



Michaelmas Term

[2025] UKSC 41

On appeal from: [2024] EWCA Civ 419

JUDGMENT

Simkova (Appellant) v Secretary of State for Work and Pensions (Respondent)

before

Lord Lloyd-Jones

Lord Sales

Lord Hamblen

Lady Rose

Lord Richards

JUDGMENT GIVEN ON

19 November 2025

Heard on 30 June and 1 July 2025

Appellant
Thomas de la Mare KC
Jack Castle
(Instructed by Leigh Day (London))

Respondent
Sir James Eadie KC
Julia Smyth KC
Barney McCay
(Instructed by Government Legal Department)

Intervener – The AIRE Centre
Tim Buley KC
Matthew Fraser
(Instructed by Herbert Smith Freehills Kramer LLP (London))

LORD LLOYD-JONES AND LADY ROSE (with whom Lord Sales, Lord Hamblen and Lord Richards agree):

Introduction

1. This case concerns the characterisation of the child element of universal credit (“UC”) payable in the United Kingdom pursuant to the Welfare Reform Act 2012 (“the WRA 2012”) for the purposes 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 (“the Coordination Regulation”) as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009. This remains a current issue, notwithstanding the withdrawal of the United Kingdom from the European Union, by virtue of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Authority (2019/C 384I/01) (“the Withdrawal Agreement”) as given effect in domestic law by the European Union (Withdrawal) Act 2018 as amended (“the EU(W)A 2018”).

2. Ms Michaela Simkova, a Slovakian national resident in England with a permanent right to reside in the United Kingdom, seeks to establish entitlement to the child element of UC in respect of her son, Markus, who at the relevant times resided with his grandparents in Slovakia.

3. It is common ground between the parties that under the applicable provisions of domestic law Ms Simkova does not have an entitlement to the child element. Section 10(1) of the WRA 2012 provides that the calculation of an award of UC is to include an amount for each child or qualifying young person for whom a claimant is responsible. Regulation 4(2) of the Universal Credit Regulations 2013 (SI 2013/376) (“the UC Regulations 2013”) provides that a person is responsible for a child or qualifying young person who normally lives with them. Because Markus lived in Slovakia at the relevant times Ms Simkova cannot claim the UC child element even though she otherwise qualified for the UC standard allowance and even though she paid for his upkeep.

4. Ms Simkova claims, however, that she has a directly effective right under the Coordination Regulation as a result of which her son must be deemed to live with her and regulation 4(2) overridden. She claims that the child element is a family benefit within the meaning of article 3(1)(j) of the Coordination Regulation. On that basis she relies on article 7 of the Coordination Regulation, which provides that cash benefits shall not be withdrawn on account of the fact that the beneficiary or members of her family reside in another Member State, and on article 67 which deems her son to be living with her.

5. The Secretary of State for Work and Pensions (“SSWP”) maintains that the child element of UC is not a family benefit within the meaning of article 3(1)(j) of the

Coordination Regulation and that, accordingly, Ms Simkova has no entitlement to the child element.

Factual background

6. On 26 July 2017, Ms Simkova made an application for UC, including a claim for housing costs element and a claim for child element in respect of her son, Markus. (Markus was born on 30 September 2002. He began High School (non-advanced) education in Slovakia on 1 September 2018 and completed it in June 2022.) On 1 September 2017 the SSWP decided that Ms Simkova was entitled to UC from 26 July 2017. She was paid the standard allowance and housing costs element with the child element still to be determined. On 8 September 2017 the SSWP accepted that she had a permanent right to reside in the United Kingdom. On 25 September 2017 the SSWP, who was aware that Markus was being schooled in Slovakia, decided to award the child element and arrears of child element were paid to Ms Simkova. On 17 October 2019, however, the SSWP revised the decision that Ms Simkova was entitled to the child element. This is the decision challenged in these proceedings.

7. On 31 January 2020, following mandatory reconsideration, the SSWP confirmed that Ms Simkova was not entitled to the child element and had not been entitled to the child element as from 26 July 2017. Ms Simkova appealed to the First-tier Tribunal which on 19 August 2020 allowed the appeal and awarded the child element from 12 September 2017. The SSWP appealed to the Upper Tribunal. In her response to the appeal, Ms Simkova accepted that the First-tier Tribunal misapplied the UC Regulations 2013 but submitted that the child element was a family benefit for the purposes of the Coordination Regulation with the result that she was entitled to the child element for different reasons. On 21 February 2023 the Upper Tribunal allowed the SSWP's appeal and remade the First-tier Tribunal's decision, with the result that from 26 July 2017 entitlement to UC was to be calculated without the child element. Ms Simkova appealed to the Court of Appeal (Lewison, Green and Laing LJ) which on 26 April 2024 dismissed the appeal. On 9 October 2024 the Supreme Court (Lord Reed, Lord Leggatt and Lady Rose) granted permission to appeal to the Supreme Court.

Statutory provisions

Coordination Regulation (EC) No 883/2004

8. The Coordination Regulation provides in relevant part:

“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.

...

(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

...

(7) Due to the major differences existing between national legislation in terms of the persons covered, it is preferable to lay down the principle that this Regulation is to apply to nationals of a Member State, stateless persons and refugees resident in the territory of a Member State who are or have been subject to the social security legislation of one or more Member States, as well as to the members of their families and to their survivors.

(8) The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.

...

(15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.

...

(17a) Once the legislation of a Member State becomes applicable to a person under Title II of this Regulation, the conditions for affiliation and entitlement to benefits should be

defined by the legislation of the competent Member State while respecting Community law.

...

(18a) The principle of single applicable legislation is of great importance and should be enhanced. This should not mean, however, that the grant of a benefit alone, in accordance with this Regulation and comprising the payment of insurance contributions or insurance coverage for the beneficiary, renders the legislation of the Member State, whose institution has granted that benefit, the applicable legislation for that person.

...

Article 1 (Definitions)

For the purposes of this Regulation:

...

(i) ‘member of the family’ means:

1. ...

2. ...

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/she 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;

...

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 or more Member States, as well as to the members of their families and to their survivors.

...

Article 3 (Matters covered)

1. This Regulation shall apply to all legislation 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.

...

5. This Regulation shall not apply to:

(a) social and medical assistance or

(b) ...

Article 4 (Equality of treatment)

Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

...

Article 7 (Waiving of residence rules)

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

...

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.

...

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/her family members residing in another Member State, as if they were residing in the former Member State. ...”

9. Many of the authorities cited in this judgment are decisions on an earlier Regulation (Regulation No 1408/71) which was replaced by the current Coordination Regulation. For present purposes, its provisions may be considered substantially similar to those of the current Coordination Regulation.

10. The Coordination Regulation continues to have effect in the United Kingdom pursuant to the Withdrawal Agreement as implemented by section 7A of the EU(W)A 2018.

Welfare Reform Act 2012

11. The WRA 2012 provides in relevant part:

“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.

2. Claims

(1) A claim may be made for universal credit by—

(a) a single person, or

(b) members of a couple jointly.

...

3. Entitlement

(1) A single claimant is entitled to universal credit if the claimant meets—

(a) the basic conditions, and

(b) the financial conditions for a single claimant.

...

10. Responsibility for children and young persons

(1) The calculation of an award of universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible.”

12. Detailed rules and administrative provisions are set out in the UC Regulations 2013 and the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) (“the Claims and Payments Regulations 2013”).

13. The UC Regulations 2013 provide in relevant part:

“4. When a person is responsible for a child or qualifying 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.”

Social security benefits and the Coordination Regulation

14. EU law draws a fundamental distinction between social security benefits and social assistance benefits.

15. Social security benefits are subject to the rules set out in the Coordination Regulation. Article 3(1) makes clear that the Coordination Regulation applies to legislation concerning the identified branches of social security. Article 3(5)(a) expressly provides that it shall not apply to social and medical assistance.

16. Social assistance benefits are subject to distinct legislation, in particular Directive 2004/38/EC and Regulation (EU) No 492/2011. In the context of the Coordination Regulation “social assistance” has been given a narrow meaning encompassing a situation where there is an individual assessment of a claimant’s personal needs and requiring a power to take account of circumstances other than those specified in legislation. *Hughes v Chief Adjudication Officer, Belfast* (Case C-78/91) [1992] CMLR 490 (“*Hughes*”) at paras 16, 17; *De Cuyper v Office national de l’emploi* (Case 406/04) [2007] ICR 317; [2006] 3 CMLR 44 (“*De Cuyper*”) at para 23).

17. The Coordination Regulation contains rules for the coordination of national social security legislation which fall within the framework of free movement of persons (recital 1). As its title suggests, it is a coordinating and not a harmonising measure. The preamble makes this clear. Recital 4 refers to the necessity of respecting the special characteristics of national social security legislation and of drawing up only a system of coordination. Recital 15 states that it is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom. Similarly, recital 17a states that once the legislation of a Member State

becomes applicable to a person under the Coordination Regulation, the conditions for affiliation and entitlement to benefits should be defined by the legislation of the competent Member State while respecting Community law. The Coordination Regulation is intended, therefore, to provide conflict of laws rules which determine which Member State is responsible for providing which social security benefits. In *Stewart v Secretary of State for Work and Pensions* (Case C-503/09) [2012] PTSR 1; [2012] 1 CMLR 13 (at paras 75-77) the CJEU provided the following explanation with reference to the previous regulation:

“75. ... Regulation 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 co-ordination of those schemes: ... Thus, according to settled case law, member states retain the power to organise their social security schemes: ...

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: ...

77. In exercising those powers, member states must none the less comply with the law of the European Union and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the member states: ...”

18. The Coordination Regulation embodies the principle of single applicable legislation. This is described in recital 18a as a principle of great importance which should be enhanced. Recital 15 emphasises the necessity that persons moving within the Community should be subject to the social security scheme of only one Member State. Under Title II of the Coordination Regulation and subject to rules in Title III applicable to specific types of social security benefits, the State of applicable legislation is the State to which a person pays any relevant contributions and to which a new claim for benefit is directed. Article 11 in Title II sets out the key rules on applicable legislation.

19. In *Tolley v Secretary of State for Work and Pensions* (Case C-430/15) [2017] 1 WLR 1261 (“*Tolley*”) Advocate General H Saugmandsgaard Øe explained (at para 65) the importance of the principle of single application:

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

This explanation was echoed by the CJEU in its judgment in the same case (at paras 57, 58):

“57. 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 co-ordination of those schemes. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law: ...

58. The provisions of Title II of Regulation No 1408/71, of which article 13 forms part, constitute a complete and uniform system of conflict rules. Those provisions are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which may ensue, but also to ensure that persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them: ...”

20. Article 4 of the Coordination Regulation precludes Member States from introducing conditions which base entitlement to benefits on the nationality of the claimant; a form of discrimination that has always been anathema in EU law. Conditions based on the residence of the claimant are, however, not subject to the same blanket prohibition as conditions based on nationality but are addressed in more detailed provisions including those set out in Title III.

21. As the SSWP explains in her written case, where a claim for a social security benefit is made and the Coordination Regulation applies, a Member State must first determine whether it is the State of applicable legislation under the rules in Title II.

Secondly, if it is, it must determine whether another State is competent for the benefit in question, which will depend on the specific rules applicable to the type of benefit concerned in Title III. Where the State is the competent State, either because its legislation is applicable, or because it is competent under the rules in Title III, it must then decide whether there are any other relevant rules to be applied such as article 4 (equality of treatment), article 5 (equal treatment of benefits, income, facts or events) or article 6 (aggregation of periods), or in the specific rules relevant to the type of benefit in question.

22. In the present case it is common ground that, if the Coordination Regulation applies, the applicable law for Ms Simkova under article 11 of the Coordination Regulation would be UK law and she would qualify to receive the child element of UC by virtue of article 67 of the Coordination Regulation. The question is, therefore, whether the child element of UC is a family benefit within article 3(1)(j) of the Coordination Regulation so as to bring that Regulation into play.

23. The characterisation of a benefit for the purposes of the Coordination Regulation is a question of EU law. However, the applicable principles of EU law make clear that the exercise must be conducted by reference to the substantive characteristics of the benefit in national law. This reflects recital 4 in the preamble to the Regulation by showing respect for the special characteristics of national social security legislation. In *Hughes* the CJEU stated the principle as follows (at para 14):

“The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.”

(See also *Hoeckx v Centre Public d’Aide Sociale de Kalmthout* (Case 249/83) [1987] 3 CMLR 638 (“*Hoeckx*”) at para 11.)

24. In *De Cuyper* (para 25) the CJEU expressed the matter in the following terms:

“The Court has already held that, in order to be categorised as social-security benefits, benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand,

characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits ...”

(See also para 28 of *Caisse nationale des prestations familiales v Lachheb* (Case C-177/12) ECLI:EU:C:2013:689 discussed further below).

25. The test of whether a benefit is a coordinated social security benefit within article 3 of the Coordination Regulation is well established. According to the CJEU in *Caisse d’Assurance Retraite et de la Sante au Travail d’Alsace-Moselle v SJ* (Case C-769/18) ECLI:EU:C:2020:203, at para 27, two conditions must be satisfied:

“... [A] benefit may be regarded as a ‘social security benefit’ when two conditions are satisfied, namely (i) in so far as it is granted to recipients, without any individual and discretionary assessment of their personal needs, on the basis of a legally defined position and (ii) provided that it relates to one of the risks expressly listed in Article 3(1) of Regulation No 883/2004 ...”

26. First, the benefit must be available on the basis of objective criteria without an individualised assessment of need. If it is a discretionary award based on an individual assessment of need it constitutes social assistance and falls outside the ambit of the Coordination Regulation. In the present appeal it is common ground that both UC considered as a whole and the child element of UC considered in isolation meet this first condition.

27. Secondly, Ms Julia Smyth KC, who made the submissions at the hearing on behalf of the SSWP, was correct in our view to contend that the benefit must be directed at one and only one of the risks listed in article 3(1) of the Coordination Regulation. This is necessary because the risks identified in article 3(1) all have different regimes. It may therefore be necessary to identify the appropriate risk where there is more than one contender.

28. In *Hoeckx* the CJEU expressed this condition in the following terms (at para 12):

“Although it is possible that because of the classes of persons to which they apply, their objectives and the detailed rules for their application, certain laws may simultaneously contain elements belonging to both the categories mentioned [ie social security and social assistance] and thus defy any general classification, it must be stated that in order to fall within the

field of social security covered by Regulation 1408/71 the legislation at issue must in any event satisfy, in particular, the condition of covering one of the risks specified in Article 4(1) of the regulation [Article 3(1) of Regulation 883/2004]. It follows that the list of risks contained in that paragraph is exhaustive and that as a result a branch of social security not mentioned in the list does not fall within that category even if it confers upon individuals a legally defined position entitling them to benefits.”

29. In *De Cuyper* a Grand Chamber of the CJEU had to decide whether unemployment allowances payable by Belgium constituted an unemployment benefit falling within the scope of the Coordination Regulation, a pre-retirement benefit or a sui generis benefit. In its judgment the Court addressed both whether a benefit fell within the scope of the Coordination Regulation and how it should be characterised for the purposes of the Regulation. The Court considered that regard should be had to the purpose and object of the benefit. It went on to observe (at para 27):

“As regards its purpose, that allowance is aimed at enabling the workers concerned to provide for themselves following an involuntary loss of employment when they still have the capacity for work. In order to distinguish between different categories of social security benefits, ‘the risk covered’ by each benefit must also be taken into consideration. Thus an unemployment benefit covers the risk associated with the loss of revenue suffered by a worker following the loss of his employment although he is still able to work. A benefit granted if that risk materialises, namely loss of employment, and which is no longer payable if that situation ceases to exist as a result of the claimant’s engaging in paid employment must be regarded as constituting an unemployment benefit.”

30. In *Tolley* one of the questions referred by this court to the CJEU was whether a benefit such as the care component of disability living allowance (“DLA”) was a sickness benefit or an invalidity benefit for the purposes of Regulation No 1408/71. Both risks were listed in article 4(1) of that Regulation as they are in article 3(1) of the current Coordination Regulation. In approaching this question the CJEU (at para 45) cited para 27 of the judgment of the Grand Chamber of the CJEU in *De Cuyper* and referred (at para 46) to previous decisions of the CJEU to the effect that benefits which are granted objectively on the basis of a statutorily defined position and are intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must be regarded as sickness benefits for this purpose. It also referred to the consideration of DLA in its decision in *Commission of the European Communities v Parliament and Council of the European Union* (Case C-

299/05) [2007] ECR I-8695 where it held that even though that allowance did not have the supplementing of sickness insurance benefits as its essential purpose, it had to be regarded, except so far as concerned its mobility component, as a sickness benefit for the purposes of Regulation No 1408/71. On this basis it concluded that the benefit in issue in the national proceedings was a sickness benefit for the purposes of that regulation. (See paras 47-55.)

31. In our view *Hoeckx* remains an authoritative statement of the law on the second condition. Contrary to the submission of Mr Thomas de la Mare KC on behalf of Ms Simkova, we do not consider that its authority is diminished by either *Newton v Chief Adjudication Officer* (Case C-356/89) [1992] 1 CMLR 149 (“*Newton*”) or *Hughes*.

32. *Newton* concerned mobility allowance. The CJEU explained (at paras 14 and 15) that this benefit had a two-fold function. It sought to ensure a minimum level of income for disabled persons who are entirely outside the social security system while also providing supplementary income for recipients of social security benefits who suffer from physical disablement affecting their mobility. The Court considered that in the case of an employed or self-employed person who by reason of his previous occupational activity was already covered by the social security system of the State whose legislation is invoked, that legislation must be deemed to fall within the field of social security, although in the case of other categories of beneficiaries it may be deemed not to do so.

33. *Hughes* concerned family credit. The United Kingdom argued that family credit did not fall within any of the branches of social security listed in article 4(1) of Regulation 1408/71 because its main purpose was to provide supplementary income for poorly paid workers with a family who would have a higher income if they were unemployed, in order to encourage them to continue working. Once again, the CJEU considered (at para 19) that family credit performed a dual function. First it encouraged workers who were poorly paid to continue working. Secondly, it was intended to meet family expenses. The Court held (at para 20) that it was by virtue of that second function that a benefit such as family credit fell within the category of family benefits within Regulation 1408/71.

34. Neither decision casts any doubt on the second condition for qualification as a social security benefit as formulated in *Hoeckx*. In both cases that condition had been satisfied by the benefit in question and the CJEU was concerned with the distinct and logically subsequent question as to how the benefit should be characterised where it also performed another function. The answer given by the Court was that in the circumstances of each case it should be treated presumptively as falling within the appropriate head of social security benefit within the Coordination Regulation. We also note that *Hoeckx* continues to be cited by the CJEU as authoritative. (See, for example, *Ministre de l’Action et des Comptes Publics v Dreyer* (Case C-372/18) ECLI:EU:C:2019:206 at para 32.)

35. Finally in this regard, it should be noted that, following the decision of the CJEU in *Newton*, Regulation 1408/71 was amended to provide for an intermediate category of benefits, special non-contributory cash benefits (“SNCBs”) which have characteristics of both social security legislation referred to in article 3(1) and of social assistance. This provision is now contained in article 70 of the current Coordination Regulation. The CJEU’s case law on SNCBs is considered further below. Neither party has suggested that UC or any element in it is an SNCB. At this point, it is sufficient to state that it allows Member States to declare certain allowances as SNCBs by listing them in what is now Annex X of the current Coordination Regulation (formerly Annex IIa of Regulation 1408/71). Listing of a benefit is permitted if a benefit provides supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in article 3(1) and also guarantees minimum subsistence income having regard to the economic and social situation in the Member State concerned. SNCBs resemble social security in that they are coordinated but resemble social assistance in that they are not exportable. One advantage of such a listing from the point of view of a Member State is that Title III of the Coordination Regulation does not apply to an SNCB which can be subject to a residency test for eligibility. The United Kingdom has not listed UC or any component of it in Annex X. SNCBs are not directly relevant to the issues in this appeal.

36. Against this background we turn to consider the nature of UC.

The nature of Universal Credit

37. UC was introduced by the WRA 2012 which effected a radical reform of the benefits system. Section 1(1) provides that a benefit known as universal credit is payable in accordance with Part 1 of the Act. Under section 1(3) an award of UC is 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. UC is, therefore, a single benefit comprising a standard allowance payable to all who are eligible to which may be added further amounts, depending on the circumstances of the particular household. A claim has to be made for UC. It is not possible to make a claim for any of the additional amounts in isolation. The unitary nature of UC is readily apparent.

38. The operation of UC was described by Andrews LJ in *R (Salvato) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1482; [2022] PTSR 366 which account we gratefully adopt:

“3. The amount of UC received by a claimant will depend on a number of factors which will vary from case to case, depending on individual circumstances. UC is a single payment which comprises a standard allowance (section 9 of the 2012 Act), plus

(where applicable) various other elements, such as an amount in respect of responsibility for children (section 10); an amount in respect of housing costs (section 11); and amounts for ‘other particular needs or circumstances’ (section 12), which include a need for payment of childcare costs whilst a single parent or both parents are at work. UC is not a full indemnity. If the claimant is working, it operates as a supplement to their earnings. If the claimant's earnings increase, the amount of UC will be reduced, and vice versa. It is designed to operate flexibly to meet the wide variety of needs and circumstances of those who claim it, including claimants whose earnings fluctuate, and can be adjusted to meet changes in those circumstances as and when they arise.

4. Payment of UC is made in arrears on a monthly basis, in the same way as a monthly salary would usually be paid. It will normally be made within seven days of the last day of the relevant monthly assessment period, which will be fixed by reference to the date on which the individual first makes a claim. That approach applies irrespective of whether the claimant is in or out of work, or moves between the two, and whether his or her earnings are from employment, self-employment, or both. The calculation of entitlement and payment each month creates certainty about what will be received and when. This encourages the recipient to budget on a monthly basis, and is seen as a means of fostering their independence.

5. The system is designed around the core principle of using monthly assessment periods and making a single monthly payment in arrears, after taking into account the claimant's actual earnings received in that period. This means that different elements of UC that feed into the overall calculation of what is due to a recipient cannot be separated out or paid before the end of the assessment period without upsetting the system and reintroducing the complexity and scope for error that it was designed to overcome.”

39. Section 10(1) of the WRA 2012 provides that the calculation of an award of UC is to include an amount for each child or qualifying young person for whom the claimant is responsible. Regulation 4 of the UC Regulations 2013 provides that a person is responsible for a child or qualifying young person who normally lives with them.

40. If a UC claimant is responsible for a child this has a number of further statutory consequences including the following:

(1) It is relevant to establishing how many rooms are included in the calculation of housing costs. (Paragraphs 9(1) and 10(1) of Schedule 4 to the UC Regulations 2013).

(2) It affects eligibility for the work allowance, ie the amount an individual can earn before their award starts to reduce. (Regulation 22 of the UC Regulations 2013).

(3) It may affect work conditionality requirements. (Sections 19-21 of the WRA 2012).

41. In the present proceedings it is common ground between the parties that UC considered as a whole cannot be a coordinated social security benefit within article 3(1) of the Coordination Regulation. It is clearly an anti-poverty measure. It addresses a wide range of needs, some of which are not aimed at risks within the Coordination Regulation. Its overall purpose is the relief of poverty and the provision of a minimum level of income for those who do not have the resources to meet their own needs. It seems that the appellant accepts that.

42. In *CG v Department for Communities in Northern Ireland* (Case C-709/20) [2021] 1 WLR 5919 (“*CG (Northern Ireland)*”), a Grand Chamber of the CJEU addressed the nature of UC in the following terms:

“70. It is apparent from the information available to the court that the benefit claimed by CG, namely universal credit, is a cash subsistence benefit under a welfare system funded by taxation, the grant of which is means tested. Its objective is to replace other social benefits, such as income-based jobseeker’s allowance, the income-related employment and support allowance, income support, working tax credit, child tax credit and housing benefit.”

43. It appears therefore that Ms Simkova can only succeed in her present claim to receive the child element of UC if EU law requires this court to address the child element as a separate benefit. If that is the correct approach, it is clearly arguable that the child element considered in isolation is a family benefit within article 3(1)(j) of the Coordination Regulation. Despite the fact that it is means tested and not given to everyone regardless of their income and so might be regarded as in part a measure to alleviate

poverty, the CJEU case law says that that conditionality is not sufficient to turn it into social assistance within the meaning of article 3(5)(a) of the Coordination Regulation and so take it outside the scope of article 3.

44. It is therefore necessary to address the grounds on which Ms Simkova maintains that the child element should be considered as a free-standing benefit.

Analogy with Child Tax Credit

45. The first major plank of the appellant's submission is that the child element of UC replaced child tax credit ("CTC"). CTC was (and still is) regarded as a family benefit within the Coordination Regulation. That is the case even though, as Mr de la Mare points out, many or even most of the families who received CTC were also on income support and other benefits which clearly constituted social assistance. (We note in passing that child benefit also constituted a family benefit within the Coordination Regulation. So much is clear from *European Commission v United Kingdom* (Case C-308/14) [2016] 1 WLR 5049 ("*Commission v UK: CTC*").)

46. In his oral submissions on behalf of the appellant Mr Jack Castle drew attention to the fact that CTC shared many characteristics with the child element of UC and was characterised as a social security benefit for the purposes of the Coordination Regulation. He submitted that the child element of UC should be treated in the same way. However, the short answer to this submission is that CTC was a free-standing benefit. By contrast, it is clear from the scheme and detailed provisions of the WRA 2012 that the child element of UC is not a free-standing, independent benefit. It is deeply integrated into a generalised, composite benefits scheme and it is UC which constitutes the benefit which must be characterised for the purposes of the Coordination Regulation. Different considerations might apply if the appellant were submitting that there was something abusive about the treatment of the child element as a part of UC. However, quite rightly, no such suggestion is made. On the contrary, it is clear that the integration of the child element into UC is a matter of substance and not of presentation.

Autonomous EU concepts and the judgment in *Lachheb*

47. The appellant's second submission followed on from the first. Mr de la Mare stressed that the terms used in the Coordination Regulation are autonomous EU concepts that do not depend on the labels attached to them by the Member State's domestic legislation. The AIRE Centre which intervened in support of the appellant also emphasised this point. They argued that the Court of Appeal's approach treats the formal structure of UC in domestic law as dictating the applicability of the protection given by the Coordination Regulation. This effectively removes the protections given to those who exercise the right of free movement which the Regulation is designed to facilitate.

48. The appellant relies in particular on the CJEU’s decision in *Caisse nationale des prestations familiales v Lachheb* (Case C-177/12) ECLI:EU:C:2013:689 (“*Lachheb*”). Mr and Mrs Lachheb were resident in France, one of them working in Luxembourg and one in France. The case concerned the calculation of a benefit known as a “child bonus” in determining the value of the payments which the Lachhebs would be entitled to receive from the Luxembourg State. The relevant Luxembourg Law of 21 December 2007 provided, broadly, for a child bonus to take the form of a tax rebate to be allowed for every child living with its parents, if the parents were entitled to family allowances. The Lachhebs were entitled to the payment of a “differential supplement” to reflect the difference in benefits available to Mr Lachheb because he worked in Luxembourg compared with the benefits payable to them in France where he resided. The question was whether the child bonus payable under Luxembourg law should be taken into account when calculating that differential.

49. The detailed implementation of the child bonus law was governed by a Grand-Ducal Regulation and the referring court considered that the correct treatment of the child bonus under the relevant Luxembourg law turned on whether the child bonus fell to be classified as a family benefit within the meaning of article 1(u)(i) and article 4(1)(h) of Regulation 1408/71 (corresponding to article 1(z) and article 3(1)(j) of the Coordination Regulation respectively).

50. The CJEU said at para 28 that the distinction between benefits within and outside the scope of Regulation 1408/71 was “based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation”. Further, the Court has made it clear “that characteristics which are purely formal must not be considered relevant criteria for the classification of benefits (...). Consequently, the fact that a benefit is governed by national tax law is not conclusive for the purpose of evaluating its constituent elements”. It was necessary therefore to evaluate whether the child bonus was a “social security benefit”. The Court reiterated that the method by which the benefit is financed is immaterial as is the legal mechanism by which it is implemented. The Court held that the child bonus was a family benefit because it represented a public contribution to a family’s budget to alleviate the financial burdens involved in the maintenance of children: para 36. The fact that it had its origin in a tax reduction had no bearing on its classification.

51. Mr de la Mare made two submissions based on the *Lachheb* judgment. The first, which we fully accept, is that a Member State cannot direct the application of the Coordination Regulation simply by labelling a benefit so that it appears either to fall within or outside one of the categories in article 3(1)(a) to (j) of the Coordination Regulation. That much is clear from the CJEU’s judgments both before and after *Lachheb*: see for example *Offermanns* (Case C-85/99) ECLI:EU:C:2001:166; [2001] ECR I-2285, para 37 and *OD Istituto Nazionale della Previdenza Sociale (INPS)* (Case C-350/20) [2022] 1 CMLR 32, para 52.

52. Further, the mechanism by which the sums are paid to the claimant makes no difference. The Luxembourg child bonus did not cease to be a “benefit” because it was administered and paid through the tax system.

53. His second submission on the significance of *Lachheb* was that the CJEU’s approach to characterising the child bonus for the purposes of article 3 demonstrates that the CJEU did not conclude that the child bonus was a family benefit simply because it was part and parcel of the underlying family allowance awarded to Luxembourg nationals. It appears to have been uncontentious that the underlying family allowance fell within article 3 as a family benefit. It would have been a simple matter, he submitted, for the CJEU to say that the child bonus, as an element of that family allowance, must also be a family benefit covered by the Regulation. But the CJEU did not treat the matter as that straightforward. Instead, it examined the nature of the child bonus itself as a discrete benefit. That shows, Mr de la Mare submitted, that this court should look at the child element of UC as a discrete benefit and assess its classification separate from the overall classification of UC.

54. We do not agree that any such principle can be derived from *Lachheb*. First, it is not at all clear from the Luxembourg law described in paras 16 onwards of the judgment that the child bonus was a component of the family allowance in the same way that the child element is a component of UC. The child bonus was introduced in separate legislation. It is true that entitlement to family allowance was a precondition of the award of the child bonus and it was paid to the person to whom the family allowance was paid for that child. But the questions referred by the Cour de cassation set out at para 25 of the judgment do not raise the issue of whether the characterisation of the child bonus followed that of the family allowance in those circumstances. It simply asked whether the child bonus was a family benefit or not, looked at on its own and the CJEU looked at child bonus on its own and concluded that it was.

55. The fact that a further investigation of the relationship between the family allowance and the child bonus may have established a factual linkage that could have provided a short cut or different route to arriving at the same result does not assist Ms Simkova. *Lachheb* is not authority for the proposition that one can ignore the structure of the benefit in domestic legislation or the way it is administered. As we have already explained, the Coordination Regulation is a coordinating measure, not a harmonising measure and the Member States retain a large degree of discretion as to how generous their benefit system will be and to whom benefits will be awarded, provided that there is no discrimination on the grounds of nationality. *Lachheb* is an illustration of the application of well established principles which identify when a payment is or is not a social security benefit and a family benefit.

56. Finally, as regards his argument that the CJEU has treated different components of a single benefit as being open to separate characterisation, Mr de la Mare relied on a

comment in a footnote of the Opinion of Advocate General de la Tour in *CG (Northern Ireland)*. That was a preliminary reference in proceedings brought by CG, an EU migrant living in Northern Ireland with limited leave to remain who challenged the rejection of her claim to UC. The case concerned the application of the Citizens Directive, Directive 2004/38/EC rather than the application of the Coordination Regulation.

57. At para 25 of his Opinion, the Advocate General described UC as a social protection scheme funded by taxation and subject to conditions based on income. He went on:

“its objective is to replace several other social benefits which have ceased to exist (or are still in force), like the Jobseeker’s Allowance and Employment and Support Allowance, Income Support, Working Tax Credit, Child Tax Credit and Housing Benefit.”

58. The Advocate General referred to the Explanatory Memorandum published by the UK Government to accompany the Universal Credit (Northern Ireland) Regulations 2016 (S.R. 2016 No. 216) as support for his comment. Later, at para 42 of his Opinion, he said that it was common ground that lack of resources formed the basis of CG’s claim for UC for herself and her children. In the footnote to that passage, he noted that the expression “universal credit” served “to designate a variety of allowances, some of which may be governed by special rules of EU law” and he referred, by way of illustration to *Commission v UK: CTC*. That was the case in which the CJEU held that child benefit and CTC in the United Kingdom were social security benefits within article 3(1)(j) and article 1(z) of the Coordination Regulation: see para 59 as regards CTC.

59. The CJEU’s judgment in the *CG (Northern Ireland)* case repeated at para 70 the Advocate General’s list of benefits that it was the “objective” of UC to replace but did not comment further on the nature of UC itself.

60. With all due respect to the Advocate General, if his footnote was intended to suggest that some elements of UC might be governed by different EU rules from others, there is no basis for that suggestion. It was not an issue that arose in *CG (Northern Ireland)* and *Commission v UK: CTC* is not authority for any such proposition. In our judgment, there is no authority to support the submission that different elements of a composite benefit must be examined separately and may fall within different categories in article 3 of the Coordination Regulation.

An emerging doctrine of severance

61. Mr de la Mare's second line of argument is that one can discern from the CJEU's case law an emerging doctrine of severance in which different elements within a single benefit are to be treated as separate for the purpose of applying the Coordination Regulation.

62. As to this point, we note first that *Newton* and *Hughes* provide no support for an emerging principle of severance. *Newton*, referred to earlier, concerned a Briton who became severely disabled whilst working in France and, on return to Britain, was granted mobility allowance. That was withdrawn when he returned to reside in France. The question was whether the mobility allowance was an invalidity benefit (in which case it could not be withdrawn because of his non-residence) or social assistance (in which case it was not covered by the Regulation and so could be withdrawn when the residence requirement was no longer met). The Court held that the allowance had links with both those categories of schemes (para 12). The allowance had a two-fold function depending on whether or not the claimant was an employed or self-employed person who by reason of his previous occupational activity is already covered by the social security system of the State whose legislation is invoked. If, like Mr Newton, he was, then the benefit "must be deemed to fall within the field of social security" but if the person had been subject as an employed or self-employed person exclusively to the legislation of other Member States, it would not. That case did not therefore concern different elements within a single benefit but rather the characterisation of the same benefit as claimed by different classes of people.

63. In *Hughes*, the claimant lived in Ireland with her husband and children and was refused family credit in Northern Ireland because she was not resident there, although her husband was a UK citizen and worked across the border in Northern Ireland. She maintained that family credit was a social security benefit because Regulation 1408/71 required her to be treated as if she was residing with her husband. The Court acknowledged that family credit performed a dual function namely encouraging poorly paid workers to go on working and also to meet family expenses. It was by virtue of that second function that a benefit fell within the category of family benefit: para 20. Again, that case was concerned with a distinct question remote from the present issue.

64. There is a further line of authority on which Mr de la Mare relies as showing that severance is the necessary and appropriate approach to adopt to a composite benefit like UC. These cases arose out of the EU Commission's challenges to amendments made by the EU Parliament and Council to Regulation 1408/71 and the category of benefits referred to as SNCBs: see para 35 above. A provision relating to special non-contributory benefits was first introduced into Regulation 1408/71 by Regulation 1247/92 (OJ 1992 L 136, p 1) but the version under consideration in the cases before the CJEU as regards cash

benefits was article 4(2a) of Regulation 1408/71 as revised by Regulation 647/2005 (OJ 2005 L 117, p 1).

65. Article 4(2a) of Regulation 1408/71 provided that the Regulation applied to special non-contributory benefits provided under schemes other than those referred to in article 4(1) where the benefits provided cover for the risks referred to in article 4(1). Article 10a (10)(1) provided that, notwithstanding certain other provisions of the Regulation, persons can only claim SNCBs in their Member State of residence, provided the benefit was listed in Annex IIa. Annex IIa to Regulation 1408/71 therefore contained a list of SNCBs which the Member States wished to list there as being provided exclusively by the Member State of residence. The persons to whom the Regulation applied received the benefits listed exclusively in the territory of the Member State in which they resided and under the legislation of that State. In other words, the benefits listed in the Annex were not exportable but paid only by the authority in the place of residence.

66. Following the judgments of the CJEU in *Jauch v Pensionsversicherungsanstalt der Arbeiter* (Case C-215/99) [2001] ECR I-1901 and *Leclere v Caisse nationale des prestations familiales* (Case C-43/99) [2001] ECR I-4265, the Commission had drawn up a revised list of benefits that could be categorised as special non-contributory benefits in light of the Court's interpretation in those cases of the criteria in article 4(2a). This list omitted various benefits which had previously been in the Annex.

67. However, the Council agreed after representations from the Member States to reinsert some benefits that the Commission had omitted. The European Parliament approved the Council's position and enacted the revised Annex including the disputed benefits. That led to the adoption of Regulation 647/2005. That Regulation replaced article 4(2a) of Regulation 1408/71 with a new text and replaced the then existing Annex IIa with a new Annex IIa. The Commission challenged the changes that had been made to the content of Annex IIa as substituted by Regulation 647/2005. It challenged in particular the inclusion as SNCBs of several benefits awarded in Finland, Sweden and the United Kingdom. The Commission complained that the benefits did not meet the definition of SNCBs as revised by Regulation 647/2005.

68. The three contentious benefits included on the list by the United Kingdom were disability living allowance ("DLA"), attendance allowance and carer's allowance. Of those, the benefit relevant to the appellant's submission in the present case is the DLA. As described earlier, DLA comprises two distinct elements – mobility component and a care component. The CJEU upheld the Commission's challenge in a case referred to earlier, *Commission v European Parliament and Council* (Case C-299/05) [2007] ECR I-8695 ("The Annex IIa case").

69. Advocate General Kokott's Opinion in the *Annex IIa* case was handed down on 3 May 2007, after the close of the oral proceedings. As we have explained earlier, she recorded at para 22 of her Opinion that the parties were agreed that the mobility component of DLA was a SNCB and so could remain in Annex IIa. She noted in para 52 that it was clear from earlier case law that Annex IIa did not stand or fall in its entirety and that the individual benefits listed in it could be annulled without having to annul the whole Annex. She regarded the *Leclere* judgment as a case where the Court had "already acknowledged that the entries in Annex IIa constitute severable elements".

70. She turned to DLA at para 107 repeating that since "the parties have unanimously recognised the mobility component of disability living allowance as constituting a benefit within the meaning of Article 4(2a)(a)(ii)", it was only necessary to assess the care component. Her conclusion at para 116 was that the care component was a sickness benefit and so could not be included in the list in Annex IIa.

71. The Advocate General went on:

"117. Since the entry under Point (d) of Section Y (United Kingdom) [of Annex IIa] refers to the legislation governing disability living allowance in its entirety, without mentioning the care and mobility components separately, that entry may also be annulled only in its entirety.

118. Although, by so doing, one annuls from Annex IIa a benefit which partially fulfils the requirements for special benefits, that fact cannot lead to the entry being maintained in its entirety. In the interests of legal certainty, Annex IIa to Regulation No 1408/71 must indicate the benefits which fall within Article 4(2a)(c) of the regulation. The principle of legal certainty requires that the persons concerned must be able to ascertain their rights and obligations from the provision. If the entry were not entirely removed, the recipient of the living allowance, with the exception of the mobility component, would not be in a position to know that that benefit is not in fact a special non-contributory benefit which, in accordance with Article 10a, can be claimed only at the place of residence.

119. It would be open to the legislature, however, to reinstate the mobility component of disability living allowance separately into the annex. Until that happens, the mobility component - even though it satisfies the substantive conditions for a special non-contributory benefit - may not be considered

as such. Article 4(2a)(c) of Regulation No 1408/71 imposes the additional requirement of listing in Annex IIa to the regulation.”

72. The entry in the Annex could not, she said, “be partially annulled, nor may it be divided in order for the Court to maintain its effects” (para 120).

73. The inclusion of this point in the Advocate General’s Opinion prompted the United Kingdom to seek to reopen the oral procedure on the grounds that it had not had the opportunity to respond to an argument to the effect that the reference to DLA in the list in Annex IIa as amended should be annulled in its entirety, even though it was not in dispute that the “mobility” component of that allowance met the requirements for it to be included (see para 17 of the CJEU’s judgment). That request was refused.

74. In its judgment in the *Annex IIa* case, the CJEU held that the amending Regulation was vitiated by an error of law in including the benefits challenged by the Commission and those entries “must therefore be annulled”. The Court then addressed the problem that this would create, namely that the “straightforward annulment” of DLA would lead to the United Kingdom being forced to grant the mobility element of DLA to recipients throughout the EU even though it could have been lawfully included in the list as a non-exportable benefit. At this point the CJEU decided to address this problem by delaying the temporal effect of its judgment. The Court held that the issue warranted the Court exercising its power under article 231 EC “provisionally to maintain the effects of inclusion of the DLA as regards solely the ‘mobility’ part so that, within a reasonable period, appropriate measures can be taken to include it in Annex IIa as amended.”

75. Unsurprisingly, this result led to further litigation and a further reference to the CJEU as to what was and what was not an exportable benefit. In *Bartlett v Secretary of State for Work and Pensions* (Case C-537/09) [2012] PTSR 535 three applicants challenged decisions of the SSWP to withdraw their entitlement to the mobility component of the DLA on the grounds that they no longer satisfied the conditions of presence and domicile in Great Britain. In other words, the SSWP treated the mobility component of DLA as non-exportable even though the conclusion of the CJEU in the *Annex IIa* case was that the inclusion of DLA in Annex IIa had been annulled.

76. The CJEU recognised that the question referred to it was asking whether “the mobility component of disability living allowance can be regarded as a ‘benefit’ on its own account”: para 20. The Court held that it could. The CJEU thus in effect recognised that the temporal effect mechanism was not the right way to address the problem. Instead, the Court held that one must read the reference to “DLA” in Annex IIa of Regulation 1408/71 as referring just to the mobility component.

77. We do not accept Mr de la Mare’s contention that the CJEU’s judgment in *Bartlett* establishes that each component of a benefit must be assessed separately to determine whether it is exportable. That submission seeks to draw too broad an inference from the judgment. *Bartlett* was a pragmatic decision by the Court in response to a very particular difficulty created by the list in Annex IIa.

78. Further, it is clear looking at the different wording of the relevant statutory provisions, that the structure of DLA is different from UC. The mobility component and care component are clearly separate benefits. According to section 71(2) of the Social Security Contributions and Benefits Act 1992 “A person’s entitlement to a disability living allowance may be an entitlement to either component or to both of them”. The two components have separate criteria as set out in section 72 and 73. That is very different from the structure of UC. A claimant cannot just apply for the child element or the amount for housing – the relevance of those elements is that they affect the calculation of the award of UC: see section 10(1) and section 11(1) of the WRA 2012.

79. Finally, we agree with Green LJ’s reasoning in para 31 of his judgment in this case that the policy and structure of the Coordination Regulation militate against the appellant’s arguments about severability. This is not only because the regime is limited to coordinating rather than harmonising social welfare systems but also because, as he put it, “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.” We agree that severance is not the sort of regulatory mechanism or principle that can be implied into this detailed and complex regime.

80. It may be that the adjustment needed to the child element of UC if it were a family benefit and therefore exportable would be relatively straightforward to identify and administer. But, again as Green LJ said, “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.” (para 36)

81. There is no basis in the case law to suggest that that is the basis on which the Coordination Regulation has been interpreted or should be applied.

Reference to the CJEU under article 158 of the Withdrawal Agreement

82. The appellant invites the Supreme Court, as a matter of discretion, to refer the issues raised in this appeal to the CJEU pursuant to article 158 of the Withdrawal Agreement as implemented in domestic law by section 7A of the EU(W)A 2018. A reference, it is submitted, would allow the CJEU to decide these issues definitively.

83. The application is opposed by the SSWP both on the ground that there is no power to make a reference and as a matter of discretion. With regard to the power to make a reference the SSWP makes two submissions.

(1) First, by virtue of section 12(8)(b) of the Social Security Act 1998, the law which must be applied is the law as it stood on 17 October 2019, the date of the decision of the SSWP which is under review. At that time EU law applied in the United Kingdom pursuant to section 2 of the European Communities Act 1972. The power to refer in article 158 of the Withdrawal Agreement arises only where a question is raised concerning the interpretation of Part Two of the Withdrawal Agreement. In this case no question arises concerning the interpretation of Part Two because it was not in force at the date of the SSWP's decision.

(2) Secondly, article 158 only applies "in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom" (article 158(1)). That reflects a deliberate choice that references should only be able to be made in proceedings instituted after the end of the transition period because it was only from then that Part Two of the Withdrawal Agreement applied. The present proceedings were instituted on 17 February 2020 which was before the end of the transition period.

84. In light of the clear conclusion to which we have come on the issues in this appeal, we conclude, as a matter of discretion, that it is not necessary to make a reference to the CJEU to enable us to give judgment in this case. The questions raised as to the power to make such a reference will have to await decision by this court on a more appropriate occasion.

Conclusion

85. For these reasons we would dismiss the appeal.