Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 5 October 2016 [1]

Case C-430/15

Secretary of State for Work and Pensions
v
Tolley (Deceased acting by her personal representative)

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling — Social security for migrant workers — Disability living allowance ('care' component) — Regulation (EEC) No 1408/71 — Article 1(a) — Concept of 'employed person or self-employed person' — Article 4(1)(a) — Cash sickness benefit — Article 13(2)(f) — Applicable law — Article 22(1)(b) and (2) — Whether exportable — Absence of prior authorisation)

I – Introduction

1. Mrs Tolley, a United Kingdom national, had, while resident in the United Kingdom, begun to receive the care component of Disability Living Allowance ('DLA'). That benefit had been granted to her for an indefinite period. Five years after she transferred her residence to Spain, the United Kingdom authorities withdrew the right to continue to receive that benefit as from that transfer of residence, on the ground that the residence condition laid down by domestic law was not satisfied. The Supreme Court of the United Kingdom asks the Court, in essence, to determine whether EU law precludes such a residence condition.

II – Legal framework

A – EU law

2. Regulation (EEC) No 1408/71 [2] was replaced by Regulation (EC) No 883/2004, [3] which became applicable on 1 May 2010. In view of the date of the facts of the main proceedings, however, [4] those proceedings continue to be governed by Regulation No 1408/71, in the version amended and updated by Regulation (EC) No 118/97, [5] as amended by Regulation (EC) No 1386/2001 [6] ('Regulation No 1408/71').

1 — Original language: French.

2 — Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and to members of their family moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

3 — Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

4 — The main proceedings concern Mrs Tolley's rights as at 6 November 2002 (see point 20 of this Opinion) and are therefore governed by the version of Regulation No 1408/71 then in force.

5 — Council Regulation of 2 December 1996 (OJ 1997 L 28, p. 1).

6 — Regulation of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1).

3. Article 1 of Regulation No 1408/71 provides:

'For the purposes of this Regulation:

(a) employed person and self-employed person mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed

or

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

…

(o) competent institution means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; …

…

(q) competent State means the Member State in whose territory the competent institution is situated;

…'

4. Article 2(1) of Regulation No 1408/71 provides that 'this Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors'.

5. Article 4 of that regulation states:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits …;

(c) old-age benefits;

…’

6. Article 10 of that regulation, entitled ‘Waiving of residence clauses — Effect of compulsory insurance on the reimbursement of contributions’, provides, in the first subparagraph of paragraph 1, that, ‘save as otherwise provided in this Regulation, invalidity, old-age or survivors’ cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated …’

7. According to Article 13(1) of Regulation No 1408/71, ‘subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title’.

8. Article 13(2)(a) of that regulation provides that, subject to Articles 14 to 17 of that regulation, ‘a person employed in the territory of one Member State shall be subject to the legislation of that State …’

9. Article 13(2)(f) of that regulation provides that ‘a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone’.

10. Article 19(1) of that regulation, in Section 2, entitled ‘Employed or self-employed persons and members of their families’, of Chapter 1, on sickness and maternity, of Title III of that chapter, entitled ‘Special provisions relating to the various categories of benefits’, states:

‘An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

…

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers …’

11. Article 22(1) of Regulation No 1408/71, in the same section, is worded as follows:

‘An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

…

(b) who, having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he resides, or to transfer his residence to the territory of another Member State;

…

shall be entitled:

…

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers …'

12. According to point I of the 'United Kingdom' section of Annex I (entitled 'Persons covered by the Regulation') to that regulation, 'any person who is an "employed earner" or a "self-employed earner" within the meaning of the legislation of Great Britain or of the legislation of Northern Ireland shall be regarded respectively as an employed person or a self-employed person within the meaning of Article 1(a)(ii) of the Regulation. Any person in respect of whom contributions are payable as an "employed person" or a "self-employed person" in accordance with the legislation of Gibraltar shall be regarded respectively as an employed person or a self-employed person within the meaning of Article 1(a)(ii) of the Regulation'.

13. In accordance with point 19 of the 'United Kingdom' section of Annex VI (entitled 'Special procedures for applying the legislations of certain Member States') to that regulation:

'Subject to any conventions concluded with individual Member States, for the purpose of Article 13(2)(f) of the Regulation and Article 10b of the Implementing Regulation, United Kingdom legislation shall cease to apply at the end of the day on the latest of the following three days to any person previously subject to United Kingdom legislation as an employed or self-employed person:

(a) the day on which residence is transferred to the other Member State referred to in Article 13(2)(f);

…

(c) the last day of any period of receipt of United Kingdom sickness or maternity benefit (including benefits in kind for which the United Kingdom is the competent State) or unemployment benefit which

(i) began before the date of transfer of residence to another Member State …'

14. Point 20 of the 'United Kingdom' section of Annex VI to that regulation provides:

'The fact that a person has become subject to the legislation of another Member State in accordance with Article 13(2)(f) of the Regulation, Article 10b of the Implementing Regulation and point 19 above, shall not prevent:

(a) the application to him by the United Kingdom as the competent State of the provisions relating to employed and self-employed persons of Title III, Chapter 1 and 2, Section 1 or Article 40(2) of the Regulation if he remains an employed or self-employed person for those purposes and was last so insured under the legislation of the United Kingdom;

…'

B – United Kingdom law

15. It is apparent from the decision for reference that DLA is a non-contributory benefit consisting of a 'care' component and a 'mobility' component. It is not a means-tested benefit and is not an income replacement benefit. Its purpose is to cater for the extra costs of requiring certain types of care or being unable or virtually unable to walk.

16. Under section 71(6) of the Social Security Contributions and Benefits Act 1992, 'a person shall not be entitled to [DLA] unless he satisfies prescribed conditions as to residence and presence in Great Britain'. Those conditions are set out, in particular, in regulation 2(1)(a) of the Social Security (Disability Living Allowance) Regulations 1991.

III – Main proceedings, questions for a preliminary ruling and procedure before the Court

17. Mrs Tolley, a British national born on 17 April 1952, paid social security contributions in the United Kingdom from 1967 to 1984. Subsequently, she was credited with contributions until the year 1993-1994. If she had fulfilled the contribution conditions when she reached state retirement age, she might have been entitled to a state retirement pension under the United Kingdom legislation. However, she died on 10 May 2011, before reaching that age.

18. From 26 July 1993, she was awarded the care component of DLA on an indefinite basis, because she was unable to prepare a cooked meal for herself.

19. On 5 November 2002, she and her husband transferred their residence to Spain. She did not engage in any occupational activity there.

20. In 2007, the Secretary of State for Work and Pensions ('the Secretary of State') decided that, as from 6 November 2002, she was no longer entitled to DLA because she did not fulfil the residence condition prescribed for that purpose in the United Kingdom legislation.

21. Mrs Tolley brought an action against that decision before the First-tier Tribunal, United Kingdom, which upheld her action, finding that she was entitled by virtue of Article 10 of Regulation No 1408/71 to continue to receive DLA after she had transferred her residence to Spain.

22. The Secretary of State appealed against that judgment before the Upper Tribunal, United Kingdom, which, first of all, considered that because Mrs Tolley was insured against the risk of old age by virtue of the contributions which she had paid in the past, she was an 'employed person' within the meaning of Article 1(a) of that regulation; it then confirmed that she was entitled to receive the care component of DLA. The Upper Tribunal nonetheless based that conclusion not on Article 10 of Regulation No 1408/71 but — after having characterised that benefit as a sickness benefit — on Article 22(1)(b) of that regulation.

23. Taking the view that it was bound by its previous decision in *Commissioners for Her Majesty's Revenue and Customs* v *Ruas*,[7] the Court of Appeal (England & Wales), United Kingdom dismissed the Secretary of State's appeal against the judgment of the Upper Tribunal. The Secretary of State then appealed to the Supreme Court of the United Kingdom.

7 — [2010] EWCA Civ 291.

24. In those circumstances, the Supreme Court of the United Kingdom decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is the care component of [DLA] properly classified as an invalidity rather than a cash sickness benefit for the purpose of Regulation No 1408/71?

(2) (a) Does a person who ceases to be entitled to [DLA] as a matter of [United Kingdom] domestic law, because she has moved to live in another member state, and who has ceased all occupational activity before such move, but remains insured against old age under the [United Kingdom] social security system, cease to be subject to the legislation of the [United Kingdom] for the purpose of Article 13(2)(f) of Regulation No 1408/71?

(b) Does such a person in any event remain subject to the legislation of the [United Kingdom] in the light of Point 19(c) of the United Kingdom’s [section of Annex VI to Regulation No 1408/71]?

(c) If she has ceased to be subject to the legislation of the [United Kingdom] within the meaning of Article 13(2)(f) [of Regulation No 1408/71], is the [United Kingdom] obliged or merely permitted by virtue of Point 20 of [the “United Kingdom” section of Annex VI to that regulation] to apply the provisions of Chapter 1 of Title III to the regulation to her?

(3) (a) Does the broad definition of an employed person in [the judgment in *Dodi and Oberhollenzer* ([C-543/03,] EU:C:2005:364) apply for the purposes of Article 19 to 22 of [Regulation No 1408/71], where the person has ceased all occupational activity before moving to another Member State, notwithstanding the distinction drawn in Chapter 1 of Title III between, on the one hand, employed and self-employed persons and, on the other hand, unemployed persons?

(b) If it does apply, is such a person entitled to export the benefit by virtue of either Article 19 or Article 22 [of Regulation No 1408/71]? Does Article 22(1)(b) [of that regulation] operate to prevent a claimant’s entitlement to the care component of DLA being defeated by a residence requirement imposed by national legislation on a transfer of residence to another member state?’

25. Mrs Tolley, the United Kingdom and Norwegian Governments and the European Commission have lodged written observations. Apart from the Norwegian Government, they were also represented at the hearing on 8 June 2016.

IV – Assessment

A – Preliminary considerations

26. The purpose of the main proceedings is to determine whether, following the transfer of her residence to Spain, Mrs Tolley was entitled to continue to receive, from the United Kingdom institution, the care component of DLA, which she had begun to receive before transferring her residence.

27. In the first place, the Supreme Court of the United Kingdom asks whether that allowance may be classified as an invalidity benefit, although the Court has previously considered it to be a sickness benefit.[8] If that were so, Mrs Tolley would be entitled to export that benefit on the basis of Article 10 of Regulation No 1408/71, which precludes residence conditions as regards entitlement to the benefits which it lists, which include invalidity benefits but not sickness benefits.

28. The Supreme Court of the United Kingdom seeks, in the second place, to ascertain whether, even on the assumption that the care component of DLA constitutes a sickness benefit, Mrs Tolley would nonetheless be able to export that allowance after transferring her residence to Spain, on the basis of Article 19(1) and/or Article 22(1)(b) of that regulation. From that aspect, that court seeks, first of all, certain clarification as to the determination, under the conflict of laws rules in Article 13(2) of that regulation, of the legislation applicable to Mrs Tolley following the transfer of her residence.

29. Before addressing those questions, I consider it appropriate to ascertain whether Mrs Tolley is indeed a person covered by that regulation, since at the hearing the United Kingdom Government claimed that she was not an 'employed person or self-employed person' ('a worker') within the meaning of Article 1(a) of that regulation.

B – Persons covered by Regulation No 1408/71

30. Under Article 2(1) of Regulation No 1408/71, that regulation is to apply to 'employed or self-employed persons … who are or have been subject to the legislation of one or more Member States'.

31. It is not disputed that Mrs Tolley has been subject to the legislation of the United Kingdom,[9] since she was insured under the social security scheme of that Member State and paid contributions to it in the past.[10]

32. On the other hand, the United Kingdom Government claims that Mrs Tolley does not have the status of worker for the purposes of Article 1(a) of that regulation. She does not come under subparagraph (i) of that provision, since at the time of transferring her residence to Spain she was not insured under a social security scheme applicable to workers. Nor does she come under subparagraph (ii) of that provision, since point I of the 'United Kingdom' section of Annex I to that regulation restricts the scope of the regulation to persons engaged in a gainful activity.

33. I would observe, in that regard, that it follows from the judgment in *Martínez Sala*[11] and the subsequent case law that a person has the status of a 'worker' for the purposes of Article 1(a) of Regulation No 1408/71 where he 'is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of [that regulation], irrespective of the existence of an employment relationship'.

8 — Judgment of 18 October 2007, *Commission* v *Parliament and Council* (C-299/05, EU:C:2007:608, paragraph 68).

9 — In accordance with Article 1(j) of Regulation No 1408/71, the term 'legislation' is to mean, in the context of that regulation, all statutes, regulations and other provisions and all other implementing measures relating to the branches and schemes of social security and also special non-contributory benefits.

10 — The conditions governing insurance under a social security scheme are a matter of domestic law (see, in particular, judgments of 12 July 1979, *Brunori* (266/78, EU:C:1979:200, paragraphs 5 and 6); of 7 July 2005, *van Pommeren-Bourgondiën* (C-227/03, EU:C:2005:431, paragraph 33); and of 19 March 2015, *Kik* (C-266/13, EU:C:2015:188, paragraph 51)).

11 — Judgment of 12 May 1998 (C-85/96, EU:C:1998:217, point 36). See also, in particular, judgments of 7 June 2005, *Dodl and Oberhollenzer* (C-543/03, EU:C:2005:364, paragraph 30), and of 10 March 2011, Borger (C-516/09, EU:C:2011:136, paragraph 28).

34. A person may therefore have that status where he does not engage in any occupational activity and where the benefit which he seeks is not linked with previous employment or with a risk against which he is insured. [12]

35. In the main proceedings, both the Upper Tribunal and the Court of Appeal (England & Wales) considered that Mrs Tolley had the status of worker for the purposes of Regulation No 1408/71, since she continued to be covered, under the United Kingdom legislation, against one of the risks listed in Article 4(1) of that regulation, namely the risk of old age within the meaning of Article 4(1)(c).

36. More specifically, I note that the Upper Tribunal and the Court of Appeal considered that Mrs Tolley came under the first indent of Article 1(a)(ii) of that regulation, since she was insured under a social security scheme applicable to all residents and since the manner in which that scheme is administered and financed is such that she can be identified as an employed person. [13]

37. As is apparent from the decision for reference, the Supreme Court of the United Kingdom does not intend to call that conclusion into question.

38. Accordingly, Mrs Tolley must be classified as a worker, in spite of the fact that she was not yet in receipt of a retirement pension.

39. The Court held, in the judgment in *Dumont de Chassart*, [14] that even in such a situation a person has the status of worker if he would have been entitled to a pension if he had lived until the age of retirement. More generally, it follows from the case law that the status of worker within the meaning of Regulation No 1408/71 does not depend on the materialisation of the contingency covered. [15]

40. Point I of the 'United Kingdom' section of Annex I to that regulation does not call that conclusion into question. In that respect, it is sufficient to observe that that annex is relevant only for the purposes of the application of the second indent of Article 1(a)(ii) of that regulation and, according to the courts which have adjudicated in the context of the main proceedings, Mrs Tolley's situation came under the first indent of that provision.

41. Consequently, my analysis will proceed on the premiss that Mrs Tolley is indeed a person covered by Regulation No 1408/71.

C – Classification of the care component of DLA (first question)

42. By its first question, the referring court asks, in essence, whether the classification of the care component of DLA as a sickness benefit within the meaning of Article 4(1)(a) of Regulation No 1408/71, which follows from the judgment in *Commission* v *Parliament and Council*, [16] must be called into question on the ground that its purpose is to cover a risk in the long term and permanently.

12 — For example, the Court considered, in the judgment in *Dodl and Oberhollenzer* (judgment of 7 June 2005 (C-543/03, EU:C:2005:364, paragraphs 32 to 34)), that persons who claimed Austrian family benefits had the status of worker provided that the national court confirmed that they belonged to the Austrian health insurance scheme.

13 — See *Secretary of State for Work and Pensions* v *LT* (DLA) [2012] UKUT 282 (AAC) and *Tolley* v *The Secretary of State for Work and Pensions* [2013] EWCA Civ 1471.

14 — Judgment of 21 February 2013 (C-619/11, EU:C:2013:92, paragraphs 27 to 29). According to the decision for reference, Mrs Tolley would have been able to claim a retirement pension only to the extent that she would have met the contribution conditions at the statutory retirement age. Thus, in the United Kingdom Government's submission, the benefit of such a pension was merely future and hypothetical, so that Mrs Tolley did not have the status of being insured against the risk of old age. The referring court nonetheless considers that she was indeed insured against that risk. Since the question whether a person is insured under a social security scheme is a matter for the law of the Member State concerned (see footnote 11 of this Opinion), there is no need to question that assessment.

15 — Judgment of 10 March 2011, Borger (C-516/09, EU:C:2011:136, paragraph 30).

16 — Judgment of 18 October 2007 (C-299/05, EU:C:2007:608, point 68).

1. Admissibility

43. As a preliminary point, the United Kingdom Government claims that the answer to this question is already clear from the abovementioned judgment. It maintains that the provisions of EU law interpretation of which is sought is therefore an *acte clair* within the meaning of the judgment in *Cilfit and Others*[17] and that, accordingly, the first question is inadmissible.

44. To my mind, that argument is derived from confusion between the obligation placed on courts or tribunals against whose decisions there is no judicial remedy to request the Court to give a preliminary ruling when a question of EU law is raised before them and the admissibility of such a question. The *acte clair* theory, enshrined in the judgment in *Cilfit and Others*, provides only an exception to that obligation.[18] On the other hand, it does not affect the admissibility of a question for a preliminary ruling.[19]

45. On the contrary, even where there is case-law of the Court resolving the point of law at issue, national courts and tribunals remain entirely at liberty to bring a matter before the Court.[20] The fact that the Court has already interpreted the provisions interpretation of which is sought does not prevent it from giving a further ruling.[21] The national courts and tribunals thus cannot be deprived of the possibility of requesting the Court, through the preliminary ruling procedure, to depart from its case-law.

2. Substance

46. According to the Court's case law, the distinction between the different categories of social security benefits depends on the nature of the risk which they are intended to cover.[22]

47. In the judgment in *Commission* v *Parliament and Council*,[23] the Court classified the care component of DLA as a sickness benefit on the ground, essentially, that it is aimed at helping the disabled person to overcome, as far as possible, his disability in everyday activities. It is not disputed that that allowance, at the time of the facts giving rise to the main proceedings, pursued the same aim.

48. The referring court essentially casts doubt on such a classification, on the ground that the allowance has characteristics analogous to those of the benefits listed in Article 10 of Regulation No 1408/71, in that the latter benefits are granted in the form of long-term or one-off payments in respect of permanent conditions.

49. Mrs Tolley's representative, while pointing out that he did not call into question in the main proceedings the classification of the care component of DLA as a sickness benefit, also puts forward certain arguments in favour of its being classified as an invalidity benefit within the meaning of Article 4(1)(b) of that regulation. In particular, that argument finds support in the judgment in *Stewart*,[24] where the Court emphasised the temporary nature of sickness benefits. Mrs Tolley's

17 — Judgment of 6 October 1982 (283/81, EU:C:1982:335, point 21).

18 — See, in particular, judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 21), and of 1 October 2015, *Doc Generici* (C-452/14, EU:C:2015:644, paragraph 43 and the case law cited).

19 — In the judgment of 27 March 1963, *Da Costa and Others* (28/62 to 30/62, EU:C:1963:6), to which the United Kingdom Government refers, the Court, after pointing out that it had already resolved in a previous judgment a question identical to that referred to it for a preliminary ruling, did not declare the latter question inadmissible, but referred the national court to its previous judgment.

20 — See judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 15), and of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32).

21 — Judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 32 and the case law cited).

22 — See to that effect, judgment of 18 July 2006, *De Cuyper* (C-406/04, EU:C:2006:491, paragraph 27).

23 — Judgment of 18 October 2007 (C-299/05, EU:C:2007:608, paragraphs 66 to 68).

24 — Judgment of 21 July 2011 (C-503/09, EU:C:2011:500, paragraph 37).

representative also observes that the case giving rise to the judgment in *Commission* v *Parliament and Council*[25] concerned the dividing line between social security benefits and special non-contributory benefits. The Court was therefore not required in that case to distinguish sickness benefits from invalidity benefits.

50. To my mind, those considerations do not constitute good reason for the Court to depart from the classification of the care component of DLA employed in that judgment.

51. First, it does indeed follow from the judgment in *Stewart*[26] that, as a general rule, sickness benefits cover the risk connected to a morbid condition involving temporary suspension of a person's activities, while invalidity benefits cover the risk of disability where it is probable that such disability will be permanent or long term.

52. Such a finding, however, cannot mean that the period which the benefit in question is intended to cover is a decisive criterion for the purposes of the classification of the benefit. In that regard, in the judgment in *Commission* v *Parliament and Council*[27] the Court rejected the relevance of such a criterion, since the duration of the disability covered by an invalidity allowance, which it classified as a sickness benefit, was not such as to alter the purpose of that benefit.

53. Likewise, in the judgment in *da Silva Martins*,[28] the Court observed that, 'unlike sickness benefits stricto sensu, benefits relating to the risk of reliance on care — being generally long-term benefits — are not in principle intended to be paid on a short-term basis'. It nonetheless considered that, although the latter benefits may share certain characteristics with invalidity or old-age benefits, the long-term nature of a care allowance did not call into question its classification as a sickness benefit.[29]

54. Second, although the Court did not expressly examine the distinction between sickness benefits and invalidity benefits in the judgment in *Commission* v *Parliament and Council*,[30] it did so in the judgment in *Molenaar*,[31] where it classified as a sickness benefit a long-term care allowance, notably on the ground that it was intended to enable the standard of living of persons requiring care to be improved as a whole by compensating for the additional expense brought about by their reliance on care.[32] On the same basis, the Court applied that classification to comparable benefits, in particular, in the judgments in *Jauch*[33] and *Hosse*.[34] In fact, the care component of DLA also pursues such an objective.

55. Furthermore, in the absence of any provisions in Regulation No 1408/71 dealing specifically with benefits relating to the risk of reliance on care, the Court's decision to regard them, even where they are paid in the long term, as sickness benefits has in my view certain advantages in terms of legal certainty and transparency.

25 — Judgment of 18 October 2007 (C-299/05, EU:C:2007:608).

26 — Judgment of 21 July 2011 (C-503/09, EU:C:2011:500, paragraphs 37 and 38).

27 — Judgment of 18 October 2007 (C-299/05, EU:C:2007:608, paragraph 63). That assessment related to the Swedish invalidity allowance, which was also the subject matter of the action for annulment giving rise to that judgment.

28 — Judgment of 30 June 2011 (C-388/09, EU:C:2011:439, paragraph 48).

29 — Judgment of 30 June 2011, *da Silva Martins* (C-388/09, EU:C:2011:439, paragraph 48).

30 — Judgment of 18 October 2007 (C-299/05, EU:C:2007:608).

31 — Judgment of 5 March 1998 (C-160/96, EU:C:1998:84).

32 — Judgment of 5 March 1998, *Molenaar* (C-160/96, EU:C:1998:84, paragraphs 22 to 25). See also judgment of 8 July 2004, *Gaumain-Cerri and Barth* (C-502/01 and C-31/02, EU:C:2004:413, paragraphs 19 and 20).

33 — Judgment of 8 March 2001 (C-215/99, EU:C:2001:139, paragraph 28).

34 — Judgment of 21 February 2006 (C-286/03, EU:C:2006:125, paragraph 48). See also, to that effect, judgments of 18 October 2007, *Commission* v *Parliament and Council* (C-299/05, EU:C:2007:608, paragraph 61), and of 30 June 2011, *da Silva Martins* (C-388/09, EU:C:2011:439, paragraphs 43 to 48).

56. I would emphasise, in that regard, that the national legislation of the Member States provide for a very wide range of care benefits, some of which share their characteristics with invalidity benefits, while others bear more resemblance to old-age benefits or family benefits. Accordingly, linking each care benefit to a specific branch of social security, on a case-by-case basis, would be liable not only to complicate the exercise of classifying care benefits, but also to render the outcome unforeseeable, thus undermining legal certainty. [35]

57. I therefore consider that the care component of DLA is a sickness benefit. Thus, it does not come within the scope *ratione materiae* of Article 10 of Regulation No 1408/71 and cannot therefore be exported on that basis.

D – Determination of the applicable law (second question)

1. Introductory remarks

58. By its second question, the referring court seeks, in essence, to ascertain the national legislation to which Mrs Tolley was subject, at the time of the facts giving rise to the main proceedings, under the conflict of laws rules in Article 13(2) of Regulation No 1408/71. More specifically, the national court asks whether the legislation of the United Kingdom ceased to be applicable to Mrs Tolley, within the meaning of Article 13(2)(f) of that regulation, following the transfer of her residence to Spain, so that she was subject to the Spanish legislation.

59. To my mind, the implications of the Court's answer to this question should be clarified at the outset.

60. In the event that the United Kingdom legislation continued to apply to Mrs Tolley, the conflict of laws rule in Article 13(2)(f) of that regulation would not apply. She would then have had to be regarded as continuing to be subject to the United Kingdom legislation in application of one of the conflict of laws rules in Article 13(2)(a) to (e) of that regulation. [36] The United Kingdom would therefore indisputably be the 'competent State' for the purposes of Article 22(1)(b) of that regulation. On that basis, the United Kingdom would have to continue to pay Mrs Tolley the care component of DLA after she transferred her residence to Spain (provided that she obtained authorisation to do so — a point to which I shall return).

61. On the other hand, in the event that the United Kingdom legislation ceased to be applicable to Mrs Tolley, she would then have been subject, in application of Article 13(2)(f) of Regulation No 1408/71, to the Spanish social security scheme. It would then still be necessary to determine whether that means that the United Kingdom is no longer the 'competent State' for the purposes of Article 22(1)(b) of that regulation — so that Mrs Tolley would be unable to rely on that provision — or indeed whether that provision may nonetheless apply, provided that the United Kingdom continues to be the 'competent State' for the purposes of that provision because its legislation was applicable when she applied for the benefit which she seeks to export.

35 — See, in that regard, Jorens, Y., et al., 'Coordination of Long-term Care Benefits — current situation and future prospects', Think Tank Report 2011, *Training and Reporting on European Social Security*, available at http://www.tress-network.org/EUROPEAN%20RESOURCES/EUROPEANREPORT/trESSIII_ThinkTankReport-LTC_20111026FINAL_amendmentsEC-FINAL.pdf, pp. 41 and 42.

36 — The decision for reference does not specify on what basis Mrs Tolley paid social security contributions in the past.

62. Furthermore, neither the decision for reference nor the observations submitted to the Court state whether Spanish law made provision, at the time of the facts giving rise to the main proceedings, for benefits in respect of the risk covered by the care component of DLA. [37]

2. The concept of 'legislation' within the meaning of Article 13(2)(f) of Regulation No 1408/71

63. The referring court has doubts as to whether 'legislation', within the meaning of Article 13(2)(f) of Regulation No 1408/71, means all social security legislation or only that relating to the benefit sought. It asks, in particular, whether, in the context of the main proceedings, the fact of retaining a potential right to receive in the future a retirement pension from the United Kingdom institution precludes the conclusion that the legislation of the United Kingdom ceased to be applicable to Mrs Tolley within the meaning of that provision.

64. In that regard, it seems appropriate to me to distinguish at the outset the question of the designation of the applicable legislation from the question of the retention of acquired rights. [38]

65. 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, [39] national legislation in social security matters. From that aspect, Article 13(2) of that regulation seeks to prevent the concurrent application of several national legislations and the complications that might ensue and to ensure that a worker is not left without social security cover because there is no legislation which is applicable to him. [40]

66. The retention of acquired rights refers essentially to the retention of entitlement to a social security benefit following the transfer of the worker's residence to a Member State other than that under whose legislation he acquired (or is in the process of acquiring) entitlement to such a benefit. [41]

67. A number of provisions of Regulation No 1408/71 thus seek to ensure that rights acquired or in the process of being acquired are retained even when, following the transfer of the worker's residence, the legislation applicable to him changes. In particular, Article 10 of that regulation provides for the right to maintain, in particular, invalidity and old-age cash benefits. As regards sickness benefits, to my mind Article 19 and Article 22(1)(b) of that regulation also enshrine such a right. [42]

37 — To my knowledge, it was only from 1 January 2007 that Spanish law initiated the gradual implementation of a mechanism for the provision of care, by means of Law No 39/2006 of 14 December 2006 on the promotion of individual independence and assistance to persons in need of care (BOE No 299, 15 December 2006, p. 44142). That assessment, however, is ultimately within the jurisdiction of the referring court.

38 — See. to that effect, judgments of 12 June 1986, *Ten Holder* (302/84, EU:C:1986:242, paragraph 22), and of 10 July 1986, *Luijten* (60/85, EU:C:1986:307, paragraph 15).

39 — However, each Member State has the option, on certain conditions, to grant social security benefits to workers who are insured under the social security scheme of another Member State (see, in particular, judgments of 20 May 2008, *Bosmann* (C-352/06, EU:C:2008:290, paragraph 31); of 12 June 2012, *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10, EU:C:2012:339, paragraph 68); and of 11 September 2014, *B.* (C-394/13, EU:C:2014:2199, paragraph 28)). In addition, the principle that a single legislation is applicable does not preclude a worker, while being compulsorily insured under the social security scheme of his Member State of residence, continuing to remain insured, on an optional basis, under the social security scheme of the Member State of his last employment in respect of the branches for which he is no longer compulsorily covered (judgment of 7 July 2005, *van Pommeren-Bourgondiën* (C-227/03, EU:C:2005:431, paragraphs 36 to 38)).

40 — See, in particular, judgment of 7 July 2005, *van Pommeren-Bourgondiën* (C-227/03, EU:C:2005:431, paragraph 34 and the case law cited).

41 — In particular, a person who works in one Member State (or, successively, in several Member States) typically acquires in those States pension rights which he retains after transferring his residence to another Member State. Article 17a of Regulation No 1408/71 envisages such a case in so far as it applies to persons who, while being subject to the legislation of their Member State of residence, are recipients of pensions due under the legislation of another Member State.

42 — See, to that effect, Opinion of Advocate General Jacobs in *Kuusijärvi* (C-275/96, EU:C:1997:613, point 65) and Opinion of Advocate General Cruz Villalón in *Stewart* (C-503/09, EU:C:2011:159, point 47).

68. A worker may therefore be insured under the social security scheme of one Member State while receiving, from another Member State in which he is not insured, a benefit determined on the basis of the rights which he has previously acquired in that Member State. Where the social security scheme of the Member State of insurance also insures against the risk covered by that benefit, the rules preventing the overlapping of benefits laid down in EU law and Member States' national legislation prevent a worker from receiving several benefits of the same kind relating to the same period of insurance. [43]

69. The legislature has now removed any ambiguity in that respect, following the adoption of Regulation No 883/2004, Article 11(3)(e) whereof, which essentially reproduces Article 13(2)(f) of Regulation No 1408/71, expressly provides that the conflict rule which it lays down is to apply 'without prejudice to other provisions of this Regulation guaranteeing [the persons concerned] benefits under the legislation of one or more other Member States'.

70. Having regard to those factors, I consider that the legislation of a Member State 'ceases to be applicable' to a worker, within the meaning of Article 13(2)(f) of Regulation No 1408/71, where the worker is no longer insured under the social security scheme of that Member State, irrespective of whether he retains rights acquired or in the process of being acquired. [44]

71. Thus, the fact that Mrs Tolley continued to be insured against the risk of old age in the United Kingdom does not prevent the law of that Member State having ceased to apply to her for the purposes of Article 13(2)(f) of Regulation No 1408/71.

3. The time from which United Kingdom law ceased to be applicable to Mrs Tolley

72. In accordance with Article 10b of Regulation No 574/72, the date and conditions on which the legislation of a Member State ceases to be applicable are to be determined by that Member State. [45]

73. Point 19 of the 'United Kingdom' section of Annex VI to Regulation No 1408/71 states, in essence, that the legislation of that Member State is to cease to apply to a person, for the purposes of Article 13(2)(f) of that regulation, at the end of the day on the latest of the events listed in that point.

74. According to the United Kingdom Government, that legislation ceased to apply to Mrs Tolley on the day following the day on which her residence was transferred to Spain, pursuant to point 19(a) (that is to say, in 2002).

75. Mrs Tolley's representative, on the other hand, claims that the date on which United Kingdom legislation ceased to apply corresponds, under point 19(c)(i), to the day following the last day of the period during which she received the care component of DLA that began before the date of transfer of her residence (that is to say, in 2007). Mrs Tolley's representative claims, in that respect, that she continued to receive that allowance between 2002 and 2007 even though the Secretary of State subsequently considered that she was no longer entitled to receive it for that period under the United Kingdom legislation.

43 — See, in particular, Articles 12, 46 a, 46b, 46c and 76 of Regulation No 1408/71 and Articles 7 to 10a of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ English Special Edition 1972(I), p. 149).

44 — Thus, as Advocate General Jacobs observed in his Opinion in *Kuusijärvi* (C-275/96, EU:C:1997:613, point 54), 'the fact that the legislation of [the State in which a person was last employed] ceases to be applicable will not necessarily, or even usually, mean that that person simultaneously loses his entitlement to continued payment [of a benefit which he received from that State]'.

45 — See to that effect, judgment of 3 May 2001, *Commission* v *Belgium* (C-347/98, EU:C:2001:236, paragraph 31).

76. Like the Commission, I consider that, in so far as the date and conditions on which the legislation of a Member State ceases to apply to a person are a matter for the domestic law of that Member State, it is for the referring court to determine whether Mrs Tolley's situation is governed by point 19(a) or by point 19(c)(i) of the 'United Kingdom' section of Annex VI to Regulation No 1408/71.

E – Retention of the care component of DLA on the basis of Article 19(1) and/or Article 22(1)(b) of Regulation No 1408/71 (third question)

1. Introductory remarks

77. By its third question, the referring court asks, in essence, whether, even though the United Kingdom legislation ceased to apply to Mrs Tolley for the purposes of Article 13(2)(f) of Regulation No 1408/71 following the transfer of her residence, she was nonetheless entitled to continue to receive the care component of DLA on the basis of Article 19(1) and/or Article 22(1)(b) of that regulation. [46]

78. The United Kingdom and Norwegian Governments and the Commission claim that Mrs Tolley's situation does not fall within the scope of those provisions; they put forward, essentially, the following arguments:

— first, the United Kingdom Government and the Commission claim that Mrs Tolley does not have the status of worker for the purposes of those provisions, which refer only to persons engaged in an occupational activity at the time when they apply to retain the benefit in question, and

— second, the United Kingdom and Norwegian Governments submit that the United Kingdom is not the 'competent State' within the meaning of those provisions. [47] They maintain that that concept refers to the Member State whose legislation applies under the conflict of laws rules in Article 13(2) of Regulation No 1408/71 during the period in respect of which the benefit in question is sought — namely, according to those Governments, Spain — and not to the Member State whose legislation applied when application was made for the grant of that benefit.

79. In the event that those arguments should be rejected, it will be necessary to determine whether Article 19(1) and/or Article 22(1)(b) of that regulation precludes a Member State from making the continuation of a sickness benefit subject to a residence condition. If the answer is in the affirmative, it will then be necessary to evaluate the consequences attaching to the failure to obtain authorisation before the transfer of the recipient's residence.

80. Before I analyse those questions, it seems appropriate to point out that those provisions do not distinguish between sickness benefits stricto sensu and benefits designed to cover the risk of reliance on care, which, unlike the former, will be paid in the long term. [48] The interpretation of those provisions will therefore take account of those two types of benefits as a whole.

81. It would be for the legislature, if appropriate, to insert into Regulation No 1408/71 further provisions specifically covering benefits designed to cover the risk of reliance on care if it should wish to subject them to a special regime in the light, in particular, of the financial stakes involved.

46 — The Court has already ruled, in the judgment in *da Silva Martins* (judgment of 30 June 2011 (C-388/09, EU:C:2011:439)), on the exportability of benefits designed to cover the risk of reliance on care, which the person concerned had begun to receive from the institution of a first Member State, following the transfer of his residence to a second Member State. However, the Court examined that problem not from the aspect of Article 19(1) or Article 22(1)(b) of Regulation No 1408/71, but from that of Articles 27 and 28 of that regulation. The latter provisions, which apply to 'persons entitled to a retirement pension', do not relate to Mrs Tolley's situation, since she was not entitled to a retirement pension under either United Kingdom law or Spanish law.

47 — At the hearing, the Commission also seems to have supported that position (see footnote 54 of this Opinion).

48 — See point 53 of this Opinion.

2. The scope of Article 19 and that of Article 22(1)(b) of Regulation No 1408/71

82. As the Court held in the judgment in *von Chamier-Glisczinski*, Article 19 and Article 22(1)(b) of Regulation No 1408/71 refer to different situations and therefore pursue different aims. [49]

83. Article 22(1)(b) of that regulation (under the title referring to 'return to or transfer of residence to another Member State during sickness or maternity') relates to the situation of a person who transfers his or her residence from the Member State in which he or she began to receive a sickness or maternity benefit to another Member State. That provisions makes the maintenance of that benefit conditional on obtaining authorisation from the competent institution of the first Member State.

84. On the other hand, Article 19 of that regulation (entitled 'Residence in a Member State other than the competent State — General rules) — which does not impose such a condition — in my view permits only a worker who at the time of applying for such a benefit already resides in a Member State other than that in which he works to receive the benefit in the Member State in which he resides. [50]

85. That interpretation follows, in particular, from a systematic reading of that regulation. If Article 19 applied where the worker has begun to receive the benefit in question before transferring his residence — that is to say, in a situation also covered by Article 22(1)(b) of Regulation No 1408/71 –, the authorisation requirement laid down in Article 22(1)(b) would be rendered meaningless.

86. Since Mrs Tolley began to receive the care component of DLA when she was resident in the United Kingdom, it is appropriate to examine her situation solely by reference to Article 22(1)(b) of that regulation.

3. The concept of 'worker' for the purposes of Article 22(1)(b) of Regulation No 1408/71

87. According to the first part of the third question, the referring court seeks to ascertain whether a person in Mrs Tolley's position has the status of worker for the purposes of Article 22(1) of Regulation No 1408/71 and is therefore a person covered by that provision.

88. Mrs Tolley's representative submits that the concept of worker has a uniform meaning in all provisions of that regulation. Thus, since Mrs Tolley meets the definition of worker for the purposes of Article 1(a) of that regulation, she must also be regarded as a worker for the purposes of the application of Article 22(1) of that regulation.

89. On the other hand, the United Kingdom Government and the Commission claim that the concept of worker for the purposes of Articles 19 to 22 of Regulation No 1408/71 has a particular meaning. That concept designates only workers who are engaged in an occupational activity at the time when they apply for the benefits in question on the basis of one of those provisions.

90. To my mind, the latter argument offends against the judgment in *Pierik*, [51] from which it is apparent that the reference to worker in Article 22(1)(b) of that regulation is not intended to restrict the scope of that provision to active workers as opposed to inactive workers.

49 — Judgment of 16 July 2009 (C-208/07, EU:C:2009:455, paragraph 46).

50 — In the judgment of 16 July 2009, *von Chamier-Glisczinski* (C-208/07, EU:C:2009:455, paragraphs 44 to 46), the Court, without taking a position on the dividing line between the scope of Article 19(1) and that of Article 22(1)(b) of Regulation No 1408/71, considered that the fact that the claimant had transferred her residence from Germany to Austria while she was already receiving the German sickness benefits which she sought to export argued in favour of the applicability of the second of those provisions.

51 — Judgment of 31 May 1979 (182/78, EU:C:1979:142, paragraph 7). The Court did not draw a distinction in that respect between a worker who has definitively and one who has temporarily ceased all occupational activity.

91. In addition, as the concept of worker is defined in Article 1(a) of that regulation, the legislature, in my view, intended, when it used that expression in other provisions of the regulation, to designate the persons covered by that definition. Conversely, as Mrs Tolley's representative observes, when the legislature specifically intended to designate workers engaged in an activity, it uses different terminology. [52]

92. Consequently, I consider that if Mrs Tolley has the status of worker for the purposes of Article 1(a) of that regulation, she also has that status for the purposes of Article 22(1)(b) of that regulation.

93. That conclusion is not called into question by the argument put forward by the United Kingdom and Norwegian Governments and the Commission, that the distinction between workers (whose situation is governed by Articles 19 to 22 of Regulation No 1408/71, under Section 2 of Chapter 1 of Title III of that regulation) and the unemployed (referred to in Article 25 of that regulation, under Section 3 of that chapter), would be rendered meaningless if persons who have definitively ceased an occupational activity were regarded as workers.

94. I observe, in that regard, that if Mrs Tolley was not regarded as a worker for the purposes of Articles 19 to 22 of that regulation, she would not be covered by any of the relevant provisions of Chapter 1 of Title III of that regulation. She cannot be classified as a pension claimant or a pensioner within the meaning of the provisions of Sections 4 and 5 of Chapter 1 of Title III of Regulation No 1408/71. It is appropriate in my view to apply Articles 19 to 22 of that regulation to situations which are not governed by the specific provisions in Sections 3 to 5 of that chapter. That is so in spite of the fact that such an application could result in a person in Mrs Tolley's situation being allowed to export a sickness benefit, when, as the case may be, other categories of economically inactive persons would not benefit from it.

4. The concept of 'competent State' within the meaning of Article 22(1)(b) of Regulation No 1408/71

(a) Outline of the problem

95. In order to examine the second part of the third question, it is necessary, as a first step, to clarify the concept of 'competent State' within the meaning of Article 22(1)(b) of Regulation No 1408/71 and, to that end, to explain the way in which that provision interacts with Article 13(2)(f) of that regulation.

96. The present case raises the question whether, in a situation such as that at issue in the main proceedings, the competent State within the meaning of Article 22(1)(b) of that regulation means the State whose legislation is applicable after the transfer of the worker's residence or the State under whose legislation entitlement to the sickness benefits was acquired.

97. The United Kingdom and Norwegian Governments argue in favour of the first of those alternatives: since Spain should be regarded as the competent State, [53] Article 22(1)(b) of Regulation No 1408/71, which refers to the situation of workers who reside in a Member State other than the competent State, does not apply. [54]

52 — Thus, Article 13(2)(a) and (b) of Regulation No 1408/71 refers to a 'person [who is] employed' and a 'person who is self-employed'.

53 — In the United Kingdom Government's submission, that would apply from the day following the day on which Mrs Tolley established her residence there (see point 74 of this Opinion).

54 — At the hearing, the Commission seems to have advocated the same approach, since it claimed that Article 22(1)(b) of Regulation No 1408/71 refers only to economically active persons, since economically inactive persons are subject to the legislation of the Member State of their residence.

98. Such an approach would amount, in fact, to taking the view that Article 22(1)(b) of that regulation does not allow a person who has ceased all occupational activity to receive sickness benefits acquired in the Member State in which he was last employed after transferring his residence to another Member States. Thus, by the effect of Article 13(2)(f) of that regulation, Article 22(1)(b) would apply only to workers who were active at the time of transferring their residence.

99. Mrs Tolley's representative advocates the second of those alternatives, and thus submits that Article 13(1)(f) of that regulation is therefore without prejudice to the right for a worker who has ceased all occupational activity to continue to receive the sickness benefits which he began to receive in one Member State after he has transferred his residence to another Member State.

100. For the reasons set out below, I find the latter approach convincing.

(b) Literal interpretation

101. Under Article 1(o)(i) in conjunction with Article 1(q) of Regulation No 1408/71, the 'competent State' means, in particular, the Member State in which the institution with which the worker is insured 'at the time of the application for benefit' is situated. [55]

102. In accordance with that definition, the 'competent State' to which Article 22(1)(b) of that regulation refers means, in my view, the Member State which was competent, on the basis of the provisions of Title II, *at the time of acquisition of entitlement* to the benefits whose export is requested. In the present case, that is the United Kingdom, since Mrs Tolley submitted her application for the benefit at issue in the main proceedings in that Member State several years before transferring her residence to Spain.

103. In order to substantiate that interpretation, I observe, first of all, that a comparable temporal aspect already attaches to the concept of 'competent State' in the context of another provision of that regulation, namely Article 71(1)(a). [56] As is apparent from the judgment in *Adanez-Vega*, [57] that concept means the State that was competent *at the time of the last employment* of the person concerned.

104. Next, to my mind it is also from that aspect that point 20 of the 'United Kingdom' section of Annex VI to Regulation No 1408/71 provides that 'the fact that a person has become subject to the legislation of another Member State in accordance with Article 13(2)(f) of [that regulation] … shall not prevent', in particular, 'the application to him by the United Kingdom as the competent State of the provisions relating to employed or self-employed persons of Title III, Chapter 1 [concerning sickness and maternity benefits] … if he remains an employed or self-employed person for those purposes and was last so insured under the legislation of the United Kingdom'.

105. That point means that the United Kingdom accepts the possibility that it will continue to be the competent State within the meaning of the provisions of Title III, Chapter 1 of Regulation No 1408/71 even where the legislation of the United Kingdom ceases to apply to the worker for the purposes of Article 13(2)(f) of that regulation. In my view, that point therefore states that that provision does not preclude the application of the provisions of Title III of that regulation relating to the maintenance of acquired rights, including Article 22(1)(b).

55 — There is also a reference to the Member State in which 'the institution from which the person concerned is entitled or would be entitled to benefits if he … were resident in the territory of the Member State in which the institution is situated'.

56 — Article 71(1)(a) of Regulation No 1408/71 provides, in essence, that an unemployed frontier worker who, during his last employment, was residing in the territory of 'a Member State other than the competent State' is to receive unemployment benefits either from the competent institution (if he is partly or intermittently unemployed) or from the institution of the country of residence (if he is wholly unemployed).

57 — Judgment of 11 November 2004 (C-372/02, EU:C:2004:705, paragraph 29).

106. Last, retention of entitlement to a cash sickness benefit from a Member State even where the transfer of the residence of the recipient to another Member State entails a change of the applicable legislation corresponds to the situation which now prevails under Regulation No 883/2004. That regulation does not contain a specific provision on the maintenance of sickness benefits comparable to Article 22(1)(b) of Regulation No 1408/71; on the other hand, it contains, in Article 7, a provision on the waiving of residence rules which covers all social security cash benefits (and no longer only those listed in Article 10 of Regulation No 1408/71).

107. Furthermore, contrary to the United Kingdom Government's contention, the judgment in *Kuusijärvi*[58] does not preclude that interpretation. After classifying the benefit at issue in the case giving rise to that judgment as a family benefit (and not as a sickness benefit), the Court ruled on the interpretation not of Article 22(1)(b) but of Articles 73 and 74 of Regulation No 1408/71.[59] However, those provisions do not concern the maintenance of a benefit which the worker began to receive before transferring his residence.[60]

(c) Teleological interpretation

108. The literal interpretation described above is borne out by a teleological reading of Article 13(2)(f) of Regulation No 1408/71.

109. Before Article 13(2)(f) of that regulation was introduced by Regulation (EEC) No 2195/91,[61] the Court had decided, in the judgment in *Ten Holder*,[62] that, in the absence of a provision specifically governing the legislation applicable to workers who cease to carry on an occupational activity in one Member State and who will not work in another Member State, those workers continue to be subject to the legislation of the Member State in which they were last employed, in application of Article 13(2)(a) of that regulation.

110. The Court subsequently limited that finding to situations in which the worker has only temporarily ceased all occupational activity.[63] Consequently, the situation of a person who has definitively ceased to work was no longer covered by any of the conflict of laws rules in Title II of Regulation No 1408/71.[64]

111. By introducing Article 13(2)(f) of Regulation No 1408/71, the legislature sought to fill the gap identified in the aftermath of that case-law.[65] To that end, it opted for the application, to a worker who has ceased — definitively or temporarily[66] — all occupational activity, of the law of the Member State of his residence.

58 — Judgment of 11 June 1998 (C-275/96, EU:C:1998:279).

59 — Judgment of 11 June 1998, *Kuusijärvi* (C-275/96, EU:C:1998:279, paragraph 71).

60 — Furthermore, Article 73 of Regulation No 1408/71 refers not to the 'competent State' but to the Member State to whose legislation the worker is subject.

61 — Council Regulation of 25 June 1991 amending Regulation No 1408/71 and Regulation No 574/72 (OJ 1991 L 206, p. 2).

62 — Judgment of 12 June 1986 (302/84, EU:C:1986:242, paragraph 15).

63 — See judgments of 21 February 1991, *Noij* (C-140/88, EU:C:1991:64, paragraphs 9 and 10); of 21 February 1991, *Daalmeijer* (C-245/88, EU:C:1991:66, paragraphs 12 and 13); and of 10 March 1992, *Twomey* (C-215/90, EU:C:1992:117, paragraph 10).

64 — In those circumstances, the provisions of Titles II and III of Regulation No 1408/71 did not preclude a person in such a situation from being subject to the law of the Member State in which he resides (see judgment of 21 February 1991, *Noij* (C-140/88, EU:C:1991:64, paragraph 15)).

65 — See the third recital of Regulation No 2195/91.

66 — See judgment of 11 June 1998, *Kuusijärvi* (C-275/96, EU:C:1998:279, paragraph 40).

112. If that Member State were regarded as the competent State within the meaning of Article 22(1)(b) of that regulation, such a worker would no longer come within the scope of that provision. In fact, he would, by definition, not reside in a 'Member State other than the competent State'. [67]

113. In the first place, in so far as it contravenes the principle of retention of acquired rights enshrined in Regulation No 1408/71, [68] I doubt that such a consequence was sought by the legislature. Moreover, there is nothing in the wording of that regulation or in the *travaux préparatoires* to suggest that the legislature intended, by introducing Article 13(2)(f) of that regulation, to preclude the application of Article 22(1)(b) of that regulation to the situation of inactive workers.

114. In the second place, if a person in receipt of a cash sickness benefit were deprived of that benefit on transferring his residence to another Member State, he would *de facto* be prevented from thus moving his residence, without interrupting his medical treatment. Such a consequence would in my view clash with the objective of promoting the mobility of workers pursued by Regulation No 1408/71 and by Article 48 TFEU. [69]

115. The interpretation which I support seems to me, in the third place, to be consistent with other provisions of Regulation No 1408/71 that demonstrate the legislature's intention to avoid placing the burden of the costs of certain sickness benefits on the Member State of residence of a person who has never worked there. In particular, Article 28(1) of that regulation provides that, where a pensioner who is entitled to a pension under the legislation of one Member State is not entitled to sickness benefits under the legislation of the Member State in which he resides, he is nevertheless to receive those benefits from the institution of the first State in so far as he would be entitled to them if he were resident there.

(d) Conclusion

116. In the light of all of the foregoing considerations, I consider that the competent State within the meaning of Article 22(1)(b) of Regulation No 1408/71 means the Member State under whose legislation the right was acquired whose retention is sought under that provision. Thus, even though the United Kingdom legislation ceased to apply to Mrs Tolley following the transfer of her residence, so that she was subject to Spanish law under Article 13(2)(f) of that regulation, the United Kingdom continued to be the competent State within the meaning of Article 22(1)(b) of that regulation so far as the retention of the benefit of the care component of DLA is concerned.

5. The illegality of the residence conditions

117. For the purpose of answering the second part of the third question, it is necessary, as a second step, to determine whether Article 22(1)(b) Regulation No 1408/71 precludes a residence condition such as that laid down in the United Kingdom legislation.

67 — Likewise, a worker who sustained an accident at work or contracted an occupational disease in one Member State would, after ceasing his occupational activity and transferring his residence to another Member State, lose his benefits in respect of accidents at work and occupational diseases from the first Member State, pursuant to Article 55(1)(b) of Regulation No 1408/71. That provision, like Article 22(1)(b) of that regulation, refers to a worker 'who, after having become entitled to benefits chargeable to the competent institution, is authorised by that institution to return to the territory of the Member State where he is resident, or to transfer his place of residence to the territory of another Member State'.

68 — See the sixth recital of Regulation No 1408/71.

69 — See the first and second recitals of Regulation No 1408/71.

118. In that regard, the United Kingdom Government has claimed that, even on the assumption that the United Kingdom was meant to be the competent State within the meaning of that provision, that provision applies, as is clear from its wording, only on condition that the worker meets the conditions required by that State in order to be entitled to the benefits. In fact, the United Kingdom makes that entitlement subject to the residence condition the legality of which is challenged in the main proceedings.

119. Such an argument cannot succeed. As Advocate General Jacobs observed in his Opinion in *Kuusijärvi*, 'if [the entitlement conferred by Article 22(1)(b) of Regulation No 1408/71] could be defeated by a national residence requirement the provision would be entirely devoid of purpose'.[70]

120. That said, EU law does not in my view prevent the competent State within the meaning of that provision from re-assessing, in so far as its domestic law so provides, entitlement to or the amount of the benefit by reference to factors such as the standard of living in the State of residence or changes in the needs of the recipient. Conversely, it cannot deprive the recipient of such entitlement on the sole ground that he is resident in another Member State.

6. The consequences of the absence of authorisation

121. In accordance with Article 22(1)(b) of Regulation No 1408/71, the recipient of a cash sickness benefit is entitled to retain that benefit after he has transferred his residence only on condition that he was authorised to do so by the competent institution. It is apparent from the decision for reference that Mrs Tolley did not seek, nor *a fortiori* was she granted, such authorisation by the competent United Kingdom institution. The referring court considers, however, that if she had applied for authorisation it would have had to be granted.[71] In fact, Article 22(2) of that regulation limits the possibility of refusing authority to situations — neither of which applies to Mrs Tolley — in which 'it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment'.

122. Accordingly, it is appropriate — still in the context of the analysis of the second part of the third question — to evaluate, as a third step, whether the absence of authorisation precludes the application of Article 22(1)(b) of that regulation even where authorisation could not have been refused if it had been requested.

123. Regulation No 1408/71 does not specify the sanction applicable where, although none of the circumstances that would allow the competent Member State to refuse to grant authorisation is present, the person concerned does not have administrative authorisation.

70 — Opinion in *Kuusijärvi* (C-275/96 (EU:C:1997:613, point 65). Contrary to the United Kingdom Government's submission, the Court did not reject that approach (see paragraph 107 of this Opinion). See also, by analogy, judgment of 30 June 1966, *Vaassen-Göbbels* (61/65, EU:C:1966:39, p. 277) and Opinion of Advocate General Darmon in *Newton* (C-356/89, EU:C:1991:98, point 23).

71 — I note that, on that basis, the Upper Tribunal considered that Mrs Tolley was entitled to export the care component of DLA after transferring her residence, even though such transfer had not been authorised (*Secretary of State for Work and Pensions* v *LT* (DLA) [2012] UKUT 282 (AAC), paragraphs 88 and 89).

124. In that regard, I consider it appropriate to examine more closely the objectives of the authorisation requirement set out in Article 22(1)(b) of that regulation. Article 22(2) of that regulation indicates, in my view, that that requirement is intended to ensure that disproportionate burdens are not placed on the State responsible for paying the benefit where the recipient travels to another Member State where his health may deteriorate or in which the provision of treatment might be jeopardised, thus entailing increased expense on the part of the first Member State. [72]

125. An interpretation to the effect that, even in the absence of authorisation to that effect, the worker would be entitled to retain a benefit provided that his move is not liable to compromise his health or the application of medical treatment would be likely to impede the attainment of such an objective. Such an interpretation might encourage a worker to transfer his residence without having sought or obtained authorisation. It might then transpire, after the event, that that transfer is liable to be detrimental to his health or his medical treatment.

126. In those circumstances, Article 22(1)(b) and (2) of Regulation No 1408/71 cannot require Member States to grant a worker the benefit of Article 22(1)(b) of that regulation where authorisation for that purpose was not obtained before the worker transferred his residence. [73]

127. However, I recall that Regulation No 1408/71 coordinates the national social security schemes without harmonising them. [74] From that aspect, since that regulation does not specify the consequences of the absence of authorisation under Article 22(1)(b), it is open to the Member States to grant workers, under their domestic laws, the right to export the benefits provided for in that provision even in such a situation. [75] That is particularly so because recognition of such a right, by conferring on migrant workers a wider protection than that available under that regulation, contributes to the attainment of the underlying objective of facilitating freedom of movement for workers. [76]

V – Conclusion

128. In the light of all of the foregoing, I propose that the Court should answer the questions submitted by the Supreme Court of the United Kingdom as follows:

(1) An allowance such as the care component of Disability Living Allowance constitutes a sickness benefit for the purposes of Article 4(1)(a) of Regulation (EEC) No 1408/71 of the Council 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1386/2001 of 5 June 2001.

(2) Article 13(2)(f) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 1386/2001, must be interpreted as meaning that a person ceases to be subject to the legislation of a Member State when he ceases to be insured under the social security scheme of that Member State under its domestic law. That is so even if

72 — This consideration seems to be particularly relevant where the State responsible for paying the benefit in question (which is the competent State for the purposes of Article 22(1)(b) of Regulation No 1408/71) is also the competent State under the conflict of laws rules in Article 13(2) of that regulation, and will therefore be required, generally, to bear the sickness insurance costs relating to the deterioration of the health of the person concerned. The same consideration also applies, nonetheless, where the State responsible for paying the benefit is no longer the competent State under the conflict of laws rules. In such a situation, the State responsible for paying the benefit will, where appropriate, have to continue to pay the benefit for a longer period in application of Article 22(1)(b) of that regulation.

73 — See, by analogy, as regards the prior authorisation condition in Article 22(1)(c) of Regulation No 1408/71, judgment of 23 October 2003, *Inizan* (C-56/01, EU:C:2003:578, paragraph 24).

74 — See, in particular, judgment of 14 October 2010, *van Delft and Others* (C-345/09, EU:C:2010:610, paragraph 99 and the case law cited).

75 — See, by analogy, judgment of 20 May 2008, *Bosmann* (C-352/06, EU:C:2008:290, paragraphs 27 to 31).

76 — See. to that effect, judgment of 12 June 2012, *Hudzinski and Wawrzyniak* (C-611/10 and C-612/10, EU:C:2012:339, paragraph 57).

that person continues to be insured against the risk of old age under the legislation of that Member State, in that he would be entitled to his share of a retirement pension in so far as he meets the contribution requirements at the statutory retirement age.

It is for the national court to determine, in the light of the circumstances of the dispute before it, the time at which the United Kingdom legislation ceases to be applicable, within the meaning of Article 13(2)(f) of that regulation, in accordance with the criteria laid down in point 19 of the 'United Kingdom' section of Annex VI to that regulation.

(3) A person who ceases to be subject to the legislation of a Member State, without the legislation of another Member State becoming applicable to him under points (a) to (e) of Article 13(2) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 1386/2001, and who is therefore subject to the legislation of the Member State in which he resides under point (f) of that provision, is nonetheless entitled, under Article 22(1)(b) of that regulation, and according to the procedures laid down in that provision, to retain the sickness benefits which he began to receive from the institution of the first Member State before transferring his residence to the second Member State.

(4) The concept of 'employed person or self-employed person' defined in Article 1(a) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 1386/2001, and set out, in particular, in Article 22(1)(b) of that regulation, includes a person who has ceased all employed or self-employed activity, on condition that that person is insured, even against only a single risk, on a compulsory or optional basis, under a general or special social security scheme referred to in Article 1(a) of that regulation, irrespective of the existence of an employment relationship.

(5) Article 22(1)(b) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 1386/2001, precludes a Member State from making retention of entitlement to a cash sickness benefit subject to a residence condition such as that at issue in the main proceedings.

(6) Article 22(1)(b) and (2) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 1386/2001, must be interpreted as meaning that a person who has ceased all employed or self-employed activity and who has begun to receive cash sickness benefits in one Member State before transferring his residence to another Member State retains the right to receive those benefits from the institution of the first Member State after transferring his residence, on condition that he has received authorisation to do so.