IN THE UPPER TRIBUNAL **Case No.** CG/1851/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 15 September 2014, whereby it dismissed the claimant's appeal against a decision of the Secretary of State dated 7 October 2013 to the effect that she was not entitled to carer's allowance from 2 August 2013.

2. The facts are straightforward and not in dispute. The claimant is a Polish national who arrived in the United Kingdom from Poland on 19 June 2011 at the age of 58 (not 61 as the First-tier Tribunal found). She was a widow in receipt of a Polish pension (*renta rodzinna*) and she moved to the United Kingdom to live with her daughter, who was working and training to be an accountant, and her granddaughter, who was born in the United Kingdom in 2003. She herself did some occasional work as a cleaner on a self-employed basis. She paid Class 2 National Insurance contributions.

3. Sadly, her granddaughter became seriously disabled due to a severe immune condition. She was awarded the highest rate of the care component and the higher rate of disability living allowance from 1 August 2013. The claimant took much of the burden of caring for her. On 27 August 2013, the Secretary of State received a claim from the claimant in which she sought carer's allowance from 2 August 2013 and said that she had stopped work on 1 August 2013 and had ceased trading.

4. On 7 October 2013, the claim was rejected on the ground that, under European Union law, Poland was the competent Member State in respect of the claimant for social security purposes. The only reason given in the Secretary of State's decision was that she was "getting a pension form Poland". The claimant appealed and the Secretary of State's submission to the First-tier Tribunal made it plain that his decision was predicated on a finding that the claimant was not economically active. The submission referred broadly to Articles 23, 24 and 29 of Regulation (EC) 883/2004 without setting them out or explaining exactly how they worked. Perhaps partly in consequence of the inadequacy of the submission, the First-tier Tribunal dismissed the appeal without citing any law at all. On the question of the claimant's work, it said –

> "20. [The claimant] registered for self-employment and paid self-employed Class II National Insurance Contributions (page 47).
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> 21. Nevertheless although she was self-employed as a housekeeper/cleaner she did not actively work. She worked a couple of hours on a Saturday but this was not consistent as it was only on an ad hoc basis.
>
> 22. She has never been employed in the UK."

In paragraph 22, it appears to have been referring to employment as opposed to self-employment and, in paragraph 21, I think it used the phrase "not consistent" in the sense of being "not regular".

5. The claimant applied to the First-tier Tribunal for permission to appeal on four grounds, drafted by Mr Matthew Jay, the Specialist Adviser for EEA and Swiss Migrants at the Citizens' Advice Bureau at Great Ormond Street Hospital who has continued to represent her by way of written submissions to the Upper Tribunal. The First-tier Tribunal refused permission to appeal and the application was renewed to the Upper Tribunal, but only on three grounds. The other was abandoned in the light of the decision of *Judge Jacobs in Secretary of State for Work and Pensions v AK (AA)* [2015] UKUT 110 (AAC). I gave permission because I considered that the other grounds merited consideration, although I pointed out that Grounds 1 and 4 covered the same issue, Ground 1 being concerned with whether the claimant was pursuing an activity as a self-employed person and Ground 4 being concerned with the adequacy of the First-tier Tribunal's reasoning, and that Ground 3 arose only if the claimant succeeded on Ground 1. I also raised the question whether the case referred to the Court of Justice of the European Union by the Supreme Court in *Secretary of State for Work and Pensions v Tolley* [2015] UKSC 55 might have any bearing on this case.

6. The Secretary of State initially supported the appeal on Grounds 1 and 4, on the basis that page 47 of the bundle of documents, to which it had referred, was not relevant to the period in issue and so did not support its finding, that the evidence was contradictory and that the First-tier Tribunal had failed to find sufficient facts or provide sufficient reasons for its decision. It was submitted that the decision in *Tolley* would not assist in determining the case and that the case should be remitted to the First-tier Tribunal. The claimant, however, argued that a rehearing was not necessary and that, on a proper interpretation of the meaning of "self-employed", the undisputed facts were sufficient to show that she was entitled to carer's allowance as asserted in her Ground 1. It was submitted that a stay to await the decision in *Tolley* was required only if Ground 1 were rejected.

7. I was not convinced by either submission. I suggested that the difference between the parties was more about the law than the facts and that Article 25 of Regulation (EC) 883/2004 might be more relevant than Articles 23 and 24, which had been cited in the Secretary of State's submission to the First-tier Tribunal. I indicated that I was minded to find that the claimant had been engaged in activity as a self-employed person before she claimed carer's allowance but not from 2 August 2013 and invited further submissions on that issue and on the question whether the case should be stayed to await the decision in *Tolley*. The Secretary of State agreed that Articles 25 and 29 were the material provisions of Regulation (EC) 883/2004 and supported my suggestion that the claimant had not been self-employed at the material time, but he maintained the argument that the decision in *Tolley* was unlikely to be of assistance. The claimant maintained her submissions that she had been self-employed and that, if that were not so, *Tolley* might be of assistance. I decided to await *Tolley*.

8. The fundamental issue in this case is whether the United Kingdom or Poland was the "competent state" to whom the claimant had to look for entitlement to social security benefits while caring for her granddaughter. This falls to be determined under Regulation (EC) 883/2004. *Tolley* was potentially relevant because the rules in relation to invalidity benefits are different from those in relation to sickness benefits and that case was concerned with the correct classification of the care component of disability living allowance for the purposes of Regulation (EEC) 1408/71, the predecessor of Regulation (EC) 883/2004. In the event, the Court of Justice held that the care component of disability living allowance was a sickness benefit for the purpose of the Regulation (*Tolley v Secretary of State for Work and Pensions* (Case C-430/15) [2017] AACR 40), maintaining the position it had taken in *Commission v Parliament* (Case C-299/05). Mr Jay accepts that it is now not really arguable that carer's allowance is an invalidity benefit. I think that is right, particularly as carer's allowance was expressly covered by the decision in the earlier case.

9. In these circumstances, Articles 11, 25 and 29 are the material provisions concerned with identifying the competent state responsible for paying benefits in kind and cash benefits.

> "**11. General rules**
> 1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.
> 2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.
> 3. Subject to Articles 12 to 16:
> (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
> (b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him/her is subject;
> (c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;
> (d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;
> (e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.
> 4. …
> 5. …"

> "**25. Pensions under the legislation of one or more Member States other than the Member State of residence, where there is a right to benefits in kind in the latter Member State**
> Where the person receiving a pension or pensions under the legislation of one or more Member States resides in a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance, or of activity as an employed or self- employed person, and no pension is received from that Member

> State, the cost of benefits in kind provided to him/her and to members of his/her family shall be borne by the institution of one of the Member States competent in respect of his/her pensions determined in accordance with Article 24(2), to the extent that the pensioner and the members of his/her family would be entitled to such benefits if they resided in that Member State."
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> "**29. Cash benefits for pensioners**
> 1. Cash benefits shall be paid to a person receiving a pension or pensions under the legislation of one or more Member States by the competent institution of the Member State in which is situated the competent institution responsible for the cost of benefits in kind provided to the pensioner in his/her Member State of residence. Article 21 shall apply *mutatis mutandis*.
> 2. Paragraph 1 shall also apply to the members of a pensioner's family."

10. It is not, I think, in dispute that the effect of that legislation is that, if the claimant was "pursuing an activity as an employed or self-employed person" in the United Kingdom, the United Kingdom was the competent state by virtue of Article 11(3)(a). Otherwise, the combined effect of Articles 11(3)(e), 25 and 29(1) is that Poland was the competent state because her pension was paid under Polish legislation and Poland was therefore responsible for the cost of benefits in kind with the result that it was also the competent institution in Poland that was responsible for paying cash benefits. (The heading of Article 25 seems slightly misleading, at least in the English version.) I note in passing that Article 11(2) did not assist the claimant as she was not receiving any benefit as a result of working in the United Kingdom.

11. So one comes back to the question whether the claimant was self-employed at the material time, which was the issue raised in Ground 1 of the claimant's original grounds of appeal. Article 1(b) defines "activity as a self-employed person" as "any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists". Thus, at first sight, the question is to be determined under United Kingdom law rather than European Union law. I say "at first sight", because the meaning of "any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State" and the construction of Article 11(3)(a) itself must be questions of European Union law and so one must have regard both to domestic law and European Union law.

12. In domestic law, section 2(1)(b) of the Social Security Contributions and Benefits Act 1992 provides that a "self-employed earner" is "a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also engaged in such employment)". Thus working two hours a week would be sufficient to fall within the definition. On the other hand, a person is exempt from the obligation to pay National Insurance contributions as a self-employed earner if his or her earnings are below the "small profits threshold" or he or she is in receipt of, *inter alia*, what would be regarded in Regulation (EC) 883/2004 as sickness benefits, including carer's allowance (see section 11 of the 1992 Act and regulation 3 of the Social Security (Contributions) Regulations 2001 (SI 2001/1004)). Moreover, small amounts of earnings from self-employment may be disregarded when considering entitlement to various social security benefits.

13. The claimant refers to *Secretary of State for Work and Pensions v JS (IS)* [2010] UKUT 240 (AAC) for the proposition that self-employment "is not confined to periods of actual work", although it is conceded that that case arose under Directive 2004/38/EC, rather than under Regulation (EC) 883/2004. It is noteworthy that in that context, it was accepted by the Upper Tribunal that pieces of work that were only occasional or isolated might not be sufficient to amount to continuing self-employment, but it is argued by Mr Jay that such an approach is not appropriate when considering a case under the Regulation. He submits that any work, however little, is treated as work for the purpose of the 1992 Act even though a person is treated as gainfully employed so as to be excluded from entitlement to carer's allowance under section 70(1)(b) only if earnings are above a certain threshold (see regulation 8 of the Social Security (Invalid Care Allowance) Regulations 1976 (SI 1976/409)). Reference is made to *Franzen v Raad van bestuur van de Sociale verzekeringsbank* (Case C-382/13). It is further submitted that, in the light of *Coppola v Insurance Officer* (Case C-150/82) and *HMRC v Ruas* [2010] EWCA Civ 291; [2010] AACR 31, the claimant had to be treated as still pursuing activity as a self-employed person while claiming carer's allowance.

14. The Secretary of State makes no argument on the question whether the claimant was pursing such an activity before 2 August 2013, although he points out that *JS*, *Franzen* and *Coppola* were all concerned with issues of European law and not domestic law (as also was *Ruas*). *Franzen* and *Coppola* (and also *Ruus*) were decided under Regulation (EEC) 1408/1971, which did not define self-employment by reference to domestic law in the way that Regulation (EC) 883/2004 does and, as the Secretary of State also points out, *Franzen* was anyway concerned with employment rather than self-employment. What is important, it is submitted, is that, as a matter of domestic law, self-employment may cease and the evidence before the First-tier Tribunal was that the claimant had stopped working on 1 August 2013. Reliance is placed on the claimant's statements in her claim form that she had stopped work and ceased trading.

15. I do not consider that being registered with HMRC as self-employed and paying Class 2 contributions is sufficient to show engagement in self-employment. There must be some evidence of actual work and, in domestic law as well as European Union law, when there are gaps between periods of work, whether the claimant is to be regarded as continuing to be self-employed during those gaps depends on both the factual circumstances and the legal context. However, I am prepared to assume that the claimant in this case was pursuing an activity as a self-employed person until 1 August 2013 and that the First-tier Tribunal erred in deciding otherwise, even if only through failing to make sufficient findings of primary fact to explain its decision. Two hours a week of irregular employment was not necessarily too little to show continuous engagement in self-employment.

16. The question then arises whether that self-employment ended on 1 August 2013. Clearly, the Secretary of State is right that self-employment may cease and, in particular, may be brought to an end by a person ceasing to seek any such work. However, it seems to me to be equally clear that, for the purpose of Article 11(3)(a) of Regulation 883/2004, a person must be treated as continuing to pursue an activity as a self-employed person if forced to give up the activity during sickness, because otherwise the point of the provision would be frustrated. At any rate, that must be so

insofar as it is necessary to enable a person to claim a benefit in respect of the period of sickness that has brought the self-employment to an end. Whether or not a person is self-employed is to be determined according to domestic law but whether that status continues for the purpose of Article 11(3)(a) of Regulation (EC) 883/2004 during a period of sickness is a matter of European Union law and I accept Mr Jay's submission that the cited cases decided under Article 13 of Regulation (EEC) 1408/71 are equally relevant to the application of Article 11 of Regulation (EC) 883/2004.

17. Nonetheless, in the circumstances of this case, the Secretary of State is entitled to rely on the claimant's unequivocal statement that she had ceased self-employment on 1 August 2013. I do not doubt that, if there were any reason to suppose that the claimant had only ceased self-employment because she had had to do so as a result of sickness, that statement would not matter. Sickness, in relation to a claim for carer's allowance, must refer to the sickness of the person being cared for and what is therefore important is whether the claimant had to give up work because of that illness. Clearly the claimant's granddaughter's illness was going to last some time in this case and so giving up work altogether, rather than temporarily, might have been understandable if work had to be given up at all. However, self-employment as a cleaner for only two hours a week on a Saturday was not incompatible with entitlement to carer's allowance and it is, in my view, plain that the claimant was not required to give up that work, or looking for similar work, due to her daughter's illness and a consequent need for her to care for her granddaughter. After all, the child lived with her mother, who had presumably been available to look after her before she became ill while the claimant had been working on Saturdays. Indeed, the claimant has produced evidence of some later work, but that was some time afterwards, when her claim had been disallowed, and clearly she had not intended to do such work when she filled in her claim form. Her granddaughter's illness may have prompted her to give up work, but it did not require her to do so. The claimant's position is similar to that of a person whose own illness prompts him or her to give up work even if it is not incapacitating; it is only if an illness is incapacitating that it gives rise to entitlement to benefits or to the continuation of a status as a worker or self-employed person.

18. Therefore, on the facts of this case, the claimant could not to be regarded as still pursuing an activity as a self-employed person from 2 August 2013, even if she had been before then. Accordingly, the First-tier Tribunal reached the right decision, even though it may have done so for the wrong reason.

Mark Rowland
27 September 2018