



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 20 March 2014¹

Case C-255/13

I

v

Health Service Executive

(Request for a preliminary ruling from the High Court (Ireland))

(Coordination of social security systems — Articles 19 and 20 of Regulation (EC) No 883/2004 — Concepts of ‘stay’ and of ‘residence’ — Article 11 of Regulation (EC) No 987/2009 — Citizen residing in one Member State afflicted with a severe medical condition while holidaying in a second Member State — Stay in the second Member State for more than 11 years on account of that condition and the lack of treatment available in the first Member State)

1. Health problems can occur suddenly in the course of a holiday in another Member State. In such cases, EU social security coordination — brought about originally under Regulation (EEC) No 1408/71² and, currently, under Regulation (EC) No 883/2004³ — makes it possible to receive medical treatment in the Member State of stay, the costs of which are to be reimbursed by the Member State of residence. However, if the treatment abroad takes a particularly long time, is the Member State of residence entitled to discontinue coverage unilaterally because of that lengthy duration? Put differently, could the very exercise of the right conferred by those regulations eventually lead to its loss?

2. For Mr I, a holiday trip with his partner away from his home in Ireland turned out to be what I can only describe as unfortunate. For various reasons, he now lives in the place where he fell ill — Germany — in order to receive treatment there. In certain ways, he is something of a ‘medical refugee’. However, after he had remained for more than 11 years in Germany, the Irish Health Service Executive (‘the HSE’) and the Irish Government claim that it is no longer feasible to consider Mr I to be a resident of Ireland. The HSE therefore announced that it would stop covering the costs of Mr I’s treatment, a decision which gave rise to the proceedings before the referring court.

¹ — Original language: English.

² — Council Regulation 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 (OJ, English Special Edition 1971(II), p. 416), as amended.

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), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43), Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35), and Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4).

I – Legal context

A – Regulation No 883/2004

3. Articles 19 and 20 of Regulation No 883/2004 replaced, in substance, Article 22 of Regulation No 1408/71.⁴

4. Article 19 ('Stay outside the competent Member State') provides:

'1. Unless otherwise provided for by paragraph 2, an insured person and the members of his/her family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation.'

5. Article 20 ('Travel with the purpose of receiving benefits in kind — authorisation to receive appropriate treatment outside the Member State of residence') states as follows:

'1. Unless otherwise provided for by this Regulation, an insured person travelling to another Member State with the purpose of receiving benefits in kind during the stay shall seek authorisation from the competent institution.

2. An insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving the treatment appropriate to his/her condition shall receive the benefits in kind provided, on behalf of the competent institution, by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though he/she were insured under the said legislation. The authorisation shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he/she cannot be given such treatment within a time limit which is medically justifiable, taking into account his/her current state of health and the probable course of his/her illness.

...'

B – Regulation No 987/2009

6. Article 11 ('Elements for determining residence') of Regulation (EC) No 987/2009⁵ provides:

'1. Where there is a difference of views between the institutions of two or more Member States about the determination of the residence of a person to whom [Regulation No 883/2004] applies, these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate:

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

4 — Article 90(1) of Regulation No 883/2004 repealed Regulation No 1408/71 with effect from the date of application of Regulation No 883/2004 (1 May 2010).

5 — Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

- (b) the person's situation, including:
 - (i) the nature and the specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;
 - (ii) his family status and family ties;
 - (iii) the exercise of any non-remunerated activity;
 - (iv) in the case of students, the source of their income;
 - (v) his housing situation, in particular how permanent it is;
 - (vi) the Member State in which the person is deemed to reside for taxation purposes.

2. Where the consideration of the various criteria based on relevant facts as set out in paragraph 1 does not lead to agreement between the institutions concerned, the person's intention, as it appears from such facts and circumstances, especially the reasons that led the person to move, shall be considered to be decisive for establishing that person's actual place of residence.'

II – Facts, procedure and the question referred

7. Mr I is an Irish national. He has worked in both Ireland and the United Kingdom. In the summer of 2002, at the age of 45, he was holidaying abroad with his partner, Ms B, a Romanian national.

8. While on holiday, Mr I was admitted as an emergency patient to the Universitätsklinikum Düsseldorf ('Uni Klinik') (Germany). Mr I was originally diagnosed as suffering from tetanus, but it later transpired that he was suffering from a rare, bilateral infarct to his brain stem. It appears that the difficulty in diagnosing him, coupled with the impact of the infarct, led him to suffer from severe quadriplegia and loss of motor function. Shortly after May 2003, Mr I was found to have a genetic mutation affecting the composition of his blood, a factor which requires constant monitoring and treatment. Moreover, since the commencement of the proceedings before the High Court, he has been diagnosed with cancer, for which he is also receiving treatment.⁶

9. Thus, since August 2002, Mr I has remained gravely ill and needed constant care and attention from the consultants attached to the Uni Klinik. He is now completely wheelchair-bound and has only very limited use of his arms and hands. Since his discharge from hospital in 2003 he has lived with Ms B, who has looked after him. They live in a rented apartment in Düsseldorf which is suitable for wheelchair use.

10. Mr I receives a disability allowance from Ireland⁷ and a small occupational pension from the United Kingdom. He does not receive any allowance or benefit from Germany. Mr I states that he is compelled to live in Germany — a Member State with which he has only a limited connection — because of his state of health and his need to receive ongoing treatment, but that his desire is to

⁶ — For the sake of completeness, it should also be mentioned that Mr I suffered a heart attack in March 1998.

⁷ — As indicated by the Commission, under Article 70(4) of Regulation No 883/2004, that allowance, which is listed in Annex X to that regulation, is to be provided exclusively in the Member State in which the person concerned resides, in accordance with the legislation and at the expense of the institution of the place of residence.

return to Ireland. More specifically, Mr I states that he has no German bank account and owns no property in Germany, whereas he has an Irish bank account and remains in regular contact with his two children in Ireland (born in 1991 and 1994 respectively). He does not speak German and has made no attempt to integrate into German society.

11. According to the order for reference, Mr I has worked little since falling ill. On various occasions between 2004 and 2007, he delivered lectures for remuneration at the University of Düsseldorf with the help of Ms B. For the purposes of the German social security system, Ms B declared this income as earned by Mr I as she is registered under that system. Moreover, she accepted redundancy in 2004 in order to care for Mr I full-time. She receives unemployment benefits from Germany. According to the High Court, Ms B was refused the German equivalent of a carer's allowance on the grounds that Mr I was an Irish resident and that no such provision was made under the Irish insurance scheme.

12. Since falling ill, Mr I has only rarely travelled abroad. In 2004, he journeyed to Lisbon (Portugal) to give a lecture, and he has travelled on a few occasions to Ireland, most recently in 2009. However, in light of his condition, the High Court states that it is accepted between the parties that it is almost impossible for Mr I to travel, at least by scheduled airlines.

13. The cost of Mr I's care in Germany was initially covered by a Form E 111 issued by Ireland.⁸ That form falls under Article 19 of Regulation No 883/2004, which provides that an insured person staying in a Member State other than the competent Member State is entitled to the benefits in kind which become necessary on medical grounds during the stay, taking into account the nature of the benefits and the expected length of the stay.

14. In March 2003, the HSE altered Mr I's status by issuing to him as from that date a Form E 112, which has since been renewed on some 20 or more occasions. That form corresponds to Article 20 of Regulation No 883/2004, which deals with the situation of an insured person who is authorised by the competent institution to go to another Member State with the purpose of receiving there the treatment appropriate to his condition.

15. On 25 November 2011, the HSE refused renewal of form E 112 for Mr I, as it took the view that, for the purposes of EU social security legislation, Mr I resided in Germany. Mr I applied to the High Court for judicial review, seeking an order of mandamus against the HSE compelling that body to continue to issue him with the form E 112.

16. Entertaining doubts as to the interpretation of Articles 19(1) and 20(1) and (2) of Regulation No 883/2004, the High Court decided to stay the proceedings and to refer the following question to the Court:

'Is an insured citizen of a Member State ("the First Member State") who has been gravely ill for 11 years as a result of a serious medical condition which first manifested itself when that person was resident in the First Member State but was on holiday in another Member State ("the Second Member State") to be regarded as "staying" in that Second Member State for that period for the purpose of either Article 19(1) or, alternatively, Article 20(1) and Article 20(2) of Regulation No 883/2004 where the person in question has been effectively compelled by reason of his acute medical illness and the convenient proximity of specialist medical care physically to remain in that Member State for that period?'

⁸ — It appears to follow from the order for reference, however, that Mr I was not in receipt of such a form prior to leaving for holiday during the summer of 2002.

17. In the order for reference, the High Court asked the Court of Justice to apply the expedited procedure provided for under Article 105(1) of the Rules of Procedure of the Court of Justice. Acting on the proposal of the Judge-Rapporteur and after hearing the Advocate General, the President of the Court refused that request by order of 18 July 2013.

18. Written observations have been submitted by Mr I, the HSE, by the Irish Government, the Greek Government and the Netherlands Government, and by the Commission. At the hearing on 29 January 2014, oral argument was presented by Mr I, the HSE, by the Irish Government, and by the Commission.

III – Analysis

A – *General observations*

19. Putting aside the tragic facts of this case for one moment, it undeniably raises an interesting and important issue.

20. It is common ground that prior to the holiday trip to Germany, Mr I was a resident of Ireland. Therefore, by the question referred, the High Court essentially wishes to know whether, in light of the circumstances of the present case, Mr I can no longer be said to be merely ‘staying’ in Germany for the purposes of Articles 1(k), 19 and 20 of Regulation No 883/2004.

21. I have taken note of the fact that, upon being invited to take a position on the need for a hearing, the Irish Government responded that it wishes the Court to focus on the notion of ‘stay’ rather than that of ‘residence’, which admittedly does not appear in the wording of the question referred. However, as I will elaborate on further below, those concepts are intrinsically linked. To me, it seems impossible to sidestep the concept of ‘residence’ when interpreting that of ‘stay’, as referred to in Articles 19 and 20 of Regulation No 883/2004.

22. On a larger scale, this case also raises an issue which is potentially thorny from a political and economic point of view, namely, whether a Member State may ‘export’ to other Member States the cost of providing medical treatment to its residents. Thus, the Greek Government contends that the Irish authorities cannot invoke Article 11 of Regulation No 987/2009 unilaterally. This point becomes particularly acute where such treatment exceeds the usual costs associated with similar treatment in the Member State of residence. On the other hand, as Mr I’s story is so unusual, it clearly cannot be regarded as a typical case.

23. In the present request for a preliminary ruling, it seems that certain parameters have been firmly established by the referring court through the terms in which the question has been framed. Indeed, the High Court describes the particular circumstances of this case as a situation ‘where the person in question has been effectively compelled by reason of his acute medical illness and the convenient proximity of specialist medical care physically to remain in that Member State for that period’.

24. Moreover, in light of the fact that Mr I is unable to travel (at least by scheduled airlines), the High Court states in the order for reference that it is not suggested that Mr I could or should return at this point to Ireland for the purposes of a medical examination in order to receive prior authorisation for medical treatment abroad.

25. In any event, it is not entirely clear whether it is actually possible for Mr I to receive comparable treatment in Ireland. Mr I claims that such treatment is not available (or, at the very least, that the HSE has not been in a position to offer him such treatment while at the same time meeting his ancillary care requirements, such as the need for suitable housing). The HSE, for its part, states rather

paradoxically in its written observations that the cost of treating Mr I in Germany is considerably lower than the cost of treating him in Ireland if he were to return.⁹ At any rate, this is a factual issue which, accordingly, falls to be decided by the national court.

26. In the following, I will begin by addressing the concept of ‘residence’, a concept which the Court has already dealt with on several occasions. I will then proceed to analyse the concept of ‘stay’ in light of the circumstances of the case and the arguments raised by the parties which have submitted observations to the Court.

27. Lastly, the following clarifications are necessary regarding the applicability of Regulation No 883/2004 *rationae temporis*. Although Regulation No 1408/71 was applicable when Mr I suddenly fell ill, that regulation has since been superseded by Regulation No 883/2004. However, as the Commission has stated, the substantive legal situation on this point has, on the whole, not changed under the new regulation.¹⁰ In any event, the contested HSE decision refusing to cover the future cost of Mr I’s treatment was taken on 25 November 2011 and therefore after the entry into force of Regulation No 883/2004. I will therefore base my assessment on the more recent regulation, in accordance with the wording of the question referred.

B – *The concept of ‘residence’ under Regulation No 883/2004*

28. Under Article 1(j) of Regulation No 883/2004, ‘residence’ means the place where a person habitually resides.

29. This modest definition is based on the case-law of the Court, which provides further guidance on that concept. Indeed, from early on, the Court held in relation to the regime applicable to workers under Regulation No 1408/71 that the residence is ‘where the habitual centre of [the worker’s] interests is also situated’, and that ‘whenever a worker has a stable employment in a Member State there is a presumption that he resides there, even if he has left his family in another State’.¹¹ That latter presumption is now reflected in Article 11(3) of Regulation No 883/2004. Accordingly, residence is equated with the centre of a person’s interests.

30. For that very reason, an insured person cannot have habitual residences in two or more Member States at any one time.¹²

31. As for the relevant criteria for establishing the centre of a person’s interests, the Court held in *Swaddling* that ‘account should be taken in particular of the employed person’s family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances’.¹³

32. Those criteria are now reflected in Article 11 of Regulation No 987/2009, as stated in recital 12 in the preamble to that regulation.¹⁴ As has been essentially argued by the Greek and the Netherlands Governments, and by the Commission, although that provision relates to disagreements between the competent institutions of two or more Member States and is therefore not directly applicable to the

9 — However, it also appears from the case-file forwarded to the Court that representatives of the HSE take the view that such treatment is available in Ireland (see, inter alia, an email dated 19 September 2011 between the HSE and Mr I). This was confirmed at the hearing.

10 — See, however, point 46 below, and footnotes 39 and 41.

11 — See Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 and 19; see also Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 22.

12 — See Case C-589/10 *Wencel* [2013] ECR, paragraphs 48 and 51.

13 — Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 29.

14 — Recital 12 is worded as follows: ‘Many measures and procedures provided for in this Regulation are intended to ensure greater transparency concerning the criteria which the institutions of the Member States must apply under [Regulation No 883/2004]. Such measures and procedures are the result of the case-law of the [Court of Justice], the decisions of the Administrative Commission and the experience of more than 30 years of application of the coordination of social security systems in the context of the fundamental freedoms enshrined in the Treaty.’ See also *Wencel*, paragraph 50.

case before the referring court, it does contain a helpful list codifying the relevant criteria for establishing the residence of an insured person. I concur with Mr I, the Netherlands Government and the Commission that the list is not exhaustive,¹⁵ and with Mr I and the Commission that no order of precedence has been established for the criteria set out in Article 11(1). Indeed, it is of paramount importance to bear in mind that, in *Swaddling*, the Court made it clear that ‘the length of residence in the Member State ... cannot be regarded as an intrinsic element of the concept of residence’.¹⁶

33. It is useful to note, moreover, that points (a) to (d) of Article 11(3) of Regulation No 883/2004 provide certain specific examples of situations involving ties with a Member State which allow that Member State to impose its legislation on an insured person. The most common situations are that of employment or self-employment in a Member State. Although, subject to the special rules in Articles 12 to 16 of that regulation, those specific forms of connection take precedence over the more general criterion of residence,¹⁷ they can also simply be viewed as specific expressions of that concept. In that way, they serve merely to underscore the fact that the application of the social security legislation of a given Member State, through residence or otherwise, presupposes a particular bond with that Member State.

34. Lastly, it is perhaps advisable not to overlook the fact that many of the cases on the concept of ‘residence’ for the purposes of the social security coordination concern the question whether the insured person had *acquired* the status of resident, inasmuch as that person wished to receive a benefit from a reticent Member State.¹⁸ The present case, however, appears to concern the reverse scenario: in what circumstances might an insured person *lose* that status and the corresponding benefits?¹⁹

35. Having attempted to summarise the law on the concept of ‘residence’, I will now move on to cast a closer look at the concept of ‘stay’ in the light of the specific characteristics of the case.

C – The concept of ‘stay’ under Regulation No 883/2004

36. As of yet, and to my knowledge, the Court has not clarified the concept of ‘stay’ under Regulation No 883/2004. I will therefore offer the following comments.

37. Under Article 1(k) of Regulation No 883/2004, ‘stay’ means temporary residence.

38. The definition of ‘stay’ under Article 1(k) of the English language version of Regulation No 883/2004 refers to the concept of ‘residence’, albeit qualified as ‘temporary’. In that sense, it is a circular definition which does not provide much assistance. Nonetheless, in that very way, it underlines the fact that, contrary to the position argued for by the Irish Government, the two concepts cannot be dealt with completely separately.

15 — This follows from the use of the expression ‘... which may include, as appropriate’, in the wording of Article 11(1) of Regulation No 987/2009, as well as the use of the term ‘in particular’ by the Court in *Swaddling*.

16 — See *Swaddling*, paragraph 30.

17 — See Article 11(3)(e) of Regulation No 883/2004.

18 — *Swaddling* concerned a UK national who had worked in France for approximately 13 years, interrupted by a six-month period in the United Kingdom, after which he returned to the United Kingdom and applied, in the same month, for income support. Mr Swaddling’s intention to reside there was not called into question, but the requirement of an appreciable period of residence prior to applying for income support was the subject of disagreement (see paragraph 27 of that judgment). In *Knoch*, which concerned a refusal on the part of the German authorities to grant unemployment benefit, Ms Knoch had lived and, for the most part, worked in the United Kingdom for a period slightly exceeding two years, only interrupted by short summer stays in Germany. Case C-503/09 *Stewart* [2011] ECR I-6497 concerned the refusal to provide short-term incapacity benefit in youth to a UK national afflicted with Down’s syndrome who had lived for approximately 11 years in Spain, inter alia due to her habitual residence there (which was not contested). Thus, these cases concerned the acquisition, rather than the retention, of a benefit.

19 — On the other hand, the present case admittedly also raises the question as from what point an insured person is not just staying in another Member State. In Case C-145/03 *Keller* [2005] ECR I-2529, mentioned by the referring court, the stay abroad during which Ms Keller received urgent treatment of the malignant tumour from which she suffered appears to have lasted for eight months at most.

39. As for the proper construction of the concept of ‘stay’, certain views have been put forward.

40. Cautioning against a strained interpretation of Articles 19 and 20 of Regulation No 883/2004, the Irish Government argues that the word ‘temporary’ in the definition of the concept of ‘stay’ should be attributed its ordinary meaning of ‘lasting for a limited period of time, not permanent’. The Irish Government contends, moreover, that a ‘stay’ is not habitual or permanent, and that other language versions of Regulation No 883/2004 support the view that a stay involves a visit to another Member State (such as the French version, which uses the word ‘séjour’). For its part, the HSE submits that one of the ordinary meanings of ‘to stay’ is ‘to live somewhere temporarily as a visitor or a guest’, and that to describe Mr I as staying in Germany on a temporary basis would be to do violence to that meaning.

41. On that point, I would first remark that, as stated in point 37 above, ‘stay’ is defined in the English language version of Regulation No 883/2004 as temporary residence. Inasmuch as ‘residence’ is, in turn, defined as the place where a person habitually resides, ‘temporary residence’ can quite readily be construed as meaning the place where a person resides temporarily. Accordingly, if it is borne in mind that the Court has consistently equated the place of ‘residence’ with the habitual centre of a person’s interests, the place of ‘stay’ could be understood to mean the temporary centre of a person’s interests.

42. Second, and following the same logic as the line of argument developed in points 30 and 38 above, a structural link exists, to my mind, between the concepts of ‘stay’ and of ‘residence’, in that a stay presupposes residence elsewhere. As a consequence, the criteria used to establish that a particular place is an insured person’s place of residence must entail the negative effect of excluding the possibility that it could be the place of stay.

43. Third, and more importantly, the use of the word ‘temporary’ qualifies the concept of ‘stay’. ‘Temporary’ does not mean definite, but rather impermanent. ‘Temporary’ does not therefore imply a fixed duration. Accordingly, I concur with the Commission that neither Article 19 nor Article 20 of Regulation No 883/2004 provides for any specific temporal limitation of the length of stay. In other words, a stay need not necessarily involve a visit of a shorter duration.

44. Moreover, if it were to be accepted, for the sake of argument, that the word ‘séjour’ in the French language means a shorter visit, it would suffice to point out that the different language versions do not point unequivocally in the direction suggested by the Irish Government and the HSE.²⁰ On the contrary, the arguments submitted by the Irish Government and the HSE are contradicted by a systemic interpretation of Regulation No 883/2004, as will be explained in the following two points.

45. As Mr I has correctly observed, according to the definition laid down in Article 1(va)(i) of Regulation No 883/2004 (as amended) — a provision which applies to Chapter 1 of Title III, in which Articles 19 and 20 of that regulation can be found — the concept of ‘benefits in kind’, referred to in both Articles 19(1) and 20(1) and (2), covers long-term care benefits in kind.²¹ Accordingly, the very structure of Regulation No 883/2004 is predicated on the assumption that an insured person may stay and receive benefits in kind in another Member State over a longer duration.

20 — Indeed, a quick glance at the different renditions of the word ‘stay’ in some of the other official languages (DE: ‘Aufenthalt’; DA: ‘ophold’; ES: ‘estancia’; FI: ‘oleskelulla’; IT: ‘dimora’; PT: ‘estada’; NL: ‘verblijfplaats’; RO: ‘ședere’; SV: ‘vistelse’) does not indicate unequivocally that it involves a shorter duration.

21 — That provision is worded as follows: “Benefits in kind” means ... for the purposes of Chapter 1 of Title III (sickness, maternity and equivalent paternity benefits), benefits in kind provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. *This includes long-term care benefits in kind* (emphasis added). That definition was inserted by Regulation No 988/2009. The reason for that amendment is not apparent, however, from the recitals to that regulation or its *travaux préparatoires*.

46. Furthermore, it is worth pointing out that, following the recast of Regulation No 1408/71, which previously had contained a proviso in Article 22(1)(i) to the effect that ‘the length of the period during which benefits are provided shall be governed ... by the legislation of the competent State’, that proviso is no longer reflected either in Article 19 or in Article 20 of Regulation No 883/2004. Indeed, when read against the new definition of ‘benefits in kind’, as set out in Article 1(va)(i) of Regulation No 883/2004, it is open to question whether Member States may set limits unilaterally on the duration of the provision of benefits in kind.²²

47. That being so, the Irish Government still claims that a purposive construction of the concept of ‘stay’ precludes the conclusion that Mr I is merely staying in Germany. That government contends that neither under the Treaties nor under Regulation No 883/2004 is a person granted the right to elect the social security system to which he is affiliated. In its view, that regulation is an act of coordination designed to ensure that only one scheme applies to any given person. In circumstances where Mr I would have the right, according to the Irish Government, to cover under the German scheme, a concurrent right to remain under the Irish system would defeat the whole purpose of the system. If it is found that Mr I is in the course of a ‘stay’ in Germany, it could be argued that, in consequence, he is not covered by the German social security system; that, in the view of the Irish Government, would be inconsistent with the overall purpose of the regulation.

48. Before dealing fully with the Irish Government’s view as to a purposive construction of the concept of ‘stay’, I should devote a little more attention to its argument that Mr I has the right to join the German social security scheme.

49. Indeed, the Irish Government and the HSE both claim that, notwithstanding the view of the High Court that ‘the present case falls between the interstices of [Articles 19 and 20 of Regulation No 883/2004]’, there is no risk of any gap in the coverage for Mr I. For its part, the HSE states that ‘the German authorities will cover [Mr I]’s health care costs if he is on their system’ and that ‘so far as the HSE is aware the relevant German authorities were agreeable to [Mr I] moving onto their system for the purposes of his health care.’ In light of the former remark, the Irish Government states that ‘[Mr I] will be permitted to enter the German system should he cooperate with applying for such cover’, and moreover that ‘[Mr I] is entitled to enter the German system’.

50. Apart from the fact that the German Government has not confirmed any of those assertions, the Irish Government and the HSE are, in some ways, correct. As stated above, no one can have several residences at one and the same time for the purposes of the social security coordination. If Mr I is not a resident of Ireland, then he is eligible for consideration as a resident of Germany for the purposes of Regulation No 883/2004. Provided that his centre of interests lies there, he is free to apply to the German competent institutions to join a social security scheme in Germany, in accordance with the procedure laid down in Article 3(2) of Regulation No 987/2009.²³

51. However, this is obviously not what Mr I wishes, and the observations of the Irish Government and the HSE seem rather deliberately to miss the point. The guidance requested from the Court concerns precisely the issue as to whether a person in Mr I’s situation can still be said to be merely staying in the Member State of treatment and, accordingly, whether it is the initial Member State of residence or the Member State of treatment that must pay for the continued (presumably costly) medical treatment which a person such as Mr I requires.

22 — Therefore, I read the dictum of the Court in *Keller*, paragraph 51, according to which Member States remain free to set a limit to the validity of the authorisation given by the competent institution of residence, as referring only to the period in which such an authorisation can be relied upon by an insured person to receive benefits in kind from a Member State of stay, and not their actual duration.

23 — That provision states that ‘[p]ersons to whom [Regulation No 883/2004] applies shall be required to forward to the relevant institution the information, documents or supporting evidence necessary to establish their situation or that of their families, to establish or maintain their rights and obligations and to determine the applicable legislation and their obligations under it’.

52. Moreover, as right as the Irish Government is to point out that Article 3(2) of Regulation No 987/2009 requires an insured person to cooperate with the relevant competent institution so that it can determine the legislation applicable to that person, such a duty also applies vice versa, under Article 3(4) of that regulation, in respect of the person concerned.²⁴

53. Besides, where a competent institution wishes to limit or refuse the benefits payable to a person under its legislation owing to the fact that the person has moved residence to another Member State, it appears to me that — under Article 3(4) in fine of Regulation No 987/2009, read in conjunction with Article 11(1) thereof and, more generally, under Article 20²⁵ and the principle of sincere cooperation enshrined in Article 4(3) TEU — such a duty of cooperation also arises in relation to the institutions of other Member States involved.²⁶ Those institutions must be given an opportunity to state whether they agree with the finding that the person concerned has changed residence, as such a finding is clearly likely to have financial repercussions for them. The opposite view would deprive Article 11(1) of Regulation No 987/2009 of its effectiveness, which is precisely to resolve differences of opinion between the institutions of two or more Member States as to a person's residence.

54. In that connection, I cannot help noticing that, apart from some bilateral correspondence between the HSE and the Commission, the order for reference does not contain any information regarding an agreement between the Irish and German authorities.²⁷ That being so, I cannot see how the allegation that Mr I has not cooperated with the relevant institution(s) could absolve the Irish authorities of their corresponding duty to cooperate with their German counterparts.²⁸

55. Therefore, the argument raised by the Irish Government and the HSE as to the willingness of the German authorities to admit Mr I to their social security system and to bear the financial responsibility for his treatment ought not be entertained any further.

56. Now, returning to the purpose of Regulation No 883/2004, I have had the occasion to state elsewhere²⁹ that that regulation coordinates the social security systems in place in the Member States. It seeks to achieve the objective set out in Article 48 TFEU by preventing the negative effects that exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits.³⁰ However, in line with recital 4 in the preamble thereto,³¹ Regulation No 883/2004 does not set up a common scheme for social security, but allows different

24 — Under that provision, '[t]o the extent necessary for the application of [Regulation No 883/2004] and [Regulation No 987/2009], the relevant institutions shall forward the information and issue the documents to the person concerned without delay and in all cases within any time limits specified under the legislation of the Member State in question. The relevant institution shall notify the claimant residing or staying in another Member State of its decision directly or through the liaison body of the Member State of residence or stay. When refusing the benefits it must also indicate the reasons for refusal, the remedies and periods allowed for appeals. A copy of this decision shall be sent to other involved institutions.'

25 — The heading of that provision is 'Cooperation between institutions'.

26 — See, in respect of a situation similar to the one under consideration, Case C-326/00 *IKA* [2003] ECR I-1703, paragraphs 51 and 52. That case concerned a pensioner residing in Greece who suffered from chronic heart disease. While staying in Germany, the pensioner, who had received beforehand a form E 111 (the validity of which was limited to a period of approximately 1½ months), was obliged to receive medical treatment. The German institution of the place of stay requested the Greek institution to issue a form E 112, which was refused.

27 — Information contained in the national case-file forwarded to the Court does, however, contain some indication of communication between the HSE and the competent German institution. Indeed, it appears that the HSE was in contact with the Deutsche Verbindungsstelle Krankenversicherung — Ausland (German Connection Point Health Insurance — Overseas), amongst others, on or around 14 September 2011 regarding the possible transfer of Mr I from form E 112 to form E 106 (now form S1), but with no result.

28 — At the hearing, the Irish Government stated that the reason why the procedure under Article 11(1) of Regulation No 987/2009 had not been applied was that there had been no 'difference of views' between the HSE and the competent German institution. However, I do not see how this affects the duty to cooperate incumbent upon the competent institution of the Member State of residence where, in spite of no formal view taken by the institution of another Member State, the former nevertheless proceeds to discontinue coverage because of the transfer of residence, in its view, to that other Member State. As regards Mr I's duty to cooperate with the HSE, counsel appearing on his behalf stated that he had offered to submit to a medical examination by a physician appointed by the HSE, provided that it took place in Germany on account of his condition.

29 — See my Opinion in C-140/12 *Brey* [2013] ECR, points 46, and 51 to 53.

30 — See the judgment of the Court in *Brey*, paragraph 51.

31 — Recital 4 states that '[i]t is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination'.

national social security schemes to persist and its sole objective is to ensure the coordination of those schemes. Under Article 11(1), the persons to whom it applies ‘shall be subject to the legislation of a single Member State only’, determined in accordance with the rules set out in Title II.³² It therefore 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.³³

57. Accordingly, the coordination mechanism set up under Regulation No 883/2004 is intended to result in one Member State being designated as ultimately responsible for the claims of insured persons. Conversely, that regulation has the corollary aim of preventing insured persons from invoking the responsibility of other Member States where no direct rights arise in that respect. From a monetary point of view, Regulation No 883/2004 therefore also serves, albeit indirectly, to set limits to the principle of financial solidarity between Member States.

58. It appears, therefore, that the system set up by Regulation No 883/2004 is an attempt to resolve an innate tension between, on the one hand, the need to facilitate the grant of benefits to insured persons who have exercised their right to freedom of movement and, on the other hand, the need to protect the public purse of the Member States who are not responsible for those insured persons under the social security legislation, whether at national or EU level.

59. That being so, it is not entirely correct to claim, as the Irish Government does, that Regulation No 883/2004 does not grant a person any right at all to elect the social security system to which he wishes to be affiliated. Indeed, in accordance with the basic tenet of the free movement of persons which that regulation seeks to promote, the place where a person habitually resides is, from the outset, very much the result of a deeply personal choice. That choice may, for instance, be to live and work in another Member State on an equal footing with the nationals of that State; or not to do so.

60. By the same token, in situations of unplanned medical emergency, one cannot meaningfully speak of a ‘choice’; nor can one compare the situation of someone who is forced to undergo medical treatment in another Member State with someone who has been in a position to do so voluntarily. Indeed, according to the order for reference — which is the sole point of reference for the Court as regards the facts of the case — there can be no doubt that Mr I does not have a choice in the matter. The referring court stresses that Mr I has been gravely ill for 11 years as a result of a serious medical condition which first manifested itself when he was on holiday in Germany, and that he is now effectively compelled, by reason of his acute illness and the convenient proximity of specialist medical care, physically to remain in Germany.

61. I therefore do not agree with the Irish Government that a purposive interpretation of Regulation No 883/2004 leads to the conclusion that a person in Mr I’s condition is somehow ‘choosing’ to remain in Germany and therefore habitually resides there. Indeed, the fact that the HSE continuously issued form E 112s for his treatment rather speaks for itself.³⁴ At any rate, the assessment of whether Mr I has a choice in where he resides must take account of his *current* medical condition, which it is accepted has deteriorated over the years.

32 — See also recital 15 in the preamble to Regulation No 883/2004, which states that ‘[i]t is necessary to subject persons moving within the [European Union] 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’.

33 — See *Brey*, paragraph 43.

34 — As the Commission stated at the hearing, the fact that those forms might have been issued on compassionate grounds, as the Irish Government claims, cannot detract from the fact that they *were* issued, with all that that implies.

62. The main argument in support of the view that Mr I is no longer merely staying in Germany for the purposes of Articles 19 and 20 of Regulation No 883/2004 is that he has lived there for more than 11 years. Indeed, the Netherlands Government, essentially supported on this point by the Irish Government and the HSE, argues that a long period of time in another Member State is of great importance to the determination of residence.

63. I disagree. That view is essentially contradicted by the abovementioned dictum in *Swaddling*,³⁵ as well as other, similar judgments.³⁶

64. Indeed, to my mind, the sole fact that an insured person has stayed in another Member State to receive medical treatment for a period of time which may be described as long (or even as very long) does not, in itself, suffice to establish — or to disprove — habitual residence. Indeed, it is precisely because of a person's will to recover from illness and to return *home* that such a length of stay does not automatically have the effect that the temporary centre of his interests is converted into the habitual centre of his interests.³⁷

65. That view appears to be borne out by Article 25(A)(3) of Regulation No 987/2009.³⁸ The rationale for that provision seems to confirm that an insured person who urgently requires medical treatment while staying in another Member State should not be forced to interrupt that treatment in order to return to the Member State of residence to seek out a similar treatment if this would be ill advised on medical grounds. Indeed, the Court has held that, even where it is possible that the treatment necessitated by developments in the insured person's state of health during a temporary stay in another Member State is linked to a chronic condition and therefore to persistent or long-lasting illness, that is not enough to prevent him from receiving that treatment.³⁹

66. For that very reason, it seems to me inconsistent that Article 11(2) of Regulation No 987/2009 purportedly places the intention of an insured person on a lower footing than the objective criteria listed in Article 11(1). It appears to follow from that latter provision that the intention of the insured person is relevant only where residence cannot be established on the basis of the criteria listed in Article 11(1). Admittedly, that regulation is intended to codify, inter alia, the case-law of the Court on the relevant criteria as regards the issue of habitual residence. However, I would argue that the dictum of the Court in *Swaddling*⁴⁰ does not establish any hierarchy between the different criteria to be taken into account and cannot be understood as meaning that intention, even where borne out by the circumstances, counts for less than the other relevant criteria. Indeed, a person's centre of interests must be based on an overall assessment of all available information relating to the relevant facts, as the Commission also recognises in its written observations.

35 — Quoted in point 31 above.

36 — See, to that effect, *Knoch*, paragraphs 26 and 27 and case-law cited, in which the Court held in relation to Article 71(1)(b)(ii) of Regulation No 1408/71 (which coordinated the provision of unemployment benefits) that, in relation to the concept of residence referred to in that provision, 'there is no precise definition of the criterion of length of absence and ... it is not an exclusive criterion' and, moreover, that 'no provision in Regulation No 1408/71 lays down a time limit beyond which Article 71(1)(b)(ii) must no longer be applied'.

37 — According to the information in the national case-file forwarded to the Court, it appears that Mr I has attempted repatriation to Ireland and in this connection sought, inter alia, the assistance of the HSE, but to no avail. This was also mentioned at the hearing by counsel for Mr I — a matter on which the HSE did not comment.

38 — Article 25(A)(3) is worded as follows: '[t]he benefits in kind referred to in Article 19(1) of [Regulation No 883/2004] shall refer to the benefits in kind which are provided in the Member State of stay, in accordance with its legislation, and which become necessary on medical grounds with a view to preventing an insured person from being forced to return, before the end of the planned duration of stay, to the competent Member State to obtain the necessary treatment.'

39 — See *IKA*, paragraph 41. Admittedly, that judgment concerned the situation of a pensioner governed, at the time, by the special provision made in Article 31 of Regulation No 1408/71 and not Article 22. Nevertheless, under Regulation No 883/2004, it appears that the stay of pensioners in a Member State other than that of residence has, on the whole, been assimilated to the rules applicable to other insured persons, see Article 27(1), (2) and (3) of that latter regulation. Moreover, the Court has held that once a form E 112 has been issued under Article 22(1)(c) of Regulation No 1408/71 for the receipt of benefits in kind abroad - as in Mr I's situation - those benefits 'cover *all treatment* calculated to be effective for the sickness or disease from which the person concerned suffers'; see Case 117/77 *Pierik* [1978] ECR 825, paragraph 15 (emphasis added).

40 — Quoted in point 31 above.

67. In any event, as I mentioned in point 32 above, Article 11 of Regulation No 987/2009 is not directly applicable to the present case. Accordingly, the fact that it might classify intentions as a secondary criterion carries no weight in the assessment of where Mr I has his centre of interests.

68. I would furthermore point to the fact that the Court has held that there is nothing in Regulation No 1408/71 to suggest that invalidity cash benefits may be discontinued on the ground that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.⁴¹ I see no reason to take a different view with regard to the provision of benefits in kind which take the form of medical treatment intended to relieve a person in Mr I's physical situation rather than cash benefits.⁴² Therefore, if a Member State does not even have the right to discontinue such a benefit where the person concerned actually resides abroad, it is all the more difficult to see how it may do so where the issue of residence is contested.

69. In light of the preceding discussion, I find it impossible to lay down a golden rule as to precisely how much time is needed in another Member State for 'stay' to become 'residence'. However, I should add that such a significant legal event ought not to be able to occur spontaneously and at random. Indeed, it is important to recall that, as acknowledged by the HSE, 'the purpose of the EU law on health is to ensure that there are no gaps and that a person is not left without funding merely because they are in another Member State'.

70. Therefore, to expand on the remarks made in points 52 and 53 above regarding the duties of the parties involved, an insured person cannot simply be excluded from the social security system to which that person has heretofore been affiliated with no forewarning. That would require either a positive step to be taken by that person in connection with the transfer of residence within the European Union (the new competent institution being informed of that transfer in accordance with Article 3(2) of Regulation No 987/2009) or, at the very least, a common agreement between the relevant institutions of two or more Member States, as contemplated in Article 11(1) of Regulation No 987/2009. Such an agreement would provide that person with an opportunity to challenge that view in the event of disagreement (such as in the present case), in line with Article 3(4) of Regulation No 987/2009.

71. To conclude, I take the view that the concept of 'stay' as referred to in Regulation No 883/2004 (in Articles 1(k), 19 and 20, for example) must be held to mean the temporary centre of a person's interests. The forced stay in a Member State for medical reasons — even for a very long period of time — does not in itself entail the consequence that the place of treatment, which has hitherto been the temporary centre of the person's interests, automatically becomes the place of habitual residence for the purposes of that regulation.

72. As all the parties which submitted observations to the Court agree, it is in any event for the High Court to apply the law to the facts and to establish Mr I's place of residence on the basis of an overall assessment of all the relevant circumstances, including as to whether Mr I remains compelled on medical grounds to stay in Germany in order to receive the necessary treatment. I do take note of the fact that, despite many of the circumstances suggesting otherwise, in the order for reference the referring court takes the preliminary view that the question referred should be answered in the affirmative.

41 — See Case C-356/89 *Newton* [1991] ECR I-3017, paragraph 21. See also *Stewart*, paragraph 62, in which the Court did not distinguish between acquisition and retention of such a benefit. That case-law concerns Article 10 of Regulation No 1408/71 and not Article 10a (now Article 70(4) of Regulation No 883/2004) concerning special non-contributory cash benefits, the exportability of which is admittedly limited.

42 — I might add that Mr I is in receipt of a non-exportable cash benefit from Ireland (disability allowance) which appears to pursue a similar purpose.

IV – Conclusion

73. In light of the foregoing, I propose that the Court respond to the question referred by the High Court (Ireland) as follows:

On a proper construction of Article 1(k) 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, for the purposes of Articles 19 and 20 thereof, the forced stay of more than 11 years of an insured person in a Member State other than that of residence on account of a grave illness which first manifested itself when that person was holidaying in that Member State and where that person has been effectively compelled, by reason of his acute medical condition and the proximity of specialist medical care, physically to remain in that Member State for that period, does not in itself entail the consequence that the person may no longer be regarded as merely staying in the Member State of treatment. It is for the referring court to establish the place of residence of that person on the basis of an overall assessment of all the relevant circumstances, including as to whether that person remains compelled on medical grounds to stay in the Member State of treatment in order to receive the necessary treatment.