[2018] AACR 26

(NB and The Commissioners for Her Majesty's Revenue and Customs (TC) [2016] NI Com 47)

Dr K Mullan Chief Commissioner **C1/14-15 (TC)(T)**
Mr O Stockman Commissioner
Mr C Ward Deputy Commissioner

4 July 2016

Tax Credits – child care element – provider of child care outside the UK – whether existing scheme for authorised providers of child care outside the UK intra vires – whether restriction of eligible child care to authorised providers in the UK contrary to EU law.

The appellant was a single person who claimed and was awarded tax credits ("TC") by HM Revenue & Customs ("HMRC") for the periods from 6 April 2008 to 5 April 2009 and from 6 April 2009 to 5 April 2010. The award included an element for weekly child care costs for her two youngest children. The appellant lived and worked in County Fermanagh in Northern Ireland. Her child care provider was situated in County Cavan in the Republic of Ireland.

On 23 March 2010, HMRC decided that she was not entitled to an award of the child care element of TC from 11 March 2009 to 21 March 2010 because the child care received by her children was provided outside the UK and not eligible child care within the meaning of regulation 14(2) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002, No.2005).

The appellant's appeal to a tribunal against that decision was disallowed.

On the appellant's further appeal to the Social Security Commissioners, HMRC sought to argue, inter alia, that a suitable legislative mechanism existed, in the form of the scheme for accreditation of child care providers used by Ministry of Defence ("MoD") personnel, under which - notwithstanding that the present case does not involve such personnel - a regulatory body in the Republic of Ireland could have applied, and the child care provider could have obtained approval under the ensuing scheme.

Held: allowing the appeal:

(i) Art.56 of the Treaty on the Functioning of the European Union ("TFEU") on the freedom to provide, and by corollary to receive, services and Directive 2006/123/EC ("the Directive") were engaged (see paragraph 81);

(ii) While Article 9 of the Directive permitted Member States to make access to or exercise of a service activity subject to an authorisation scheme, neither section 12(4) of the Tax Credits Act 2002 nor any other provision provided authority for the regulations relied upon as justifying the MoD scheme (see paragraphs 76-79);

(iii) The *Marleasing* principle (see *Marleasing SA v La Comercial Internationale de Alimentacion SA* (Case C-106/89)) could not be applied retrospectively so as to validate the legislation relied upon as the authority for the MoD scheme (see paragraph 104);

(iv) If the MoD scheme was legally valid, contrary to the above analysis, it was nevertheless insufficiently transparent and accessible to comply with the requirements of Article 10 of the Directive (see paragraph 92);

(v) By Article 19(b) of the Directive, the UK could not set discriminatory limits on the grant of financial assistance for the services in question by reason of the fact that the service provider was established in another Member State;

(vi) There was no valid authorisation scheme for child care providers outside the UK which avoided an infringement of Article 56 TFEU (see paragraph 84);

(vii) Accordingly, the appellant was not disentitled to the childcare element of TC solely on the basis that her child care provider was situated in the Republic of Ireland.

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. This is a claimant's appeal from the decision of an appeal tribunal sitting at Enniskillen on 23 April 2012.

2. For the reasons we give below, we decide that the appellant was not disentitled to tax credits (TC) for the period from 11 March 2009 to 21 March 2010 solely on the basis that her child care provider was located outside the United Kingdom and therefore not providing eligible child care within the meaning of regulation 14(2) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002, No.2005) (the WTC Regulations).

REASONS

Background

3. Throughout the period relevant to the decision under appeal, the appellant was a single person engaged in remunerative work and responsible for four children. She claimed and was awarded TC by HM Revenue & Customs (HMRC) for the periods from 6 April 2008 to 5 April 2009 and from 6 April 2009 to 5 April 2010. The award included an element for weekly child care costs for her two youngest children. The appellant lived and worked in County Fermanagh in Northern Ireland. The appellant's child care provider was situated in County Cavan in the Republic of Ireland.

4. On 2 October 2009 the appellant was notified that her claim was being reviewed. She was called to an interview with HMRC on 12 February 2010 and provided further information. On 23 March 2010, HMRC decided that the appellant was not entitled to an award of the child care element of TC from 11 March 2009 to 21 March 2010. However, in all the circumstances, HMRC indicated that she was not required to repay any TC overpaid as a result of the decision. The reason given for the decision on entitlement was that the child care received by her children was not eligible child care within the meaning of regulation 14(2) of the WTC Regulations.

5. The appellant appealed from the decision that she was not entitled to the child care element of TC. Her appeal was heard by a tribunal consisting of a single legally qualified member (LQM). The argument then presented to the tribunal by the appellant's representatives was that the legislation under which the decision had been made was not compatible with European Union Directive 79/7(EEC). That Directive concerns equal treatment for men and women in matters of social security. The tribunal confined its consideration to this issue. It found that the legislation was not discriminatory on grounds of gender and disallowed the appeal.

6. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 27 November 2012. The appellant applied to the LQM for leave to appeal to the Social Security Commissioner from the decision of the appeal tribunal, but leave was refused by a determination issued on 23 January 2013. On 22 February 2013 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

7. The appellant, represented by Law Centre (NI), submitted that the tribunal had erred in law on the basis that:

(i) the tribunal had given inadequate reasons for its decision; and

(ii) the tribunal failed to take into account evidence provided by the appellant relating to gender discrimination.

8. HMRC was invited to make observations on the appellant's grounds. HMRC responded and submitted that the tribunal had not erred in law as alleged and indicated that HMRC did not support the application for leave to appeal.

9. On 4 March 2014 the Social Security Commissioner, in exercise of his inquisitorial jurisdiction, directed a number of questions to the appellant's representative. These concerned the application to the case of Article 56 of the Treaty on the Functioning of the European Union (TFEU) and the right to provide and receive services under European Union (EU) law. The appellant's representative responded to submit that the appellant had the right to receive services as a matter of EU law and that the decision to deny the child care element of TC to the appellant was an unlawful restriction on her freedom to receive services. In response, HMRC accepted that Article 56 TFEU was potentially engaged in the case, but submitted that there was no interference with the right or, if there was, that such interference was justified and proportionate.

Procedural steps

10. On 12 June 2014, the Social Security Commissioner granted leave to appeal. On 20 June 2014 the Chief Social Security Commissioner decided that the case involved a point of law of special difficulty and directed that the appeal should be determined by a Tribunal of Commissioners. He directed an oral hearing of the appeal.

Relevant legislation

11. The legislation which falls to be considered in this case consists of two elements, namely, United Kingdom (UK) law relating to the child care element of TC and European Union law relating to the right to provide and receive services.

United Kingdom law

12. A provision which had been repealed by the date of the decision in the case, yet which is important to the discussion which follows, is section 15 of the Tax Credits Act 1999 (the 1999 Act). This provided as follows:

> **"15 New category of child care providers for tax credit purposes.**
>
> (1) The Secretary of State may by regulations make a scheme for establishing a new category of persons whose charges for providing child care are to be taken into account for the purpose of determining—
>
> (a) the appropriate maximum working families' tax credit for the purposes of section 128(5) of the Social Security Contributions and Benefits Act 1992 or section 127(5) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992; or
>
> (b) the appropriate maximum disabled person's tax credit for the purposes of section 129(8) of the Social Security Contributions and Benefits Act 1992 or section 128(8) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992.
>
> (2) A scheme so made shall—
>
> (a) provide that a person shall not fall within the new category unless he is approved by an accredited organisation in accordance with such criteria as may be determined by or under the scheme;
>
> (b) authorise the making of grants or loans to, and the charging of reasonable fees by, accredited organisations; and
>
> (c) include such other provisions as the Secretary of State considers necessary or expedient.
>
> (3) In subsection (2) above "accredited", in relation to an organisation, means accredited by the Secretary of State in accordance with such criteria as may be determined by or under the scheme.
>
> (4) Regulations under this section—
>
> (a) may make different provision for different cases or circumstances or for different areas;
>
> (b) may make such incidental, supplemental, consequential and transitional provision as appears to the Secretary of State to be necessary or expedient; and

> (c) shall be made by statutory instrument which, subject to subsection (5) below, shall be subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (5) A draft of the first regulations to be made under this section shall be laid before each House of Parliament and those regulations shall not be made unless the draft has been approved by a resolution of each House."

13. Under section 15 of the 1999 Act, the Tax Credits (New Category of Child Care Provider) Regulations 1999 (SI 1999, No.3110) (the 1999 Regulations) were made by the Secretary of State for Education and Employment, coming into force on 2 December 1999. For the purpose of eligible TC child care costs, the 1999 Regulations established a scheme of accreditation for child care providers. The key elements were (a) the accreditation by the Secretary of State of organisations which (b) satisfied the Secretary of State that they met specific criteria and which (c) would then approve child care providers who (d) met certain scheduled criteria.

14. Also under section 15 of the 1999 Act, the Tax Credit (New Category of Child Care Provider) Regulations 2002 (the 2002 Regulations) (SI 2002, No.1417) were made by the Secretary of State for Defence (the SSD), coming into force on 20 June 2002. For the purpose of eligible TC child care costs, the 2002 Regulations established a scheme of accreditation for child care providers who looked after one or more children outside the UK for reward. The key elements were (a) the accreditation by the SSD of organisations which (b) satisfied the SSD that they met specific criteria and which (c) would then approve child care providers in relation to provision of child care outside the UK who (d) met the same scheduled criteria (albeit formatted slightly differently) as appear in the 1999 Regulations.

15. At regulation 3 the 2002 Regulations provided that:

> "A person shall only fall within the category of persons established by the scheme-
>
> (a) if he is approved by an accredited organisation; and
>
> (b) in relation to the provision by him of child care outside the United Kingdom."

16. Regulation 4 of the 2002 Regulations made parallel provision to regulation 5 of the 1999 Regulations and the scheme broadly replicated the scheme under the 1999 Regulations, with the key difference being the requirement that child care was provided outside the United Kingdom. The Explanatory Note to the 2002 Regulations states that:

> "These Regulations make a scheme for establishing a new category of persons whose charges for providing child care outside the United Kingdom are to be taken into account for the purposes of determining working families' tax credit or disabled person's tax credit. The persons whose charges can be taken into account for these purposes must be approved by an organisation that has been accredited by the Secretary of State".

17. The 1999 Act was repealed in its entirety by section 60 and Schedule 6 to the Tax Credits Act 2002 (the 2002 Act) from 27 August 2002 for the purpose of awards of TC commencing after that date, with a saving provision for awards commencing on or after 4 June 2002 but before 27 August 2002. The saving provision has no relevance to this case, which concerns a claim made after 27 August 2002.

18. Section 12 of the 2002 Act came into effect on 9 July 2002 and provides as follows:

> **"12 Child care element**
>
> (1) The prescribed manner of determination of the maximum rate at which a person or persons may be entitled to working tax credit may involve the inclusion, in prescribed circumstances, of a child care element.
>
> (2) A child care element is an element in respect of a prescribed proportion of so much of any relevant child care charges as does not exceed a prescribed amount.
>
> (3) "Child care charges" are charges of a prescribed description incurred in respect of child care by the person, or either or both of the persons, by whom a claim for working tax credit is made.
>
> (4) "Child care", in relation to a person or persons, means care provided—
>
> (a) for a child of a prescribed description for whom the person is responsible, or for whom either or both of the persons is or are responsible, and
>
> (b) by a person of a prescribed description.
>
> (5) The descriptions of persons prescribed under subsection (4)(b) may include descriptions of persons approved in accordance with a scheme made by the appropriate national authority under this subsection.
>
> (6) "The appropriate national authority" means—
>
> (a) in relation to care provided in England, the Secretary of State,
>
> (b) in relation to care provided in Scotland, the Scottish Ministers,
>
> (c) in relation to care provided in Wales, the National Assembly for Wales, and
>
> (d) in relation to care provided in Northern Ireland, the Department of Health, Social Services and Public Safety.
>
> (7) The provision made by a scheme under subsection (5) must involve the giving of approvals, in accordance with criteria determined by or under the scheme, by such of the following as the scheme specifies—
>
> (a) the appropriate national authority making the scheme,

(b) one or more specified persons or bodies or persons or bodies of a specified description, and

(c) persons or bodies accredited under the scheme in accordance with criteria determined by or under it.

(8)… *not relevant*. "

19. The WTC Regulations were made under powers in the 2002 Act. They came into force from 6 April 2003, although some provisions relating to claims and decisions had earlier effect. Regulation 14 of the WTC Regulations made further provision for the definition of "child care". As amended at the relevant period, so far as relevant for these proceedings, regulation 14 provides:

"**Entitlement to child care element of working tax credit**

14. (1) Subject to paragraph (1A), for the purposes of section 12 of the Act charges incurred for child care are charges paid by the person, or in the case of a joint claim, by either or both of the persons, for child care provided for any child for whom the person, or at least one of the persons, is responsible within the meaning of regulation 3 of the Child Tax Credit Regulations 2002. In these Regulations, such charges are called "relevant child care charges".

(1A) … *not relevant*;

(1B) … *not relevant*;

(2) "Child care" means care provided for a child—

(a) in England and Wales—

(i) by persons registered under Part 10A of the Children Act 1989;

(ii) in schools or establishments which are exempted from registration under Part 10A of the Children Act 1989 by virtue of paragraph 1 or 2 of Schedule 9A to that Act;

(iii) in respect of any period between his eighth birthday and the day preceding the first Tuesday in September following his twelfth birthday, where the care is provided out of school hours, by a school on school premises or by a local authority; or

(iv) by a child care provider approved by an accredited organisation within the meaning given by regulation 4 of the Tax Credit (New Category of Child Care Provider) Regulations 1999;

(b) in Scotland—

(i) by a person in circumstances where the care service provided by him consists of child minding or of day care of children within the meaning of section 2 of the Regulation of Care (Scotland) Act 2001 and is registered under Part 1 of that Act; or

(ii) by a local authority in circumstances where the care service provided by the local authority consists of child minding or of day care of children within the meaning of section 2 of the Regulation of Care (Scotland) Act 2001 and is registered under Part 2 of that Act;

(c) in Northern Ireland—

(i) by persons registered under Part XI of the Children (Northern Ireland) Order 1995; or

(ii) by institutions and establishments exempt from registration under that Part by virtue of Article 121 of that Order; or

(d) anywhere outside the United Kingdom—

(i) by a child care provider approved by an accredited organisation within the meaning given by regulation 4 of the Tax Credit (New Category of Child Care Provider) Regulations 2002;

(3) *…not relevant*; "

We observe in passing that, when originally made, regulation 14(2)(d) read:

"(d) in any part of the United Kingdom—

(i) by a child care provider approved by an accredited organisation within the meaning given by regulation 4 of the Tax Credit (New Category of Child Care Provider) Regulations 2002; or

(ii) by a child care provider approved in accordance with a scheme made by the appropriate national authority under section 12(5) of the Act."

20. However, this version of regulation 14(2)(d) would appear to have been made in error. It was amended on 24 March 2003 by regulation 13 of the Working Tax Credit (Entitlement and Maximum Rate) (Amendment) Regulations 2003 (SI 2003 No.701) (the WTC Amendment Regulations), also from 6 April 2003 – the commencement date of the WTC Regulations. Regulation 14(2)(d) therefore never came into operation in this particular form.

European Union law

21. Further to the UK domestic provisions, EU law on the right to provide and receive services is relevant to this appeal. Article 56 of the TFEU provides as follows:

"Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union."

22. Article 57 of the TFEU further provides:

"Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

23. Article 61 of the TFEU provides:

"As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56".

24. Directive 2006/123/EC (the Directive) develops the nature of the right to receive services under Article 56 and builds upon the case law of the former European Court of Justice to codify the rights of recipients of services. Specifically at Chapter III it provides as follows:

"Article 9

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

Article 10

Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;
(b) justified by an overriding reason relating to the public interest;
(c) proportionate to that public interest objective;
(d) clear and unambiguous;
(e) objective;
(f) made public in advance;
(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable

as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations."

Article 11

Duration of authorisation

1. An authorisation granted to a provider shall not be for a limited period, except where:

(a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;

(b) the number of available authorisations is limited by an overriding reason relating to the public interest; or

(c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

2. Paragraph 1 shall not concern the maximum period before the end of which the provider must actually commence his activity after receiving authorisation.

3. Member States shall require a provider to inform the relevant point of single contact provided for in Article 6 of the following changes:

(a) the creation of subsidiaries whose activities fall within the scope of the authorisation scheme;

(b) changes in his situation which result in the conditions for authorisation no longer being met.

4. This Article shall be without prejudice to the Member States' ability to revoke authorisations, when the conditions for authorisation are no longer met."

25. Further at Chapter IV, the Directive provides:

"Article 19
Prohibited restrictions

Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

(a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;

(b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided."

Oral hearing

26. We held an oral hearing of the appeal on 23 September 2014. The appellant was represented by Mr Lee Hatton of Law Centre NI. The respondent was represented by Mr Jason Coppel QC, instructed by Ms Liaquat of HM Revenue & Customs Solicitor's Office. We are grateful to the parties for their thorough and helpful submissions. We mean no disrespect to the breadth of argument submitted by the parties by reducing these to the summary of the respective submissions given below.

The appellant's submissions

27. At hearing, Mr Hatton advised us that the appellant ceased to rely on the grounds relating to sex discrimination under Directive 79/7 which had been advanced to the tribunal as well as to us. We consider that this was an appropriate course and will say no more about this ground.

28. Mr Hatton advanced the primary submission that the appellant had British nationality and, therefore, citizenship of the European Union. He provided evidence from the proprietor of Cleverclogs Montessori and Day Care Centre – the appellant's child care provider at the period relevant to this appeal - to the effect that the provider was located in the Republic of Ireland, approximately one kilometre from the United Kingdom border. The child care provider had been approved by the Health and Safety Executive (the HSE) in the Republic of Ireland and was a member of the National Children's Nurseries Association (the NCNA) there.

29. Although the appellant resided in Northern Ireland, Mr Hatton accepted that the appellant's child care provider was not registered as a provider of child care services under Part XI of the Children (NI) Order 1995 (the Children Order). As such, the child care received in the relevant period did not fall within the definition in regulation 14(2)(c) of the WTC Regulations. However, he submitted that there was nothing to suggest that the facility would fail to meet the requirements of Part XI of the Children Order. He acknowledged that a scheme existed under the 2002 Regulations to permit relevant child care by providers outside the UK under Ministry of Defence (MoD) accreditation. He characterised this scheme as being provided only for Crown Servants living outside the UK.

30. Mr Hatton submitted that Article 56 of the TFEU had the aim of removing barriers on individuals and organisations to provide or receive services within the EU and that the services provided by the appellant's child care provider fell within the scope of Article 56. He submitted that the decision not to allow an element within the appellant's TC for child care services provided in the Republic of Ireland amounted to a restriction on freedom to receive services.

31. Mr Hatton further submitted that the regulation governing entitlement to the child care element of TC was indirectly discriminatory in so far as it required approval by accredited organisations, as this made it more difficult for child care providers in the Republic of Ireland to offer services to persons living in the United Kingdom.

32. Mr Hatton submitted that the only scheme permitting the appellant to obtain child care outside the UK, and to be awarded the child care element of TC, was that established under the 2002 Regulations. He submitted that it was plain that this was a scheme created for Crown servants abroad. All of the organisations which were accredited under the scheme were related to the MoD.

33. Mr Hatton submitted that the requirements of Article 9 of the Directive were that a Member State should not make access to a service activity subject to an authorisation scheme, unless the authorisation scheme did not discriminate against the provider, and the need for an authorisation scheme was justified by an overriding reason relating to the public interest, and the objective pursued could not be attained by means of a less restrictive measure. He further relied on Article 10 of the Directive which required authorisation schemes to be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner. Among the criteria referred to under Article 10(2) were that they would be "(f) made public in advance" and "(g) transparent and accessible".

34. Mr Hatton submitted that, when the appellant was interviewed by HMRC officials, the record indicates that none of the HMRC officials present appeared to be aware of the MoD scheme. He further submitted that, when the provider approached a body responsible for registration of child care in Northern Ireland, the body indicated that the provider fell outside its jurisdiction but made no reference to the scheme permitting accreditation outside the UK. He submitted that if relevant public officials administering TC and those administering a related authorisation scheme were unaware of it, the MoD scheme was not transparent and accessible.

35. Mr Hatton further relied upon Article 19(b) of the Directive which prohibited discriminatory limits on the grant of financial assistance by a Member State by reason of the fact that the provider is established in another Member State. He submitted that the scheme under the 2002 Regulations involved a number of discriminatory aspects, such as the requirement to renew authorisation and matters such as the requirement to provide a planned programme of developmental activity that meets the needs of children cared for – which was different to the requirements placed on child care providers in the UK. He further submitted that the limitation on the duration of authorisation was contrary to the requirements of Article 11.1 of the Directive.

The respondent's submissions

36. Mr Coppel submitted that the appellant was not entitled to the child care element of TC for the relevant period because the child care provided for her two younger children did not fall within the definition of child care in regulation 14(2) of the WTC Regulations. This was because the provider was located outside the UK but had not been approved by an accredited organisation pursuant to the 2002 Regulations.

37. He did not dispute that the appellant was an EU citizen travelling to another EU Member State in order to receive services and that her freedom to do so was protected by Article 56 TFEU. He acknowledged that Article 56 TFEU was potentially engaged by any restriction which regulation 14(2) of the WTC Regulations might place on the appellant's right to receive services. However, Mr Coppel submitted, there was no impermissible restriction on the appellant's freedom to receive services from a child care provider located in the Republic of Ireland as the facility existed for such providers to be approved under regulation 14(2)(d) of the WTC Regulations and regulation 4 of the 2002 Regulations.

38. Mr Coppel submitted that the purpose of the requirement of approval by accredited organisations was to ensure an appropriately high level of quality in child care services and to obtain value for public money. He submitted that regulation of child care providers was delegated to devolved national authorities within the UK, and that the 2002 Regulations made similar provision aimed at providers outside the UK. He submitted that the requirements of the scheme outside the UK were non-discriminatory in principle as child care providers under all schemes required approval or authorisation. He did not dispute that the primary intention of the 2002 Regulations was to address the needs of Crown servants who have exemption from residence requirements, mostly employed by the SSD.

39. While Mr Coppel candidly accepted that the scheme under the 2002 Regulations was primarily for persons who work on military bases overseas, his key point was that it was not restricted to that. While accepting that the scheme perhaps could be better known, he nevertheless submitted that applications would be dealt with on their merits. He submitted that the appellant had been refused entitlement, not because there was no facility to be accredited but because her child care provider had not used that facility. He submitted that it was not a breach of EU law to have a system set out in legislation which people do not know about as they should. He submitted that the fact that it had not been utilised in the past did not amount to interference by the UK government with rights guaranteed by the TFEU or the Directive.

40. Mr Coppel disputed the submission that transparency was a specific requirement, as this was based on Articles 9 and 10 of the Directive which were aimed at freedom of establishment for providers. He submitted that we should not be concerned with these provisions, but rather Article 19 and the freedom to receive services.

41. As far as Article 10.3 and the issue of duplication of regulatory requirements was concerned, Mr Coppel submitted that there need not be duplication. A regulatory body in any Member State such as the Republic of Ireland could apply to become an accredited organisation, allowing its members to become approved child care providers. It was not an onerous task to complete and it was justifiable to have a small administrative burden in order for HMRC to be able to monitor expenditure of public funds. Even if there had been no lawful scheme in place for approval of child care providers outside the UK, Mr Coppel submitted that Article 19(b) would not be breached if the lack of a scheme outside the UK was objectively justifiable.

42. Mr Coppel outlined the procedure for the provision of information under section 14 of the 2002 Act. He further referred to HMRC's ability to seek information from child care providers in regulation 31(2)(a) of the Tax Credits (Claims and Notifications) Regulations 2002 (SI 2002, No.2014). He referred to section 31 of the 2002 Act, which established a penalty regime. He relied on the general interest that State-funded child care is of an appropriate standard and that public funds are properly accounted for, and further relied on the fact that there cannot be enforcement of a criminal sanction for fraud under the 2002 Act outside the UK. Even if it would breach the appellant's right to receive services, he submitted that these factors amounted to sufficient and proportionate justification for not paying TC for child care outside the UK. He submitted that the measures required by the 2002 Regulations were clearly suitable for attaining the objectives pursued and did not go beyond what was necessary for their attainment.

Discussion

43. In relation to Mr Hatton's principal submission, it was common case that the circumstances of the appellant represented an instance of a European Union citizen moving from one Member State of the European Union to another to receive a service. This has the consequence that Article 56 of TFEU and the Directive were engaged. Although the transposition date for the Directive was 28 December 2009, whereas the period which we are considering commenced on 6 April 2008, it was common case that the Directive had codified the principles arising from relevant jurisprudence on receipt of services such as *Luisi and Carbone v Ministero del Tesoro* (Cases C-286/82 and C-26/83) and that nothing turned on the question of timing.

44. We consider that the appellant's case falls within the material scope of the Directive. Whilst we observe that by Article 2(2)(j), services to which the Directive does not apply include:

> "(j) social services relating to social housing, child care and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;"

It is common case and clear that this exclusion does not refer to private sector child care as provided in the present appeal.

45. We consider that the appellant falls within the personal scope of the Directive. In particular, Article 4 sets out definitions of "service", "provider" and "recipient". The appellant is a recipient within the relevant definition which states:

> "'recipient' means any natural person who is a national of a Member State … who, for professional or non-professional purposes, uses or wishes to use, a service;".

46. It being accepted that Article 56 was engaged on the facts of the case, argument had centred on the question of whether the existence of the scheme provided by the UK government for the authorisation of child care providers outside the UK meant that there had been no restriction of the appellant's freedom to receive child care services from elsewhere in the European Union.

47. In evidence, submitted by Mr Coppel after the hearing, it was confirmed that two organisations had been accredited by the SSD to approve child care providers outside the UK, on the recommendation of the Office for Standards in Education, Children's Services and Skills (OFSTED). These were the British Forces Early Years Service (BFEYS) and the Soldiers Sailors Airmen and Families Association (SSAFA) Forces Help. In turn, SSAFA had approved 16 child care providers and BFEYS 626. All the providers approved by BFEYS were located in Germany. Of the 16 approved by SSAFA, 12 were in Cyprus, with approval of a further provider in each of Brunei, the Falkland Islands, Gibraltar and Canada. All of the child care providers were located in approved settings used by MoD personnel.

48. In the course of the hearing we were also directed to HMRC information leaflet WTC5 – "Working Tax Credit – Help with the costs of child care". At page 6 this includes the paragraph:

> "**Crown servants working abroad**
>
> If you're a civil servant or a member of the Armed Forces posted overseas and your child has gone with you, you can get help with your child care costs if your child care provider is approved under a Ministry of Defence accreditation scheme abroad."

49. However, before proceeding further with our determination of the issues in the appeal, it appeared necessary to explore a preliminary issue. Mr Coppel had placed reliance on the existence of schemes for approval of child care providers outside the UK which had been made under the 2002 Regulations. These had been made under section 15 of the 1999 Act. He placed further reliance on regulation 14(2)(d) of the WTC Regulations, which had been made under section 12 of the 2002 Act. Nevertheless, it appeared to us that the continued validity of the 2002 Regulations after the repeal of the 1999 Act was unclear. While the parties were in agreement that the 2002 Regulations were valid, we requested further submissions.

50. Firstly, we requested submissions as to whether the 2002 Regulations had lapsed upon the repeal of section 15 of the 1999 Act. An implication of the repeal of section 15 from 27 August 2002 was that any regulations made under section 15 ceased to have effect from that date. However, the 2002 Act had come into operation by this time and a new regulation

making-power in relation to child care schemes was created under section 12 of the 2002 Act from 9 July 2002. Our question was whether this power preserved the validity of the 2002 Regulations.

51. Secondly, the new regulation-making power in section 12 of the 2002 Act in relation to child care schemes expressly empowered authorisation of childcare providers in four areas within the UK. Our question was whether regulation 14(2)(d) of the WTC Regulations, which provided authorisation of child care charges incurred outside the UK, was authorised by section 12 of the 2002 Act.

52. While we initially viewed these as separate issues, our analysis later crystallised around the extent of the regulation-making powers under section 12 and whether these permitted the creation of a child care authorisation scheme otherwise than in the UK.

Preliminary issues – the *vires* of the 2002 Regulations and of regulation 14(2)(d) of the WTC Regulations

Submissions

53. For his part, Mr Hatton adopted a neutral approach and, understandably, did not actively contribute to this discussion, relying on his substantive arguments from European law.

54. In addressing these issues Mr Coppel accepted that the 2002 Act was not a measure consolidating the 1999 Act but was a new statute. Nevertheless, it incorporated a wide range of the features of the previous benefit, including the child care element. Mr Coppel submitted that the 2002 Regulations had not lapsed on the repeal of section 15 of the 1999 Act, but that their effect was preserved by section 17(2) of the Interpretation Act 1978 (the 1978 Act). Section 17 of the 1978 Act provides:

> "17 (2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears,—
>
> > (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;
> >
> > (b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision".

55. Mr Coppel submitted that section 15 of the 1999 Act provided for the approval of child care providers by accredited organisations, and that section 12 of the 2002 Act similarly included provision for approval of child care providers by accredited organisations. He acknowledged that there were differences in the wording of the two sections but submitted that their purpose and effect were materially the same. Section 15 had been re-enacted "with modification" and there was no limit within section 17 on the extent of such modification and nor had any limitation been imposed by the courts. He relied on *Stevens v The General Steam*

Navigation Company Ltd [1903] 1 KB 890 and *R v Corby Juvenile Court, ex parte M* [1987] 1 WLR 55 as examples of the operation of section 17 of the 1978 Act.

56. Mr Coppel submitted that, when enacting the 2002 Act, Parliament must be taken to have been acquainted with the previous regime for approval of child care providers under section 15 of the 1999 Act and the various regulations made under that section. He submits that it must have been the intention of Parliament to continue the effect of the accreditation and approvals regime existing under the 1999 Act. He submitted that this intention is borne out by the subsequent use of the section 12 regulation-making power to revoke the 1999 Regulations through the Tax Credit (New Category of Child Care Provider) (Revocation) (England) Regulations 2007 (SI 2007/2480) and the Tax Credits (Child Care Providers) (Miscellaneous Revocation and Transitional Provisions) (England) Scheme 2007 (SI 2007/2481). He observes that the explanatory note to the latter provisions reads:

> "This Scheme partially revokes the Tax Credit (New Category of Child Care Provider) Regulations 1999 (S.I. 1999/3110) ("the 1999 Regulations") and revokes the Tax Credits (Approval of Child Care Providers) Scheme 2005 (S.I. 2005/93) ("the 2005 Scheme"), with transitional provisions. The Scheme applies in relation to England only. The revocations provided for by the Scheme come into force on 1st October 2007, with the exception of the revocations of regulations 11(a) and (b) and 12 of the 1999 Regulations, for which the commencement date is 1st October 2009.
>
> The 1999 Regulations were made under section 15 of the Tax Credits Act 1999. Although that Act was repealed by the Tax Credits Act 2002, the 1999 Regulations continue to have effect (by virtue of section 17(2)(b) of the Interpretation Act 1978) as regulations under section 12(4)(b) of the 2002 Act and as a scheme under section 12(5) of that Act. The 2005 Scheme was made under sections 12 and 65 of the Tax Credits Act 2002 …"

57. On section 12 of the 2002 Act, Mr Coppel submitted that sub-section 12(4)(b) was expressed in permissive terms, and that sub-section 12(5) did not cut down on sub-section 12(4). He submitted that sub-section 12(6) was not exhaustive and did not exclude an authority from providing for a scheme for care providers outside the UK. He further submitted that, if we had difficulty with that interpretation, he could rely on our obligation under EU law to interpret domestic legislation as to accord with EU law, relying on *Marleasing SA v La Comercial Internationale de Alimentacion SA* [Case C-106/89] and *Litster & others v Forth Dry Dock Engineering Company Ltd* [1988] UKHL 10 [1990] 1 AC 546.

58. The implication of any decision that there was no valid scheme of authorisation of child care providers outside the UK might be that the argument that the appellant's child care provider could have sought authorisation under such a scheme would fail. However, the consequences would be broader, having the implication that there would be no entitlement to the child care element of TC for very many other individuals, such as those whose children receive child care in overseas UK Service bases from providers approved under the 2002 Regulations. For that reason, following the hearing, we placed the SSD on notice of the preliminary questions of concern to us and afforded him an opportunity to make submissions on the issues. In due course, he responded by way of further written submissions from Mr

Coppel, who maintained his argument that the 2002 Regulations had not lapsed on the repeal of section 15 of the 1999 Act on essentially the same grounds.

Consideration of preliminary issues

59. In relation to his argument under section 17 of the 1978 Act, Mr Coppel relied on *Stevens v The General Steam Navigation Company Ltd* [1903] 1 KB 890, where, he submitted, the Court of Appeal held that a modification within the equivalent provision of the Interpretation Act 1889 would cover the extension in a re-enactment of the scope of a previous provision. However, that case was concerned with the 1889 Act equivalent of section 17(2)(a) of the 1978 Act, and the definition of a word. He further relied on *R v Corby Juvenile Court, ex parte M* [1987] 1 WLR 55. That case was concerned with sub-section 17(2)(b) and a "thing done" – namely, a county council's assumption of parental rights under the Children Act 1948, which was then repealed by the Child Care Act 1980. We consider that neither authority assists us directly on the application of section 17(2)(b) to the authorisation of subordinate legislation.

60. Mr Coppel noted the caution expressed by the authors of Bennion on Statutory Interpretation (6th Edition) at page 286 that section 17 should be given a narrow interpretation in order to avoid alteration to rights and liabilities in unintended ways. He submitted that Bennion cited no directly relevant authority for this proposition and that we should not accept it. We accept that this is not a case in which we should give a narrow interpretation to section 17.

61. We accept that Mr Coppel demonstrates, as far as the 1999 Regulations were concerned, that it was the understanding of those who provided the Explanatory Note to SI 2007/2481 that these continued in force following the repeal of the 1999 Act, at least in relation to England, and it would appear that this was also the case for a period in relation to Wales (see regulation 14(2)(a)(iv) of the WTC Regulations). The residual territorial extent of those regulations is entirely within the UK, therefore, and we consider that this submission casts no particular light on the more difficult issue of the continuation of the 2002 Regulations in relation to schemes outside the UK.

62. As indicated above, it appears to us that what we had identified as two issues initially reduces to a single question at the end of the day. This is whether section 12 of the 2002 Act gives authority for the provision of a scheme for TC purposes in relation to the provision of child care otherwise than in the United Kingdom. Such authority would be necessary both for the 2002 Regulations to have continued in effect by way of sub-section 17(2)(b) of the 1978 Act but also for the making of regulation 14(2)(d) of the WTC Regulations.

63. It may be helpful to recall at this point that sub-section 15(1) of the 1999 Act permitted the Secretary of State by regulations to make a scheme for establishing a new category of child care provider and that by sub-section 15(2) this included the mandatory element of approval of providers by accredited organisations in accordance with such criteria as may be determined by or under the scheme. Sub-section 15(4) of the 1999 Act then provided that "Regulations under this section … may make different provision for different cases or circumstances or for different areas". Therefore, whatever provision was made for different geographical areas, the accreditation and approval elements of the scheme were mandatory.

64. Sub-section 12(4) of the 2002 Act defines "child care" as care provided for a child of a prescribed description by a person of a prescribed description. "Prescribed" means "prescribed by regulations" by section 67 of the 2002 Act. By sub-section 65(1) of the 2002 Act the power to make regulations under section 12 is exercisable by the Treasury. Sub-sections 65(7)-(9) (but especially (7)) make detailed provision for the manner in which the regulation-making power may be exercised.

65. Sub-section 66(3) of the 2002 Act appears to envisage that the mechanism by which the Secretary of State may make a scheme in relation to care provided in England is by way of statutory instrument subject to annulment. Similar provisions for the democratic control of schemes exist for Scotland (s66(4)) and Northern Ireland (s66(5)).

66. Sub-section 12(5) of the 2002 Act specifically provides that "the descriptions of persons prescribed under sub-section (4)(b) may include descriptions of persons approved in accordance with a scheme made by the appropriate national authority under this subsection". "Appropriate national authority" is defined in sub-section 12(6) which makes separate provision for England, Scotland, Wales and Northern Ireland. The appropriate national authority ("ANA") exercises jurisdiction in relation to care provided <u>in</u> the jurisdiction concerned as a devolved matter. However, there is no ANA for care provided in any place outside the jurisdictions comprising the UK. There is no equivalent to the carefully crafted provisions in sub-sections 66(3)-(5) allowing for the democratic control of any such scheme.

67. Sub-section 12(7) of the 2002 Act, which can only apply to ANA schemes made under sub-section 12(5), imposes the accreditation and approval elements in accordance with criteria determined by or under the scheme. The conferring of approval, while it may be done by the ANA, may also be done by persons specified under the scheme (whether directly by the scheme or by description) or by persons accredited under the scheme in accordance with criteria determined by it. It is thus entirely possible that the ANA may make a scheme which does not contain criteria, though it must contain a mechanism for determining those criteria, and under which the person to take the decision may be specified by the scheme or is accredited under the scheme.

68. Therefore, whereas section 15 of the 1999 Act established the requirements for approval as a child care provider, and then enabled different provision for different areas, section 12 of the 2002 Act delegates power to authorities in different areas, and then enables them to set the requirements for approval as a child care provider. Mr Coppel submits that the context of the changes appearing in the 2002 Act was the establishment of legislative assemblies in Scotland, Northern Ireland and Wales. The effect of section 12 of the 2002 Act was to give the post-devolution national authorities responsibility for this area for the first time. This submission is undoubtedly correct. However, his submissions went further than that.

69. In relation to section 12 of the 2002 Act, Mr Coppel submitted that sub-section 12(4)(b) would permit the making of provision for the accreditation of child care providers within and outside the UK. He submitted that, whereas the definition of child care in section 12(4)(b) of the 2002 Act is supplemented by sub-sections 12(5) to (7), these are not exhaustive of what may be prescribed pursuant to the general wording of sub-section 12(4)(b). He submitted that this did not restrict the power to make provision for child care

providers outside the UK and submitted that section 15 of the 1999 Act was thus re-enacted within sub-section 12(4)(b) of the 2002 Act.

70. On our analysis, section 12 of the 2002 Act involves a triple delegation of power. Firstly, there is delegation from Parliament to the Treasury in order to make regulations. Secondly, there is delegation from the Treasury to the ANA (where there is one) to make a scheme. Thirdly, there is delegation from the ANA to the person actually conferring approval under the scheme.

71. Since the 2002 Regulations were made by the SSD, and since the power to make regulations under section 12 of the 2002 Act is exercisable by the Treasury (see sub-section 65(1) of the 2002 Act), we asked whether the SSD would have power to make regulations under section 12. Mr Coppel submitted that by Schedule 1 of the Interpretation Act 1978 "Secretary of State" means "one of Her Majesty's principal secretaries of state" and by implication that the power to make regulations is interchangeable. However, we observe that by the same Schedule "The Treasury" means the Commissioners of Her Majesty's Treasury. Under Schedule 1 of the 1978 Act, the term "the Treasury" in section 65(1) of the 2002 Act does not extend to the SSD. It appears to us that Parliament has conferred the rule-making power under sub-section 12(4) of the 2002 Act on the Treasury and not on anyone else. In the light of our conclusions in the following paragraphs that the terms of section 12 of the 2002 Act are such that reliance on section 17 of the 1978 Act to preserve the 2002 Regulations is precluded for other reasons in any event, we consider that we do not need to state a concluded view on whether the change from delegation to the Secretary of State to delegation to the Treasury provides a further reason why reliance may not be placed on section 17 of the 1978 Act for such a purpose.

72. Sub-sections 12(5) and 12(6) allow the description of persons for the purposes of sub-section 12(4)(b) to include persons approved in accordance with a scheme made by the ANA - a decision-maker one step down the line from the Treasury (the prescriber). Section 12(7) then prescribes content for schemes made by an ANA under section 12(5). The content requires approvals to be made in accordance with criteria specified by an ANA, or by one or more specified persons or bodies or persons or bodies of a specified description, or by persons or bodies accredited under the scheme in accordance with criteria determined under the scheme. This potentially involves a further layer of sub-delegation. However, it is clear that such delegation could only occur in relation to an ANA scheme under sub-section 12(5).

73. We consider that, when Parliament went to the trouble of specifying the ANA, the mandatory content of schemes under section 12(5) and, at least in relation to England, Scotland and Northern Ireland, the mechanism by which such a scheme could be made, it would make no sense to say that a scheme could be created under the general power in section 12(4)(b). Such a scheme would escape the carefully crafted controls in sub-section 12(7).

74. Mr Coppel submits that the general power in sub-section 12(4)(b) would be enough to enable the SSD to make the 2002 Regulations. However, we consider that the making of the 2002 Regulations would require delegation of specific power to accredit organisations which met specified criteria, and in turn to delegate the power of approval of child care providers to those organisations in relation to provision of child care outside the UK. We consider that, whereas the terms of sub-section 12(4)(b) are broad, as they need to be for Mr Coppel's argument to succeed, there would be no obligation on the SSD thereunder to adopt such a

well-regulated system as sub-sections 12(5) and (7) provide. This would be to enable a coach and horses to be driven through the carefully-crafted regulatory environment. If Mr Coppel is correct, the power in sub-section 12(4)(b) could potentially enable a less regulated environment, with less democratic scrutiny, in relation to child care provided outside the UK than in it. It is difficult to justify why the legislation would permit such a difference.

75. In general, if Parliament said A, B, C and D, then it can be taken not to have meant E. By setting out a system for prescribing authorised child care providers via schemes made by the ANAs within the UK, approved by the Treasury, section 12(5) can be assumed to have precluded prescription of authorised child care providers via such schemes in other situations, including outside the UK. Considered on a practical level, it would leave wholly unclear who is authorised to make a scheme in respect of child care otherwise than in the UK and the arrangements for democratic scrutiny of such a scheme.

76. We are of the view that section 12 does not authorise the making of regulations under which "a person of a prescribed description" for the purposes of section 12(4)(b) is determined by reference to a scheme made in relation to care provided otherwise than in England, Scotland, Wales or Northern Ireland. We consider that any attempt to do so would be an unlawful delegation of (or abdication from) the power vested in the Treasury by sub-section 12(4)(b) and section 65(1).

77. The WTC Regulations and the WTC Amendment Regulations were made by the Treasury under sections 10, 11, 12, 65(1) and (7) and 67 of the 2002 Act. As we have seen, as amended, regulation 14(2)(d) of the WTC Regulations includes in the definition of "child care" care provided "anywhere outside the United Kingdom … by a child care provider approved by an accredited organisation within the meaning given by regulation 4 of the [2002 Regulations]". As indicated above, those Regulations were made by the SSD under the authority of section 15 of the 1999 Act.

78. However, as we have said, nothing in section 12 of the 2002 Act empowers a description of persons by reference to a scheme established other than by the ANA. At regulation 2(b), the 2002 Regulations define a "child care provider" as "a person who looks after … children … outside the United Kingdom for reward". The requirements of the scheme at regulation 3 restrict it to persons approved by an accredited organisation in relation to provision of child care outside the UK. It appears to us that the 2002 Regulations cannot survive the repeal of section 15 of the 1999 Act. In turn, sub-section 12(4)(b) of the 2002 Act cannot confer validity to regulations which have ceased to have effect.

79. In conclusion on this aspect, we consider that, subject to the possible application of the *Marleasing* principle, there is no lawful scheme for TC purposes in relation to the provision of child care otherwise than in the UK. As the *Marleasing* principle would relate to the right of the appellant to receive services under EU law, we will explore the EU law aspects of the appeal before returning to a consideration of the implications of *Marleasing*.

Article 56 TFEU right to provide and receive services

80. Mr Hatton had provided some evidence that the appellant's child care provider had sought to register with the relevant authority in Northern Ireland for the purposes of meeting the requirements of regulation 14(2)(c) of the WTC Regulations. We do not consider that this

is a matter of any significance, however, as regulation 14(2)(c) requires care to be provided to a child "in Northern Ireland". Even if the appellant's child care provider had been registered, for example, under Part XI of the Children (Northern Ireland) Order 1995, the fact that the child care was given in the Republic of Ireland and not in Northern Ireland would have defeated any claim for the child care element of TC under regulation 14(2)(c).

81. The right to provide services under Article 56 of the TFEU is directly effective (*Van Binsbergen*, C-33/74). The right to receive services is not expressly articulated in Article 56 TFEU, but it has long been accepted that the right to receive services is a necessary corollary of the right to provide services (*Luisi and Carbone v Ministero del Tesoro*, C-286/82 and C-26/83). We therefore accept that this case falls within the ambit of Article 56 of the TFEU.

82. The consequence of the decision of HMRC to end the appellant's entitlement to TC was to bring to an end the element of state support she received towards paying for child care. The sums of money the appellant had received by way of TC were relatively significant, amounting to £10,611.21 in 2008/09 and £10,375.89 in 2009/10. When she was notified that she would no longer be entitled to TC in respect of child care in the Republic of Ireland, we understand that she sent her two children to what she considered to be a less satisfactory child care provider in Northern Ireland. We have no hesitation in finding that the decision removing TC entitlement was *prima facie* an interference with the appellant's right to receive services from a provider in another EU Member State. In particular, the grant of financial assistance for child care services was stopped solely by reason of the fact that her child care provider was established in another Member State.

83. As indicated above, Mr Coppel submitted that the real reason for the appellant's non-entitlement to the child care element of TC was that the appellant's child care provider was not authorised. However, providers in different parts of the UK and overseas all required authorisation. Therefore, the location of the appellant's child care provider was not decisive and there had been no discrimination. He submitted that the appellant's child care provider could have sought authorisation from a relevant accrediting body with responsibility for child care providers outside the UK but did not do so. Therefore, he submitted, the UK did not breach any Article 56 rights of the appellant.

84. For the reasons we have given above, we do not consider that there was a legally valid scheme of general provision for authorisation of child care providers outside the UK. If we are right about that, it follows that there would be no authorisation scheme to which the HMRC could point to in order to rebut the argument that there has been a breach of Article 56 TFEU and of Article 19(a) of the Directive.

85. If we are wrong on the question of the validity of the 2002 Regulations, however, it becomes necessary to examine the issue of whether that scheme of authorisation, as relied upon by Mr Coppel, achieves the effect that the appellant's rights under Article 56 are not breached. We will therefore explore that issue next.

86. As noted, Article 9 of the Directive requires that a Member State shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the authorisation scheme did not discriminate against the provider, and the need for an authorisation scheme was justified by an overriding reason relating to the public interest, and the objective pursued could not be attained by means of a less restrictive measure. It can be

seen that these principles derive from the jurisprudence of the former ECJ, which has held that national legislation which makes the provision of services subject to prior administrative authorisation is liable to impede or render less attractive the provision of those services and therefore constitutes a restriction on the freedom to provide them (see *Analir and Others v Administración General del Estado* (Case C-205/99), paragraph 22). The former ECJ has further held that freedom to provide services may be restricted only by rules which are justified by overriding reasons in the general interest and are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. In order to be so justified, the national legislation in question must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (see *Sager v Dennemeyer & Co Ltd*, Case C-76/90, paragraph 15).

87. Again as noted, Article 10 of the Directive requires authorisation schemes to be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner. Among the criteria referred to under Article 10(2) are that authorisation schemes would be "(f) made public in advance" and "(g) transparent and accessible". Again this derives from the jurisprudence of the former ECJ. In *Geraets-Smits v Stichting Ziekenfonds VGZ* (Case C-157/99), at paragraph 90, it was held that:

> "in order for a prior administrative authorisation scheme to be justified, even though it derogates from such a fundamental freedom, it must, in any event be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Analir and Others*, paragraph 38). Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings".

88. We observe that, when the appellant was interviewed by HMRC officials, and her circumstances were known to them, the record indicates that none of the HMRC officials present appeared to be aware of the scheme for approving child care providers outside the UK. We observe that the information materials provided to the public by HMRC, such as the WTC5 booklet, do not refer to a general scheme for persons receiving child care from providers outside the UK, but rather to a scheme for "a civil servant or a member of the Armed Forces posted overseas".

89. Mr Coppel disputed Mr Hatton's submission that transparency and accessibility was a specific requirement, as this was based on Articles 9 and 10 of the Directive. These were aimed at freedom of establishment for providers and he submitted that we should not be concerned with these provisions, but rather the freedom to receive services. As noted above, however, the rights of persons to receive a service have been accepted by the ECJ as a necessary corollary of the right to provide services (*Luisi and Carbone*). We observe that the key case on the direct effect of Article 56 (*Van Binsbergen*) was brought not by a provider of services but by the prospective recipient of services. We do not accept Mr Coppel's submission that the rights of service providers and service recipients should be viewed as categorically distinct rights. Rather each of these rights stems from the same source, namely Article 56.

90. If (contrary to our view) the scheme introducing the requirement of prior authorisation for child care providers outside the UK is a valid scheme, we must ask whether or not it is an accessible and transparent scheme. We see from the evidence that HMRC officials administering the appellant's claim for TC were clearly unable to direct her to it. Further, we observe that the literature from HMRC publicising the scheme is positively misleading on the question of whether it was restricted to civil servants and members of the Armed Forces. No other publicity material for the scheme was evident which might illuminate its general application to prospective providers in EU Member States.

91. An explanation for this may well lie in the fact that by section 3 of the 2002 Act a TC claimant must be "in the United Kingdom". By regulation 3(1) of the Tax Credits (Residence) Regulations 2003 (SI 2003/654) a person shall be treated as not being in the United Kingdom for the purposes of the 2002 Act if he is not ordinarily resident in the United Kingdom. However, by regulation 3(2), this provision does not apply to "a Crown servant posted overseas or his partner". It might reasonably have been considered unlikely that a person ordinarily resident in Great Britain would engage a childcare provider in another EU member state. This may have led to the emphasis in the WTC5 booklet on civil servants or members of the armed forces posted overseas. However, this is to overlook the position of persons living close to the border between Northern Ireland and the Republic of Ireland, who might live and work in the UK but obtain childcare from a provider in the Republic of Ireland.

92. We accept Mr Coppel's submission that the precise scope of the authorisation scheme was to be found on a careful reading of the 2002 Regulations. However, these regulations are relatively obscure. In order for a scheme of prior authorisation to be justified, following *Geraets-Smits*, it must first be easily accessible. Mr Coppel submitted that it was not a breach of EU law to have a system set out in legislation which people do not know about as they should. However, we reject that submission, as contrary to Article 10 of the Directive and the relevant authorities. The scheme for authorising child care outside the UK under the 2002 Regulations was self-evidently not an easily accessible scheme, even to those administering TC. As such, we consider that it cannot be a justified scheme of authorisation as a matter of EU law. It follows that there has been a breach of the appellant's right to receive services in another Member State under Article 56 TFEU.

93. Even if there was no lawful scheme in place for approval of child care providers outside the UK, Mr Coppel submitted that Article 56 would, nevertheless, not be breached if the lack of a scheme outside the UK was objectively justifiable. We accept that submission as correct in principle. Mr Coppel placed reliance on the need for a system of controls which would ensure that TC was properly paid to those who were entitled to it and that child care subsidised by TC was of appropriate quality. In this context, he outlined the procedure for the provision of information under section 14 of the 2002 Act. As indicated above, he submitted that the fact that there cannot be enforcement of a criminal sanction for fraud under the 2002 Act outside the UK gave sufficient justification.

94. If there was no scheme for permitting the costs of child care provided as a service outside the UK in another Member State, there would be a clear restriction on access to a service within the meaning of Article 56. In order to be objectively justifiable, overriding reasons for such a restriction would need to be established. This is a high threshold and, while we accept that proper administration of the TC scheme is a legitimate aim, we do not accept that this aim could not be achieved by less restrictive means, such as civil penalties. We reject

the submission that the restriction of child care costs to claimants who receive child care in the UK can be justified under EU law on the basis of the lack of criminal sanctions for child care providers outside the UK and lack of adequate financial controls. In particular, the residence requirement on a claimant means that the person who receives payment of TC is within the jurisdiction of the UK.

95. We have not been offered evidence that the standards of the HSE or the NCNA in the Republic of Ireland would fall significantly below those of the 1999 Regulations in the UK such as to render unsuitable a non-UK service provider's own national standards as a basis for the UK to ensure that appropriate care was being provided. We do not consider that the restriction of child care costs to the appellant can be justified under EU law on the basis of the standard of care received.

96. Finally in this section, and for completeness, we observe that the Directive was transposed into UK law by the Provision of Services Regulations 2009 (SI 2009, No.2999). The parties submit, and we agree, that these have no direct relevance to the particular question before us. In order to succeed in her appeal, the appellant cannot rely upon UK domestic regulations, but only upon any directly effective rights which may be conferred by the TFEU or the Directive.

The "*Marleasing* principle"

97. Mr Coppel submitted that he could rely on our obligation under EU law to interpret domestic legislation as to accord with EU law, in order to construe section 12(4)(b) as authorising accredited child care provision outside the UK, relying on *Marleasing SA v La Comercial Internationale de Alimentacion SA* (Case C-106/89).

98. *Marleasing* concerned the effect on existing Spanish law of an EU Directive which Spain had failed to bring into effect at the date required for transposition. At paragraph 8 the ECJ stated that:

> "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty. "

99. The obligation of the courts under the *Marleasing* principle thus requires the courts to "interpret" domestic legislation "as far as possible" to accord with the Directive. It is not confined to measures adopted in order to transpose a Directive, but can apply to national law provisions whether adopted before or after the Directive. After a review of the main authorities, the relevant principles were summarised by Sir Andrew Morritt, Chancellor of the High Court, in the Court of Appeal in England and Wales in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 [2010] 2 WLR 288 at [37]-[38]:

"37. In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

(a) It is not constrained by conventional rules of construction (Per Lord Oliver in *Pickstone* at 126B);

(b) It does not require ambiguity in the legislative language (Per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32);

(c) It is not an exercise in semantics or linguistics (See *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115);

(d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghaidan* at 31);

(e) It permits the implication of words necessary to comply with Community law obligations (Per Lord Templeman in *Pickstone* at 120H-121A; Lord Oliver in *Litster* at 577A); and

(f) The precise form of the words to be implied does not matter (Per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in *IDT Card Services* at 114).

38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:

"The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (Per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in *EB Central Services* at 81) An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in *IDT Card Services* at 82 and 113) and

(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden L in *IDT Card Services* at 113.)"

100. It can be seen from some of the authorities cited above that the required approach is considered by the courts to have close similarities to the exercise required by section 3(1) of the Human Rights Act 1988. In that context, compatibility with the Convention rights has been said to be the sole guiding principle. It has also been emphasised by the courts that

section 3 does not entitle the court to legislate. Its task is still one of interpretation, but interpretation in accordance with the direction contained in section 3 (see, for example, Lord Wolff in *Poplar Housing Association Ltd v Donoghue* [2001] EWCA Civ 595 [2002] QB 48 paragraph 75).

101. In terms of the chronology of this case, the 2002 Regulations came into force on 20 June 2002; the regulation-making powers in section 12 of 2002 Act came into force on 9 July 2002 (SI 2002, No.1727); the WTC Regulations were made on 30 July 2002; the WTC Amendment Regulations were made on 24 March 2003; Regulation 14(2)(d) as originally made came into force on 6 April 2003; Directive 2006/123/EC was made on 12 December 2006; the period of the appellant's claim for TC began on 11 March 2009; the deadline for transposing the Directive was 28 December 2009. The above chronology demonstrates that the regulations relating to accreditation of child care providers for TC purposes were not passed to implement the Directive. Their subject-matter is different and they were made long before the Directive.

102. The *Marleasing* principle concerns "chiefly" domestic provision enacted in order to implement the Directive in question. *Litster*, relied upon by Mr Coppel, is an example of this. However, we accept that it is not confined to such legislation. For example, in *R (Irving) v Sec of State for Transport* [2008] EWHC 1200 (Admin), which concerned health standards required of holders of driving licences, an Act pre-dating the relevant Directive fell to be applied in accordance with it. However, that Act was still extant at the time when the Directive required transposition.

103. For the reasons we have given above, we consider that the 2002 Regulations had lapsed with the repeal of the 1999 Act and that regulation 14(2)(d) of the WTC Regulations was *ultra vires* the enabling power in section 12 of the 2002 Act. What Mr Coppel essentially asks us to do is to interpret section 12 of the 2002 Act in such a way as to give retrospective validity to the 2002 Regulations and to regulation 14(2)(d) of the WTC Regulations. Effectively what is needed to achieve this is for us to read in to section 12(4) a provision allowing regulations to proceed by way of a scheme where care is provided otherwise than in England, Scotland, Wales or Northern Ireland. However, such a reading would need to be effective as of 24 March 2003 in order to validate the WTC Amendment Regulations and from 9 July 2002 for the purpose of enabling the 2002 Regulations to be preserved via section 17(2) of the 1978 Act.

104. We accept in principle that *Marleasing* could apply to legislation existing before the transposition date of the Directive and require that legislation be read in a modified way in order to achieve a result compatible with the Directive in such a case. However, we are not aware of any authority where the *Marleasing* principle has caused a court to read an interpretation retrospectively into a legislative provision effective from before the Directive concerned was even made. Indeed to do so would appear unsupported by the rationale for the *Marleasing* principle. Further, we consider that to do so would require impermissible legislating on our part, in that it would be necessary to consider such matters as the vehicle for democratic oversight of a scheme for child care provided outside the UK (cf. 2002 Act, s.66). We therefore reject Mr Coppel's submission to this effect.

Conclusions

105. For the reasons we have given, we are satisfied that:

i) the appellant had a right under Article 56 of the TFEU and the Directive to receive services from a child care provider in another Member State;

ii) by article 19(b) of the Directive the UK government could not set discriminatory limits on the grant of financial assistance for such services by reason of the fact that the service provider was established in another Member State;

iii) there would not necessarily be discrimination if the real reason for placing limits on the grant of financial assistance was that the service provider had not been authorised under a necessary and proportionate scheme of authorisation;

iv) the 2002 Regulations which are relied upon as establishing a scheme of authorisation had lapsed on the repeal of the 1999 Act;

v) the 2002 Regulations were not preserved by the effect of section 17(2)(b) of the 1978 Act;

vi) we cannot read the 2002 Regulations as continuing in force under the principle derived from the *Marleasing* case;

vii) even if the 2002 Regulations were still in force, they could not be accepted as a proportionate scheme of authorisation since the authorisation scheme was not made public in advance and was insufficiently transparent and accessible;

viii) the decision to find that the appellant was not entitled to the child care element of TC was unlawful under EU law; and

ix) the appellant was not disentitled to the child care element of TC solely on the basis that her child care provider was situated in the Republic of Ireland.

Our decision

106. The decision under appeal was to the effect that the appellant is not entitled to the child care element of TC for the period from 11 March 2009 to 21 March 2010. Our decision is that the appellant was not disentitled to TC for this period solely on the basis that her child care provider was located outside the United Kingdom and therefore not providing eligible child care within the meaning of regulation 14(2) of the WTC Regulations. As the appellant was paid TC throughout this period, and as no recovery of the TC which HMRC understood to have been overpaid was sought, we consider that the operative part of our decision needs to say no more.

107. We consider that regulation 14(2)(d) of the WTC Regulations is *ultra vires* section 12 of the 2002 Act. This has the implication that there is no valid scheme of approval of childcare providers outside the UK for the purposes of the TC childcare element. However, by the same reasoning as applies to the appellant, we consider that those Crown servants in receipt of the childcare element of TC within the EU, such as those in Germany and in Cyprus after 1 May 2004, are in an analogous position to the appellant in the present case and should not be disentitled to TC solely on the basis that their childcare provider was located outside the United Kingdom.

108. We cannot say the same for those residents claiming TC in Gibraltar, Canada, Brunei and the Falkland Islands, or in Cyprus prior to 1 May 2004, but hope that the same approach as regards recovery of any overpaid TC might be adopted to their cases as adopted by HMRC in the case of the appellant.