in and out of work. UC is not a social security benefit for the purposes of EU law since does not address one of the issues listed in Article 3 of Regulation 883/2004. If anything it is "*social assistance*" which is excluded from the Regulation. Consistent case law makes clear that generalised schemes fall outside the scope of the Regulation. The only way that the "*Child Element*" could ever be treated as a social security benefit would be if it was somehow severed from UC and treated as a discrete, stand-alone, benefit in its own right. In this regard the reliance placed upon the judgments of the CJEU is misplaced. Properly analysed they provide no support for the proposition that benefits can be disaggregated from an overall, single, means-tested benefit. There is no doctrine of severance, as the appellants describe it. There is no case where the CJEU has recognised or applied such a "*severability principle*".

29. There are, argues the Secretary of State, three discrete questions to pose. First, is a benefit a social security benefit under EU rules? As to this UC is not a social security benefit. Secondly, can the "*Child Element*" be "*split off*" (severed) from UC and co-ordinated as a social security benefit? As to this the component cannot be severed from UC because it is not a benefit at all because (a) it is simply a calculation factor for UC and (b) it is in any event "*too embedded*" in the structure of UC to be severed from it. Thirdly, is the child component a "*family benefit*" (i.e. as opposed to a different type of social security benefit)? This question does not arise because it cannot be severed from UC.

D. Analysis / Conclusions

30. This appeal raises a question of interpretation. Accordingly, the first task is to consider the purpose and context of the legislation to determine whether it provides an answer to the issue. The second task is to consider the relevant case law.

Legislative context and purpose

31. In my judgment the policy and structure of Regulation 883/2004 militates against the appellant's arguments about severability. There are two central reasons for this. First, it is inconsistent with the central premise underlying the legislation which is that it amounts to a regime of coordination and not harmonisation and does not (save in certain limited respects) fetter the discretion of Member States as to the configuration of their social welfare systems. Secondly, and in any event, a doctrine of severance, such as is contended for, would be a controversial and complex policy and would, from the perspective of legislative drafting, have been set out comprehensively and explicitly, were it to exist at all.

32. A system of disaggregation (or severance) is the sort of regime which would be found in a harmonisation measure requiring every Member State to adhere to a bare minimum set of benefits. But the Regulation is *not* a harmonisation measure. It exists to ensure that the right of free movement (which includes a principle of non-discrimination), found elsewhere in the treaties, can be effectively exercised and it does this by coordinating how different national benefit systems work together. Beyond this it does not seek to instruct Member States how to construct their social welfare systems. The central premise is that persons are at any one time subject to the legislation of one Member State only and it seeks to prevent the overlapping of benefits (Article 10). Article 11 is contained in Title II of the Regulation entitled "

Determination of the legislation applicable". It lays down the basic rules on applicable law and prioritises competence depending upon where the individual is economically active. A number of exceptions to this exist where special rules apply. Title III sets out discrete rules in relation to ten particular categories of benefits. Those include "*family benefits*", the category in dispute in this case. In these special cases a state may be responsible for paying benefits even if its law would not apply under the rules in Title II.

33. In my judgment, were the regime to include the doctrine of severance it would, because of its importance and complexity, inevitably, have been set out fully and explicitly. It is not the sort of regulatory mechanism or principle that can be implied. This is not least because it would, as Ms Smyth for the Secretary of State argued, have serious consequences for the freedom which Member States are said to enjoy to configure their own systems and which is an essential underpinning to the regulatory regime of coordination; and closer to home it would have serious consequences for the scheme and operation of UC in the United Kingdom.

34. First, if the appellant was right and the child component could be severed from and treated as a family benefit there could be people who would no longer receive the child component of UC who were currently receiving it. For example, the UK would not be competent in respect of a claimant living in the UK with their child, but with a partner living and working in the EU, where the EU state paid family benefits (subject to any payment by the UK of a supplement).

35. Secondly, given that the child component was embedded in the overall UC system the entire system would need to be "*fundamentally redesigned*" if the component were in law a separate, family benefit, co-ordinated by Regulation 883/2004. Ms Smyth submitted:

> "For example, the claims and decision-making process would need to be redesigned so that an applicable law/competence check could be conducted, and new administrative processes would need to be introduced e.g. to allow liaison with other states. That would introduce complications and delays for claimants. More radical alterations would need to be made to the conditions for UC (requiring legislative amendment), to unpick the calibration and interaction referred to above, for example to ensure that a person did not receive too much benefit (so that they were not treated as entitled to accommodation costs in respect of a child whom they were not accommodating, or to a work allowance in respect of a child living abroad and whose care was not preventing access to work, for example). Amendment might also need to be considered to address the situation of claimants no longer receiving the Child Amount as a result of another state being competent."

36. I agree with this analysis. If the appellant is correct there is no reason why the doctrine of severance should be limited to family benefits. It would appear to be a principle of general application. And if that were the case then other benefits could

equally be disaggregated so as to give rise to stand-alone legal rights. Ms Smyth put it in the following way:

> "SSWP's present assessment is that the only realistically possible way to proceed, if the Child Amount were required to be co-ordinated as a social security benefit in its own right, would be to remove the Child Amount from UC, and create a new benefit. That would obviously completely undermine one of the central policy drivers behind the introduction of UC, which was to create a simplified, integrated, global benefit.
>
> This illustrates exactly why there is no example of the CJEU doing what the Appellant asks this Court to do in this case. Otherwise, the EU co-ordination rules would be driving the design of the domestic benefit system, which would be completely contrary to the purpose and function of those rules. The unpicking of a domestic scheme through a mechanism of severance would run counter to the fundamental principle that it is for states to decide how to organise their benefits system."

Case law

37. My starting premise is therefore that properly construed by reference to its purpose and context Regulation 883/2004 does not incorporate a test of severance. I turn now to consider whether that conclusion is consistent with case law. Mr de la Mare KC, for the appellant, recognised that there was no fully blown doctrine of severance in the case law but he argued, with considerable ingenuity, that there were jurisprudential hints and suggestions that such a doctrine was in the throes of coming into being. The seeds had been sown and this was good reason for this Court to send a reference to the CJEU to give it the chance to articulate the principles which were now lurking just beneath the surface.

38. However, I am clear that on careful analysis of the case law such suggested portents and hints are mirages. The case law does not support the appellant's thesis that individual components of a single, generalised, benefit can be disaggregated in order to create discrete stand-alone entitlements. There is no doctrine of severance evident from the jurisprudence. True it is that upon occasion the Court refers to different benefits as having been "*severed*". But this is only in the context of *prior* decisions by the legislatures of the Member State pursuant to which different benefits were treated, under national law, as claimable upon a several basis. In other words the Court is referring to an entirely different concept of severance to that mooted by the appellant. It is describing an extant state of affairs where benefits are *already* distinct under pre-existing domestic law. The Court is not creating a novel doctrine of disaggregation applicable to generalised benefits schemes <u>not</u> already severed or separated one from the other under national law.

Case 122/84 Vera Hoeckx v Centre Public D'aide Sociale de Kalmthout [1985] ECR 973 ("Hoeckx")

39. The starting point is a judgment heavily relied upon by the Secretary of State as authority for the proposition that composite, blended, social benefit schemes fall

outside the scope of Regulation 883/2004. In that case the claimants, nationals of other EU member states, applied for the grant of a subsistence allowance, the "*minimum means of subsistence*", also known as the "*minimex*", as provided for under Belgian law. An entitlement under Belgian law to the minimex was (as is clear from the description of the facts set out in the Advocate General's Opinion) determined by conditions which were "*defined in general terms*". A claimant was entitled if he or she did not have adequate resources and was unable to obtain them either by his or her own efforts or from other sources. The applicant had to be able to demonstrate a preparedness to accept work unless prevented by health grounds or by some other imperative social reason. The applications in dispute were refused by the competent authority upon the basis that they did not meet a special condition as to length of residence imposed upon nationals of other Member States. Questions of law about the compatibility of the minimex with Regulation 1408/71 were referred to the CJEU by the Labour Tribunal of Antwerp. One question was whether the minimex fell within the "*material scope*" of Regulation 1408/71 or whether it constituted "*social assistance*" within the meaning of Article 4(4). The Court concluded that the minimex fell outside the scope of the Regulation. To be within the "*material scope*" of the Regulation the legislation had to cover one of the "*risks*" specified in Article 4(1)[1]; the list of risks contained in that paragraph was exhaustive, and "*a branch of Social Security not mentioned in the list*" did not fall within that category even if it conferred upon an individual a legally defined position entitling them to benefits. A "*general*" social benefit was not referred to in the list of risks and was hence excluded. In paragraph [14] the Court stated:

> "It follows that an allowance like the one at issue, *being a general social benefit*, cannot be classified under one of the branches of Social Security listed in article 4(1) of Regulation 1408/71 and therefore does not constitute a Social Security benefit within the specific meaning of the Regulation."
>
> (emphasis added)

40. In the present appeal the appellant argues that this was an early case, and has been overtaken by subsequent case law. I would disagree. The CJEU decided this case as a question of statutory interpretation. Unless there is some material difference between Regulation 1408/71 and Regulation 883/2004, one would expect the conclusion arrived under the former to apply to the latter, especially as the recitals make clear that the latter is not a departure from the philosophy of the earlier Regulation but a simplification which was also intended to take account of case law on Regulation 1408/71. Furthermore, if the Court was intending to depart from its judgment in this case one would expect some recognition of such a shift to be evident in the later cases. But, as is explained below, there is none and on the contrary in the very cases relied upon by the appellant to show that the doctrine of severance exists the Court cites *Hoeckx* upon the basis that it remains good law.

Case C-299/05 Commission v European Parliament and Council [2007] ECR I-8695 ("Commission v Parliament")

[1] The reference in case law to "*risks*" simply reflects the fact that in most European states social security is funded by mandatory insurance so that payment (of a benefit) is triggered by an identified need or "risk".

41. This is the most important case relied upon by the appellant to support the existence of a doctrine of severance. The judgment concerns the scope and effect of Regulation 1408/71. It concerned the classification of different benefits as either social assistance, social security benefits or special non-contributory benefits. The dispute concerned the inclusion in Annex IIa of certain benefits available under the laws of Finland, Sweden and the United Kingdom. That annex contains a list of special non-contributory benefits. The disputed benefits were included by the Council and Parliament in the annex at the instigation of those Member States. A consequence of being so included was that the benefit was not exportable, as it would have been had it been properly categorised as a social security benefit. As such there could be a lower cost to the Member State concerned. In the United Kingdom three types of benefit were included: disability living allowance ("*DLA"*); attendance allowance ("*AA"*); and carer's allowance ("*CA*"). As is set out fully in paragraphs [21] - [26] of the Opinion of Advocate General Kokott, DLA consisted of two components: a care component and a mobility component. Both could be claimed either in conjunction or separately. In other words they had been rendered separate, and in this sense were "*severable*", by virtue of prior domestic legislation. Proceedings were brought by the EC Commission against the Council and the Parliament upon the basis that a number of these benefits were wrongly categorised as special non-contributory benefits and should not, therefore, have been included in Annex IIa. The CJEU explained that a benefit could not simultaneously be classified under more than one category:

> "51 The scheme and wording of Article 4 of Regulation No 1408/71 as amended show that a benefit cannot be classified simultaneously as a family benefit and a special benefit. Family benefits are dealt with in Article 4(1) while special benefits are dealt with in Article 4(2a), the aim of that distinction being to enable the respective schemes for those two categories of benefits to be identified (see, to that effect, Case C-286/03 *Hosse* [2006] ECR I-1771, paragraphs 36 and 37 and the case-law cited)."

42. To determine into which category each disputed benefit fell the Court examined its purpose, structure and context: see paragraphs [52]- [73]. In the case of the United Kingdom this meant that the court considered DLA, AA, and CA separately. The Court was able to do this because each benefit gave rise to a discrete entitlement under national law. This is the context to paragraphs [67]-[69] upon which the appellant relies:

> "67 Contrary to what the United Kingdom asserts, only the DLA can be considered to include a social assistance component. The other two benefits at issue have a single purpose which is akin to that of the Swedish disability allowance, namely to help the disabled person to overcome, as far as possible, his or her disability in everyday activities.
>
> 68 Accordingly, those three allowances as well as the preceding allowances must be regarded as sickness benefits, even though the DLA includes a distinct part relating to mobility.

> 69 As the Commission indeed observes, the 'mobility' component of the DLA, which might be regarded as a special non-contributory benefit, is severable, so that that component alone could be included on the list in Annex IIa as amended if the United Kingdom decided to create an allowance which concerned that component alone."

43. In my view this judgment does not support the proposition that there is a principle whereby a single, composite and blended, benefit can be disaggregated into its constituent parts. The reference, in paragraph 69, to the mobility component of the DLA being "*severable*", so that it alone could be included in Annex IIa, was no more than an acknowledgment that under existing national law the DLA had two separate components both of which could be discretely claimed and give rise to stand-alone entitlements. Further, the final quoted sentence indicates that it is for the Member State to decide whether to sever the benefit. If there was a general principle of severance, the CJEU would have applied it and severed the benefit.

44. There is a further reference to severability in paragraph [20] of the judgment. There it is recorded that the United Kingdom had applied for the right to submit additional written observations upon the publication of the Opinion of the Advocate General who had concluded that under national law DLA had two, several, parts. The Court rejected the application upon the basis that the issue of severability of the DLA had been mentioned in the pleadings of the Commission and the United Kingdom could have responded to it in its own statement of intervention and, therefore, the Court had all the information needed in order to respond to the questions raised. Insofar as this has any relevance it supports the view that the reference proceeded upon the premise that, *under national law*, the benefits in issue were *already* disaggregated and claimable upon a joint and/or several basis.

45. I note further that the judgment in *Hoeckx* (in relation to the minimex), and in particular the critical paragraphs [12]-[14] in which it is held that generalised schemes fall outside the scope of the Regulatory regime, was cited with approval by the CJEU in this case at paragraph [56]. This undermines the submission of the appellant that, by necessary implication if not expressly, the judgment in *Hoeckx* has been overtaken by subsequent jurisprudential evolution.

Bartlett, Gonzalez Ramos and Taylor v Secretary of State for Work and Pensions (C-537/09) [2012] PTSR 535).

46. This is the second case relied upon by the appellant to support the existence of a doctrine of disaggregation or severance. In proceedings before the UT the applicants sought to annul decisions of the Secretary of State made between 2002 and 2005 to withdraw their entitlements to DLA upon the basis that, having moved permanently to other Member States of the EU, they no longer satisfied the conditions as to residence in the relevant legislation. The Court was therefore addressing at least one of the same UK benefits that it had considered in *Commission v Parliament* (*ibid*). The CJEU proceeded to judgment without an opinion of the Advocate General. This practice is used when the Court, including the Advocate General, is of the view that the law is settled, and in particular covered by earlier authority, such that there is no need to delay proceedings by awaiting the opinion of an Advocate General. As is explained in the judgment this case was intended to be a straightforward application of the

principle in *Commission v Parliament*. This would suggest that the Court was not in this judgment intending to establish any novel principles. The Court, in paragraph [11], set out section 71 of the Social Security Contributions and Benefit Act 1992 under which DLA comprised a care component and a mobility component. Section 71(2) made clear the joint and several nature of the components:

> "A person's entitlement to a disability living allowance may be an entitlement to either component or to both of them"

47. The essential question referred by the UT was whether the mobility component of DLA was capable of being categorised separately from the DLA as a whole as either a social security benefit covered by Article 4(1) of the Regulation or as a special non-contributory benefit under Article 4(2). The answer to this exercise in classification would determine whether the claimants were entitled to receive the benefit or not. In paragraphs [19] - [23] the Court said as follows:

> "19 By its first two questions, which it is appropriate to examine together, the national tribunal asks, in essence, whether Article 4(2a) of Regulation No 1408/71 and of Regulation No 1408/71, as amended, must be interpreted as meaning that the mobility component of DLA constitutes a special non-contributory cash benefit within the meaning of that provision.
>
> 20 In order to answer those questions, it is first of all necessary to determine whether the mobility component of DLA can be regarded as a 'benefit' on its own account within the meaning of Article 1(t) of Regulation No 1408/71 and of Regulation No 1408/71, as amended.
>
> 21 In that regard, it must be borne in mind that the Court held, in paragraph 69 of the judgment in Case C-299/05 *Commission* v *Parliament and Council*, that the mobility component of DLA is severable, with the result that that component alone could be included on the list in Annex IIa to Regulation No 1408/71, as amended, if the United Kingdom decided to create an allowance which concerned that component alone. It follows that the mobility component of DLA, by itself, constitutes a 'benefit' within the terms of Article 1(t) of Regulation No 1408/71, as amended.
>
> 22 Such a finding must also be made, and for the same reasons, with regard to Regulation No 1408/71.
>
> 23 Accordingly, it must be held that the mobility component of DLA can also constitute a 'benefit' within the terms of Article 1(t) of Regulation No 1408/71."

48. In my judgment this case cannot be construed as the Court endorsing the existence of a principle of disaggregation by severance which applies to composite, generalised, national benefits systems. It was a straightforward application of the principles laid

down in *Commission v Parliament* and it proceeded upon the basis that the benefits in dispute were *already* disaggregated, or severed, under the relevant domestic law. This is confirmed further by paragraph [32] which states:

> "32 Finally, it cannot validly be claimed that the mobility component of DLA cannot be regarded as listed in Annex IIa to Regulation No 1408/71 on the ground that it does not appear separately there but through the reference to DLA, of which it forms a part, *since DLA has always had two components clearly identified in the national legislation at issue in the main proceedings*."
>
> (Emphasis added)

49. Further, there is nothing in the judgment which casts into doubt the principle laid down early on, in *Hoeckx,* that generalised schemes (such as UC) fall outside the scheme of the coordination regulation.

Case C-709/20 CG v Department for Communities in Northern Ireland EU:C:2021:602 (15th July 2021) ("CG")

50. Finally, the appellant cites paragraph [42] and footnote [31] of the Opinion of the Advocate General in *CG*. These state, respectively:

> "42. In the second place, as concerns the classification of the benefits sought by CG on the basis of Article 18 TFEU, on which the identification of the rule of EU law under which the compatibility of the national provisions by reference to the principle of equal treatment must be examined depends, I observe that it is common ground that it is lack of resources that forms the basis of CG's application for Universal Credit for herself and her children and that that benefit is classified as 'social assistance' for the purposes of Directive 2004/38. The additional point, made at the hearing, that the benefit sought by CG should cover health expenditure is not capable of altering that classification."
>
> "31 As to what the expression 'Universal Credit' covers, see point 25 of this Opinion. It serves to designate a variety of allowances, some of which may be governed by special rules of EU law. See, by way of illustration, judgment of 14 June 2016, *Commission v United Kingdom* (C-308/14, EU:C:2016:436; 'the judgment in *Commission v United Kingdom'*; paragraphs 27 and 55)."

51. It is said that these indicate that a principle of severance or disaggregation exists under Regulation 883/2004. With respect, I disagree. On the facts UC had been denied to the claimant and the issue before the CJEU was not whether UC should have been granted under Regulation 883/2003, but whether the state should have provided some *other* subsistence level of benefit to the claimant. The questions referred did not cite Regulation 883/2004 and there is no analysis by the Court of

severance either in the sense used by the appellant in this case or, for that matter, in the sense used by the CJEU in the cases referred to above. The question asked by the referring court was whether the UCR, which excluded from entitlement to social security benefits EU citizens with pre-settled status and a domestic right of residence, were unlawfully discriminatory under EU law: See judgment paragraph [39]. The comments of the Advocate General relied upon are, in truth, very slim pickings. It is not even said that UC amounted to a social security benefit but, to the contrary, it was "*social assistance*". There is nothing in the Opinion of the Advocate General that, in my judgment, could alter the clear position set out in jurisprudence of the CJEU as to the material scope and effect of Regulations 1408/71 or 883/2004.

E. Conclusion / disposition

52. In conclusion, I do not detect in the jurisprudence of the CJEU either the existence of a principle of severance, or even its earliest germs. To the contrary, the case law is consistent with the proper inferences to be drawn from the structure and policy of Regulation 883/2004 which is that the Regulation does not undermine the essential freedom of Member States to shape their own social security systems and that generalised, composite, benefits schemes are outside the scope of the Regulation. In my judgment the position is sufficiently clear for there to be no need for a reference to be made to the CJEU under Article 158 of the Withdrawal Agreement. For these reasons I would dismiss the appeal.

53. I would wish to acknowledge that in the tribunals below the appellant was represented pro bono by Mr Jack Castle of counsel and by the FRU. The willingness of the profession and of bodies such as the FRU to provide support and representation in cases such as this which raise important points of principle is of singular importance to the Courts and to the furtherance of justice.

Lady Justice Elisabeth Laing:-

54. I agree.

Lord Justice Lewison:-

55. I also agree.