[2018] AACR 9

(Secretary of State for Work and Pensions v Fileccia [2017] EWCA Civ 1907)

CA (Sales, Lindblom and Asplin LJJ) **CG/1697/2014**
24 November 2017

Carer's allowance – co-ordination of social security systems across the European Union – interpretation of "a difference of views" for the purposes of Article 6(2) of Regulation 987/2009 [2009] OJ L284/1

In 2009 the claimant, an Italian national, came to live in the UK. He received a French state pension. In 2013 he claimed carer's allowance which was refused by the Secretary of State on the basis that France was the competent State to pay such benefits. The claimant appealed to the First-tier Tribunal (F-tT) stating in his letter of appeal that the French social security office had advised him that it would not pay carer's allowance for a disabled person living in the UK. The F-tT allowed the appeal holding that the UK was the competent State not France. The Secretary of State appealed against that decision and the Upper Tribunal (UT) held that Regulation 987/2009 [2009] OJ L284/1 (the implementing Regulation) provided a mechanism for resolving a case where two countries both denied responsibility for paying a claimant despite one being responsible for doing so. It set aside the F-tT decision, holding that the correct approach in such cases depended on whether there had been a difference of views under Article 6(2) of Regulation 987/2009. Article 6(2) said nothing about the form in which that difference must be expressed nor the nature of the evidence required to show it and it did not require a formal decision. The Secretary of State appealed against that decision and the issues before the Court of Appeal were, the interpretation of the phrase a difference of views for the purposes of Article 6(2) and the nature of the evidence necessary to establish such a difference of views.

Held, dismissing the appeal, that:

1. the legislative background as a whole reflected the intention to provide a system for the provision of benefits which whilst not being harmonised are co-ordinated, user friendly and enabled people to access their rights as rapidly as possible (paragraph 38);

2. there was no need for a formal dispute in the sense of conflicting written decisions of the relevant institutions or Member States in order for a difference of views to arise. A difference of views will have arisen in a case in which there are conflicting formal decisions in Member States about the competency of those States to pay benefits to an individual or in circumstances which apply to that individual claimant. That did not mean that it was necessary for there to be a formal decision of a Member State in order for there to be a difference of views. It was merely a way of describing the situation when different views are taken, a difference of views persisted where there was an absence of agreement (paragraphs 39 to 41);

3. UT Judge Jacobs' interpretation of Article 6(2) was correct, the only issue for the decision maker, the F-tT and the UT, was whether the evidence was sufficient to satisfy them that the two competing States hold different views on the issue of competence (paragraph 46).

DECISION OF THE COURT OF APPEAL

Miss Fiona Scolding QC and Toby Fisher (instructed by the Government Legal Department) appeared for the Appellant

Mr Richard Drabble QC and Tom Royston (instructed by Platt Halpern) appeared for the Respondent

Approved Judgment

LADY JUSTICE ASPLIN:

1. The questions raised in this appeal are as to the interpretation of the phrase "a difference of views" for the purposes of Article 6(2) of Regulation 987/2009 [2009] OJ L284/1 (the "implementing Regulation") and the nature of the evidence necessary to establish such a difference of views.

2. The implementing Regulation lays down a procedure for implementing Regulation (EC) No 883/2004 (the "basic Regulation") which is concerned with the co-ordination of social security systems across the European Union and the creation of more effective co-operation in order to facilitate the free movement of persons within the European Union. Article 6 of the implementing Regulation sets out a regime to cater for the situation in which there is "a difference of views" between the institutions or authorities of two or more Member States concerning the payment of cash benefits.

3. The Appellant, the Secretary of State for Work and Pensions (the "SSWP") contends that Upper Tribunal Judge Jacobs ("UT Judge Jacobs") erred in law in the manner in which he interpreted "a difference of views" and in finding that Article 6(2) applied in this case, based on the content of what is described as an informal expression of hearsay from the Respondent, Mr Fileccia, and in accepting the hearsay statement as evidence of a difference of views for the purposes of Article 6(2).

Relevant Background

4. Mr Fileccia is an Italian national who came to live in Larkhall, South Lanarkshire on or around 25 November 2009. He receives a French state pension. On 26 June 2013, he applied for a carer's allowance on the basis that he provides care to a person with a disability and asked that the entitlement commence on 9 June 2013. His claim under section 70 Social Security Contributions and Benefits Act 1992 was refused by the SSWP on 30 July 2013 because it was stated that the United Kingdom was not the "competent State" to pay the cash benefits.

5. Carer's allowance is a non-contributory benefit under section 63(c) Social Security Contributions and Benefits Act 1992 (the "SSCBA") and is a "cash sickness benefit" for the purposes of the basic Regulation and, accordingly, Chapter 1 of Title III to the basic Regulation applies. Section 70(4A) SSCBA provides amongst other things that a person to whom the basic Regulation applies shall not be entitled to an allowance under section 70 for any period unless the UK "is competent for payment of sickness benefits in cash to the person for the purposes of Chapter 1 of Title III of the Regulation in question."

6. It is the SSWP's position that as a result of Articles 21 and 25 of the basic Regulation where an EU national who is resident in the United Kingdom receives a pension from another Member State, it is the Member State which provides the pension which is the competent Member State for determining entitlement to all cash sickness benefits.

7. Mr Fileccia appealed the SSWP's decision to the First Tier Tribunal (the "FTT") on 21 August 2013. At the same time, he submitted a letter to the FTT in which he stated as follows:

> "I would like to appeal the decision regarding the refusal of me receiving a carer's allowance. I have contact [sic] France social security office and the [sic] told me that there is no way that they would pay a career's [sic] allowance for a disabled person living in the UK, I considered looking after someone who is disabled as a job whether

> I have contributed or not into the country the person I care for come from the UK she has contributed into the system and has paid into it. Could you please re-look at the situation?"

In a decision made on paper and dated 21 January 2014, the FTT decided that Mr Fileccia was entitled to the carer's allowance claimed because the United Kingdom was the competent Member State to pay the cash benefit on the basis that Article 11(3)(e) (application of the legislation of the Member State of residence) of the basic Regulation applied.

8. On 19 February 2014, the SSWP appealed that decision to the Upper Tribunal (the "UT") on the basis that the FTT had erred in the way in which it had interpreted Article 11 of the basic Regulation. Permission to appeal was granted in July 2014 on the basis of an arguable error of law. However, when granting permission, UT Judge Jacobs also noted that he wondered whether the case raised issues under Article 6(2) of the implementing Regulation because Mr Fileccia was in receipt of a retirement pension from France and had claimed a carer's allowance in the United Kingdom, having been refused in France; his claim having also been refused in the United Kingdom on the basis that the United Kingdom was not the competent Member State. The Judge questioned whether the SSWP should have paid the carer's allowance on a provisional basis and made a reference of the matter to the EU Administrative Commission in order to determine which of the UK and France was the competent Member State.

9. Article 6(2) having been raised, in July 2014, SSWP agreed to contact the French authorities. On 21 January 2015, the SSWP emailed their French counterparts asking for information as to why Mr Fileccia's "claim for the equivalent benefit was not granted in France and whether a review of this decision has been undertaken." There had been no reply by the time the appeal was heard by the UT and there was no evidence of a substantive reply before us. However, it is important to note that the email of 21 January 2015 was not before UT Judge Jacobs when he decided the appeal. In the submissions which were before the UT, the SSWP had stated amongst other things that Mr Fileccia had applied for a carer's allowance on 26 June 2013 and had applied to the French authorities first who had "refused him the benefit as he does not live in France." The submissions went on:

> "With regards to the application of Article 6(2) of Regulation 987/2009 to the claimant's situation, the Secretary of State notes that no contact has so far been made with the relevant French authorities. It also notes the Judge's concern that the claimant may have been placed in an unfavourable situation because two Member States have separately refused him a benefit to which it seems he ought to be entitled pursuant to one of their legislations.
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> As a result, the Secretary of State proposes to make contact and engage with the French authorities with the aim of reaching agreement as to the substantive position on the claimant's claim. Should such attempts be unsuccessful, it may indeed become necessary to follow the procedure provided under Article 6(2).
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> The Secretary of State would like to emphasise that the proposed engagement with French authorities to seek to resolve the claimant's entitlement does not affect the issues subject of the present appeal and bearing in mind the summer months and holiday season, we may not receive an immediate response from the French authorities.

> . . . ”

UT’s Decision

10. UT Judge Jacobs went on to determine the SSWP’s appeal and by his Decision of 3 September 2015, he set aside the decision of the FTT on the basis of an error of law and remade the decision himself. He decided that the SSWP must investigate and decide Mr Fileccia’s claim and if he fulfilled the conditions of entitlement, the SSWP should make a provisional award under Article 6(2) and implement the other provisions of that article. At paragraph 8 of his Reasons for Decision he stated that following his decision in *Secretary of State for Work and Pensions v HR* [2014] UKUT 571 (AAC) [2015] AACR 26, he had given a direction in this case that as he read Article 6(2), it applied in the following way:

> “It applies if there is a difference of views between member States. In this case, there is. France has refused benefit and the United Kingdom denies responsibility.
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> In those circumstances, responsibility lies with the State of residence until the issue is resolved. The claimant lives in this country.
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> That means that this country is provisionally responsible under its legislation.
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> Payment is not automatic. It is only required if the claimant satisfies the domestic conditions of entitlement to a particular benefit, which in this case is carer’s allowance”

and that unless persuaded otherwise, within a month of the direction, he would dispose of the Appeal in the way in which ultimately, he did.

11. He set out his reasoning at paragraphs [11] – [13] of his Reasons for Decision as follows:

> **“C. Analysis**
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> 11. As a result of decisions I have given in *HR* and other cases, the correct approach to cases like this one has become clear. It depends on whether there has been a difference of views. Article 6(2) says nothing about the form in which that difference must be expressed or the nature of the evidence required to show it. In particular, it does not say that it must be formally expressed in a decision. The only issue for the domestic authorities in this country – the decision maker, the First-tier Tribunal and the Upper Tribunal – is whether the evidence is sufficient to satisfy them that the two competing States hold different views on the issue. The United Kingdom takes the view that France is the competent State. The claimant says that he approached the French authorities and was told that they would not pay benefit for caring for someone in the United Kingdom. I have no reason to doubt what he says. Given their attitude, it is understandable why he did not press the matter by making a formal claim for the equivalent of a carer’s allowance in France. A formal decision is not required, as I have said. The failure of the Secretary of State’s officials to elicit any response from their French counterparts is some indication of the difficulty that the claimant would face if required to produce some more formal evidence. His difficulty in that regard

would be compounded by the fact that he now lives here. His evidence is sufficient to satisfy me that there is a difference of views in this case.

12. The Secretary of State's representative has argued that the application of Regulation 883/2004 is clear. France is the competent State, not the United Kingdom. That may be right, but it is not how Article 6(2) operates. That provision is triggered by a difference of views. It takes the decision out of the hands of the States to ensure a single, binding decision. It prevents claimants being left in the position of each State refusing to accept responsibility. That is its purpose and it applies regardless of how clear any particular State considers the answer to be.

13. As there is a difference of views, Article 6(2) applies. The tribunal went wrong in law by not applying that provision. I set its decision aside and re-make it to provide for the Secretary of State to investigate and decide the claim under domestic legislation and, if necessary, to make a provisional award pending resolution by the Administrative Commission."

Relevant EU legislation

12. The implementing Regulation, which is dated 16 September 2009 and took effect from 1 May 2010, is described in its title as "laying down the procedure for implementing Regulation (EC) No 883/2004 [the basic Regulations] on the coordination of social security systems." Paragraphs (2), (10) and (11) of the Preamble are as follows:

"(2) Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by Regulation (EC) No 883/2004 to access their rights as quickly as possible and under optimum conditions.

. . .

(10) To determine the competent institution, namely the one whose legislation applies or which is liable for the payment of certain benefits, the circumstances of the insured person and those of the family members must be examined by the institutions of more than one Member State. To ensure that the person concerned is protected for the duration of the necessary communication between institutions, provision should be made for provisional membership of a social security system.

(11) Member States should cooperate in determining the place of residence of persons to whom this Regulation and Regulation (EC) No 883/2004 apply and, in the event of a dispute, should take into consideration all relevant criteria to resolve the matter. These may include criteria referred to in the appropriate Article of this Regulation."

13. Paragraphs 1 and 2 of Article 2 which is headed "Scope and rules for exchanges between institutions" provide as follows:

"1. For the purposes of the implementing Regulation, exchanges between Member States' authorities and institutions and persons covered by the basic Regulation shall be based on the principles of public service, efficiency, active assistance, rapid delivery and accessibility, including e-accessibility, in particular for the disabled and the elderly.

> 2. The institutions shall without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic Regulation applies. Such data shall be transferred between Member States directly by the institutions themselves or indirectly via the liaison bodies."

14. Article 3 which is headed "Scope and rules for exchanges between the persons concerned and institutions" provides that Member States shall ensure that necessary information is made available to persons and that user-friendly services are provided. At paragraph 2 it states that persons to whom the basic Regulation applies are required to forward to the relevant institution the information, documents or supporting evidence necessary to establish their situation and rights and, at paragraph 4, that to the extent necessary for the application of the basic Regulation and implementing Regulation, the relevant institutions shall forward information and issue documents without delay and when refusing benefits shall indicate the reasons for refusal and a copy of such a decision shall be sent to other involved institutions.

15. Article 4 is concerned with the Administrative Commission which by paragraph 1 is required to lay down the structure, content, format and detailed arrangements for exchange of documents and provides at paragraph 2 that the transmission of data between institutions should be by electronic means through a common secure framework.

16. Article 5 is headed "Legal value of documents and supporting evidence issued in another Member State" and where relevant provides as follows:

> "1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued."

17. The relevant parts of Article 6 of the implementing Regulation provide as follows:

> "1. Unless otherwise provided for in the implementing Regulation, where there is a difference of views between the institutions or authorities of two or more Member States concerning the determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States, the order of priority being determined as follows:
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> . . .
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> 2. Where there is a difference of views between the institutions or authorities of two or more Member States about which institution should provide the benefits in cash or in kind, the person concerned who could claim benefits if there was no dispute shall be entitled, on a provisional basis, to the benefits provided for by the legislation applied by the institution of his place of residence or, if that person does not reside on the territory of one of the Member States concerned, to the benefits provided for by the legislation applied by the institution to which the request was first submitted.
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> 3. Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent

> authorities no earlier than one month after the date on which the difference of views, as referred to in paragraph 1 or 2 arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it.
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> . . .
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> 5. Benefits in kind granted provisionally by an institution in accordance with paragraph 2 shall be reimbursed by the competent institution in accordance with Title IV of the implementing Regulation."

18. Articles 72 and 73 of the implementing Regulation are concerned with the circumstances in which and mechanism by which the Member State may recoup benefits paid on a provisional basis where another Member State is subsequently found to have been the competent State for the purposes of the benefits. In summary, paragraph 1 of Article 73 provides that the institution identified as being competent to pay the benefits shall deduct the amount due in respect of the provisional payment from the arrears of the corresponding benefits it owes to the person concerned and without delay transfer the amount deducted to the institution which made the provisional payment. If there is no corresponding benefit payable by the competent Member State, Article 73 provides that that state should (subject to certain limits and conditions) deduct the appropriate sum from any other ongoing payments it might be making to the applicant and repay the Member State which has paid benefits (although it was not the competent State) out of those monies. However, Article 73 leaves open the possibility that a Member State which is not the competent Member State might make payment to an applicant and then find that there is no recoupment available because the competent Member State in fact does not provide monetary benefits to that applicant.

19. Lastly, Article 81 of the basic Regulation provides where relevant that:

> "Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. …"

The Parties' cases in outline

20. Miss Scolding QC on behalf of the SSWP submits that the evidence available as to the position of the French authorities could not on any rational view establish that France had decided that it was not the competent Member State for determining Mr Fileccia's claim for cash sickness benefits (in this case, a carer's allowance) under the basic Regulation, and that the UT was wrong in law, therefore, to apply Article 6(2) because "a difference of views" as to competence had not arisen. Assuming that the French authorities had made the statement to Mr Fileccia which he said they had, it was entirely possible that they had done so because there simply was no French welfare benefit payable to someone in his position, rather than because they were denying that France was the competent Member State for the purposes of the two Regulations. She argues that it is important to have a clear statement denying

competence because otherwise the principle that there can be different national schemes for entitlement to social security benefits would be undermined. The state of residence would be required to pay benefits on a provisional basis even where there was merely a denial of eligibility in the second Member State and she says that the provisional payments would not be recoverable.

21. She submits that Article 6 must be read in the context of the implementing Regulation as a whole and points to the reference to "dispute" in paragraph (11) of the Preamble and to the documentation and level of formality envisaged in Articles 3 and 5. She also points out that Article 6(2) is engaged where a person could claim benefits if there was no "dispute" between the institutions or authorities of the Member States in question and that Article 6(3) applies where there is no "agreement" between the institutions or authorities concerned.

22. She submits, therefore, that it is clear that Article 6 is intended to regulate "disputes" between institutions as to competence which require a level of formality in order to amount to a "difference of views". Therefore, in order to trigger Article 6(2), she submits that it was necessary for Mr Fileccia to have obtained a formal decision from the French authorities to the effect that France is not the competent Member State or, at least, to have been able to point to official documentation in which competence is denied in a clear and unambiguous way. Miss Scolding went as far as to suggest that in the circumstances of this case, if necessary, Mr Fileccia should have sought the equivalent of judicial review in France in order to obtain a cogent and authoritative statement as to the position of the French authorities.

23. However, she accepts that evidence falling short of a formal decision could suffice if it were cogent and authoritative. She gave examples of: a Member State's published policy in relation to competence; an authoritative statement by representatives of the relevant institution denying competence in the relevant circumstances; a binding decision of the court of such other Member State which has the effect of denying competence in comparable circumstances; and the consistent practice of such other Member State evidenced by decisions on other claims in similar circumstances.

24. In support of the need for a formal document or decision for the purposes of giving rise to a dispute and a difference of views, Miss Scolding relies upon the travaux preparatoires for the implementing Regulation. The phrase "difference of views" is used in each of the French, German and Italian proposed versions of Article 6(2) and the article took much the same form as it did in the final version. However, it was proposed that "uncertainty" be used in Article 6(1). In the final version, "difference of views" appears in both Article 6(1) and (2). Miss Scolding submits that the change in wording shows that a difference of views is a stronger concept than mere uncertainty.

25. In this regard, she also relies upon Decision A1 of the Administrative Commission for the co-ordination of social security systems which is dated 12 June 2009 and expressly states that it is intended to apply from the date of entry into force of the implementing Regulation. Although not legislation itself, Decision A1 is a legal act within the terms of Article 288 TFEU and has binding effect.

26. At point [1] of the Decision it states that it "lays down the rules for the application of a dialogue and conciliation procedure" which can be used in two cases (the first of which has two limbs), namely: "(a) cases where there is doubt about the validity of a document or about the correctness of supporting evidence stating the position of a person for the purposes of the application of the [basic Regulation or the implementing Regulation]; or (b) cases where there

is a difference of views between Member States about the determination of the applicable legislation.” At point [5] the institution expressing doubts about the validity of a document issued by the institution or authority of another Member State or which does not agree with the (provisional) determination of the applicable legislation is called the “requesting institution” and the institution of the other Member State, the “requested institution.” At point [6] under the heading “First stage of the dialogue procedure” it provides that:

> “If one of the situations referred to under point 1 occurs, the requesting institution contacts the requested institution to ask for necessary clarification of its decision and, where appropriate, to withdraw or declare invalid the relevant document, or to review or annul its decision.”

Miss Scolding submits that this too points to a need for formality, a document and a decision for a “difference of views” to have arisen.

27. In relation to the nature of the evidence necessary Miss Scolding says that the hearsay evidence of what Mr Fileccia says he was told by an unidentified French social security office at an unidentified time was incapable of being sufficient evidence of an expression of view as to competence by the French authorities. She submits, therefore, that UT Judge Jacobs erred in law in accepting it as the basis of a difference of views. She says that it was neither authoritative nor cogent evidence that the French authorities disputed the competence of France, as a Member State, to pay cash benefits rather than merely rejecting or disputing a claim.

28. In contrast, Mr Drabble QC on behalf of Mr Fileccia submits that the UT interpreted the meaning of “difference of views” correctly and that its factual finding on whether there was in this case a “difference of views” was neither perverse nor irrational and, therefore, discloses no error of law. He submits that the question of whether the two competing Member States held different views is a question of fact which can be ascertained by considering such evidence and drawing such inferences as the Tribunal sees fit.

29. Mr Drabble also submits that UT Judge Jacobs, as a specialist judge with considerable experience in the field of social security law and practice, quite properly took into account what was reasonable to expect when determining how to interpret the phrase a “difference of views”. Mr Drabble says that the court should be slow to conclude that UT Judge Jacobs was wrong about what is necessary for there to be “a difference of views” in the light of his specialist experience and the realities of which he was familiar, or about his conclusion on the evidence before him. He says that the Judge’s views should be respected.

30. In this regard, he referred to *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] AACR 25, a case in which the phrase “a crime of violence” for the purposes of the Criminal Injuries Compensation Scheme 2001 was under consideration. Lord Hope of Craighead DPSC considered the role of the tribunal and the appeal court in the following way:

> “16. . . it is for the tribunal which decides the case to consider whether the words "a crime of violence" do or do not apply to the facts which have been proved. . . I agree with Lord Carnwath for all the reasons he gives that it is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues, bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of

> tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals."

31. Lord Carnwath JSC (with whom Lord Hope had expressly agreed as to this point and with both of whom Baroness Hale, Lord Sumption and Lord Walker agreed) stated:

> "41. . . Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First-tier level.
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> 43. Thus it was hoped that the Upper Tribunal might be permitted to interpret 'points of law' flexibly to include other points of principle or even factual judgment of general relevance to the specialised area in question. . . .
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> 44. Commenting on the distinction between issues of law and fact, Lord Hoffmann said in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, also reported as R (DLA)7/03:
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>> '26. It may seem rather odd to say that something is a question of fact when there is no dispute whatever over the facts and the question is whether they fall within some legal category. . .
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>> 27. Likewise it may be said that there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question: see *In re Grayan Building Services Ltd* [1995] Ch 241, 254-255.'
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> 45. Lord Hoffmann took this line of thinking a stage further in *Lawson v Serco* [2006] UKHL 3 [2006] ICR 250, where the issue was the application of the Employment Rights Act 1996 to 'peripatetic employments', involving substantial work outside the UK. He described this as 'a question of law, although involving judgment in the application of the law to the facts'. Under the heading 'fact or law', he said at para 34:
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>> 'Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to section 94(1), namely that it applies to peripatetic employees who are based in Great Britain. Whether one characterizes this as a question of fact depends, as I pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to

> errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post-section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. In the present case I think not only that the Tribunal was entitled to reach the conclusion which it did but also that it was right….'

46. I discussed these developments in an article in 2009 (*Tribunal Justice, A New Start* [2009] PL 48, pp 63-64). Commenting on *Moyna* I said:

> 'The idea that the division between law and fact should come down to a matter of expediency might seem almost revolutionary. However, the passage did not attract any note of dissent or caution from the other members of the House. That it was intended to signal a new approach was confirmed in another recent case relating to a decision of an employment tribunal, *Lawson v Serco*.'

Of Lord Hoffmann's words in *Serco* itself, I said:

> 'Two important points emerge from this passage. First, it seems now to be authoritatively established that the division between law and fact in such classification cases is not purely objective, but must take account of factors of "expediency" or "policy". Those factors include the utility of an appeal, having regard to the development of the law in the particular field, and the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other. Secondly, even if such a question is classed as one of law, the view of the tribunal of fact must still be given weight. This clarifies the position as between an appellate *court* on the one hand and a first instance tribunal. But what if there is an intermediate appeal on law only to a specialist appellate tribunal? Logically, if expediency and the competency of the tribunal are relevant, the dividing line between law and fact may vary at each stage. Reverting to Hale LJ's comments in (*Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 [2002] 3 All ER 279 at [5 to 17]), an expert appellate tribunal, such as the Social Security Commissioners, is peculiarly fitted to determine, or provide guidance, on categorisation issues within the social security scheme. Accordingly, such a tribunal, even though its jurisdiction is limited to 'errors of law', should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, 'issues of law' in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words, expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field.'

47. For the purposes of the present appeal it is unnecessary to consider further the working out of these thoughts. In the present context, they provide support for the view that the development of a consistent approach to the application of the

expression 'crime of violence', within the statutory scheme, was a task primarily for the tribunals, not the appellate courts."

32. Mr Drabble also urges caution in the light of the reported decision of *Secretary of State for Work and Pensions v HR* [2014] UKUT 571 (AAC) [2015] AACR 26 (18 December 2014), a decision of UT Judge Jacobs in the Upper Tribunal's Administrative Appeals Chamber upon which he relied when determining this matter. Decisions are only reported when they: "command the broad assent of the majority of the salaried Upper Tribunal Judges of the chamber who regularly determine appeals in the jurisdiction to which the decision relates or which engage the issues that merit the decision being reported." Although the *HR* case does not deal directly with all of the precise issues which are relevant here, it is concerned with the interpretation of Article 6. Mr Drabble refers in particular to [16] to [19] which are in the following form:

> "16. The Article presupposes a difference of views. That raises at least three questions. When does a difference of views arise? Is it necessary for the States to have discussed the matter first? What evidence is required?
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> 17. As to the first question, the Secretary of State's representative argues that the difference of views did not arise until Mrs R provided the document from the Swedish Social Insurance Agency. I reject that argument. The difference of views existed, whether or not one of the States was aware of it. It is an objective fact, not a matter of what a particular State knows at a particular time. I will come back later to how decision-makers and tribunals should proceed if there is no evidence that the other possible competent State takes a different view.
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> 18. As to the second question, what Article 6 requires is a difference of *views*. This is a word that is more general than disagreement or dispute, both of which may presuppose a discussion or argument on the matter in issue. I see no basis on the language for requiring some prior discussion or argument. Nor would this be realistic in the circumstances in which the legislation has to apply. Given that the claimants involved are, by definition, (i) in need of financial assistance and (ii) disabled or incapacitated and often elderly, it is unlikely that the Article is designed to allow States to undertake lengthy discussions before a difference of views can arise. Indeed, the general principles set out in Article 2 indicate that matters should proceed speedily. A difference of views is all that is required, not a disagreement following discussion or argument.
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> 19. As to the third question, the Secretary of State's representative accepts that the United Kingdom has expressed a view by its decision on Mrs R's claim. I put it to the representative that in this case there was documentary evidence that Sweden took a different view. The document I have set out from the Swedish Social Insurance Agency makes clear that Sweden will not take responsibility for Mrs R so long as she lives in the United Kingdom and does not work in Sweden. That is what it says in terms and it cites Article 11 of Regulation 883/2004 in support. The representative accepts that as sufficient in this case. However, she argues that there must always be some form of documentary evidence. That will certainly put the matter beyond doubt, but it may be setting too demanding a standard. Claimants often enquire of the Department for Work and Pensions whether they may be entitled to a particular

benefit and act on the information given. That information is not necessarily, or even usually, put into writing. No doubt, the same thing happens abroad. I suspect that in practice decision-makers will always insist on documentary proof, but tribunals, especially after an oral hearing, may be more confident to accept oral evidence. I will come back later to how decision-makers and tribunals should proceed if the claimant's evidence is not accepted."

UT Judge Jacobs went on as follows:

"24. Moreover, Article 6 is designed to ensure that the time taken to identify the responsible State does not disadvantage anyone. The claimant is protected by the provisional application of the law of the place of residence. And the paying State is only required to pay if the claimant satisfies the conditions of entitlement under domestic law and, if so, is then protected by the right to reimbursement if the other State is eventually held responsible. The Secretary of State is now pursuing recovery from Sweden in this case.

25. The Secretary of State's representative has submitted that the application of Article 6 is a separate and subsidiary issue to determining the competent State. In a sense, that is right. But it is important to appreciate the point at which Article 6 applies. I will try to approach this systematically by considering three different cases. Assume in each case that the Secretary of State has received a claim from a claimant who is resident in the United Kingdom. What happens next?

26. *First case* If the Secretary of State decides that the United Kingdom is the competent State, the only remaining issues are ones of domestic entitlement. If the claimant appeals, there will be no EU element.

27. *Second case* If the Secretary of State decides that the United Kingdom is not the competent State and another State has already expressed a different view, there will be a difference of opinion and Article 6 applies. The Secretary of State must decide whether the claimant satisfies the domestic conditions of entitlement and, if so, the United Kingdom becomes immediately but provisionally liable to make payments under Article 6. As the United Kingdom is making provisional payments pending eventual resolution by agreement or by the Administrative Commission, the claimant may not consider it necessary to appeal. The Secretary of State is certainly not entitled to delay applying Article 6 pending any appeal to the First-tier Tribunal or the Upper Tribunal or the resolution of an appeal. The duty to pay is triggered by the difference of opinion. Moreover, delay would be inconsistent with the speed of action that is required by Article 2, which expressly recognises the needs of 'the disabled and the elderly'. The First-tier Tribunal would have to decide how to deal with any appeal that was made. It might consider it appropriate to stay the case to await the outcome of what is intended to be the decisive determination of the issue under EU law and procedures.

28. *Third case* If the Secretary of State decides that the United Kingdom is not the competent State and there is no (acceptable evidence of a) difference of views with the other EU State, the Secretary of State should refuse the claim but submit it to the other State under Article 81 of Regulation 883/2004. This may generate a difference of

views, to which Article 6 will apply and the United Kingdom may become provisionally liable. This creates difficulties."

33. In his written submissions, Mr Drabble also highlights the policy considerations behind the implementing Regulation and Article 6(2) in particular. He points out that the implementation Regulation is intended to facilitate rapid access to benefits and that Article 6(2) itself provides for the provision of short-term provisional payments. He says that it is unlikely, therefore, that it was only intended to be triggered if the lengthy process which would be likely to unfold if the SSWP is correct about the interpretation of "difference of views" had to be undertaken before benefits could be paid even on a provisional basis.

34. Mr Drabble also points out that, pursuant to Article 81 of the basic Regulation, the UK authorities could have forwarded the claim to France as soon as it had been refused in the United Kingdom if no difference of views had arisen at that stage and/or could have sought clarification under point [6] of Decision A1 but failed to do so. There were means, therefore, of limiting the period during which benefits were payable on a provisional basis under Article 6(2).

35. Lastly, in relation to interpretation, as to Decision A1, Mr Drabble submits that the reference to reviewing a decision in point [6] can refer to changing one's mind and the term "decision" used in that point is a broad concept.

36. As to the quality of the evidence required for the purposes of Article 6(2), Mr Drabble says that Mr Fileccia's letter was quite sufficient and that UT Judge Jacobs was entitled to come the conclusion he did. He says that it was a factual finding which was neither perverse nor irrational. Mr Fileccia's claim had already been refused on the basis of competence by the UK authorities and his letter refers to a refusal by the French authorities on the basis of the residence of the person being cared for outside France. Mr Drabble submits that that was sufficient to raise the issue of lack of competence. Furthermore, the SSWP's submissions which were before UT Judge Jacobs were to the effect that the French authorities had refused Mr Fileccia benefits on the basis that he was resident outside France.

Meaning of "a difference of views" and evidence necessary

37. What does "difference of views" mean for the purposes of Article 6 of the implementing Regulations? First, I should mention that it is common ground that the "difference of views" to which Article 6 refers is as to competence and not eligibility. Secondly, it is accepted that the phrase and Article 6(2) must be construed against the relevant legislative background, being the basic Regulation and the implementing Regulation as a whole, and that Decision A1 is a proper aid to construction. Thirdly, it is not in dispute that it is necessary to approach the matter of interpretation purposively.

38. It seems to me that the legislative background as a whole reflects the intention to provide a system for the provision of benefits which whilst not being harmonised is co-ordinated, user friendly and enables people to access their rights as rapidly as possible: see for example, the Preamble at paragraph (2) and Article 2 and Article 3 paragraph 4 of the implementing Regulation. Those provisions together with the Preamble at paragraph (10) and Article 4, which is concerned with the operation of the Administrative Commission, are concerned with the protection of the individual whilst issues as to competency are dealt with between the relevant institutions or Member States. This is also consistent with Article 81 of

the basic Regulation which requires a claim to be forwarded "without delay" to another Member State where it has been refused, but there is no difference of views.

39. I agree with UT Judge Jacobs that if Article 6(2) is construed against that background and care is taken to avoid a construction which would be unworkable or impracticable in reality, there is no need for a formal dispute in the sense of conflicting written decisions of the relevant institutions or Member States in order for a "difference of views" to arise. It seems to me that if that had been the intention of the legislature, a different and a more restrictive phrase would have been used. Of course, a difference of views will have arisen in a case in which there are conflicting formal decisions in Member States about the competency of those States to pay benefits to an individual or in circumstances which apply to that individual claimant. That does not mean that it is necessary for there to be a formal decision of a Member State in order for there to be a "difference of views". It seems to me that the phrase, taken in context, is broad enough to cover a variety of circumstances ranging from conflicting formal, written decisions to the expression of different views as to the competence of the Member State by the State itself or an authorised representative of the relevant authority or institution.

40. It follows that I am not persuaded to the contrary by Miss Scolding's reference to the use of the word "dispute" in Article 6(2). If one reads the paragraph as a whole, it takes the matter no further and cannot elevate the meaning of the phrase "difference of views" to a clash of formal decisions. It seems to me that it is merely a way of describing the situation when different views are taken. As a matter of common sense, in order for there to be a difference of views, a decision in the loosest sense or stance as to that view must have been taken by each of the relevant institutions and a dispute or difference in opinions, also in the loosest sense, will have arisen. Although I place no weight upon it as an aid to construction, because it was not available to UT Judge Jacobs, in their email to the French authorities of 21 January 2015, the SSWP themselves characterise the position which had arisen as a "dispute". It seems to me that that is perfectly natural.

41. Such an interpretation is consistent with Article 6(3) which provides that where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the difference of views has arisen. It seems to me that it is clear from the paragraph that a difference of views arises first and continues in the absence of a subsequent agreement. Unless such an agreement is reached, the matter will be determined by the Administrative Commission. As a matter of inference therefore, a difference of views persists where there is an absence of agreement and Article 6(3) does not require a formal decision to have been reached.

42. I do not consider that Miss Scolding is assisted by the travaux preparatoires in relation to Article 6. I am not persuaded that the replacement of "uncertainty" in Article 6(1) with "difference of views" in the final form is indicative of the need for formality or a formal dispute to have arisen for there to be a "difference of views." In my judgment, the change is merely indicative of a desire for consistency and, if anything, suggests that a "difference of views" may include circumstances which fall short of conflicting decisions.

43. It also seems to me that such a construction is not contrary to the passage at point [6] of Decision A1 upon which Miss Scolding relies. Although the Decision is an aid to construction it is not appropriate to construe it separately as if it were a statute. It seems to me that point [6] is concerned with all the situations which might arise under point [1] (a) or (b)

and should not be read strictly to refer to one or other of those situations. It is in general terms. It seems to me once again that the reference to a "decision" of the Member State or its institution is no more than the natural use of words and is apt to describe a view which has been taken whether in the form of a formal decision or otherwise. It is a broad concept which sweeps up all of the circumstances which may arise under point [1]. The reference to withdrawing a document or declaring it invalid relates naturally to the first set of circumstances described in point [1](a) and the reference to reviewing or annulling decisions is equally apt to describe the formal setting aside of a decision made and a change of mind in relation to a less formal "decision", including, for instance, an expression of view regarding the "correctness" of supporting evidence under the second set of circumstances in point [1](a).

44. I should also add that in my judgment, the interpretation put forward by the SSWP would be contrary to the entire legislative background to Article 6(2) because it would require the person seeking the benefits both to take steps himself to pursue the relevant institutions in the Member States for a formal decision and to suffer what would be likely to be considerable delay before obtaining such a decision and triggering the payment of benefits on a provisional basis under Article 6(2). The framework of the legislation pre-supposes the protection of the individual by the payment of provisional benefits whilst issues of competence are debated between Member States or their agencies. The SSWP's interpretation would nullify that approach and prevent the protection of the vulnerable, which is an important objective of the legislative regime.

45. Furthermore, whether a comparable benefit is payable in France and whether the provisional payment of benefits will be recouped are both an irrelevance. Article 6(2) is not predicated on the basis that benefits are only payable on a provisional basis by a Member State which denies competency and is ultimately found not to be competent if they can be recouped. Neither Article 3 nor Article 6 is drafted in that way. In any event, Member States have it in their own power to deal with the issue rapidly and avoid the situation in which benefits which may not be recouped are paid on a provisional basis for a lengthy period. In any case where there is doubt as to the position on competence which is being adopted by the authorities of another Member State, they can do that by complying with their obligation under Article 81 and passing on the claim for benefits "without delay" to the authorities of that other Member State to obtain a decision.

46. In my judgment, therefore, UT Judge Jacobs' interpretation of Article 6(2) was correct and on the facts before him he was entitled to conclude that a difference of views had arisen, which was essentially an evidential question. As he pointed out at [11] of his Reasons for Decision, the only issue for the decision maker, the FTT and the UT, is whether the evidence is sufficient to satisfy them that the two competing States hold different views on the issue of competence.

47. Equally, there is nothing perverse about his decision on the facts to find that on the evidence available there was a relevant "difference of views". As he also pointed out at [11] of his Reasons for Decision, there is nothing in Article 6(2) itself which requires the difference to be evidenced in a particular way. In my judgment, in the light of the content of Mr Fileccia's letter which was date stamped 21 August 2013 and the submissions filed on behalf of the SSWP, which stated that his claim had been refused in the UK on the basis of competence and that the French authorities had "refused him the benefit as he does not live in France", UT Judge Jacobs was entitled to conclude on the facts that there was a difference of views as to competence and that Article 6(2) applied. There is nothing to suggest that UT Judge Jacobs fell into error in making this assessment.

48. In coming to this conclusion, I have given weight to the practical and purposive approach taken by UT Judge Jacobs who has specialist experience and sits in a specialist chamber of the Upper Tribunal, in relation to something which is essentially a matter of fact. As Lord Hope noted in the *Jones* case, when agreeing with Lord Carnwath, an appeal court should not venture too readily into an area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals. I have also taken into account the approach to Article 6, approved by all of the relevant specialist UT judges, in the *HR* case and, in particular, the approach set out at [18] and [19] and [24] to [28] of that judgment.

49. For all the reasons set out, I would dismiss the appeal.

LORD JUSTICE LINDBLOM:

50. I agree with both judgments.

LORD JUSTICE SALES:

51. I agree that the appeal should be dismissed for the reasons given by Asplin LJ. In my view UT Judge Jacobs has adopted a correct construction of Article 6 of the implementing Regulation and was entitled to find on the evidence available that a relevant "difference of views" existed regarding the determination of the applicable legislation and which Member State, the United Kingdom or France, was the competent State for those purposes.

52. Neither party has asked for a reference to be made to the CJEU in this matter. In my opinion, although we were not asked to rule on this, the interpretation given to Article 6 of the implementation Regulation by UT Judge Jacobs is so strongly in line with the object and purpose of the legislation that it is entirely possible that it would meet the *acte clair* standard. Miss Scolding QC for the Secretary of State did not dispute that it was open to us to follow the guidance given by Lord Hope of Craighead DPSC and Lord Carnwath JSC in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 [2013] AACR 25, set out above, regarding the weight to be given to the considered view of the Upper Tribunal, as a specialist tribunal with expertise in the field of welfare benefits, on this point of interpretation. That was her position even though the present case concerns the application of EU legislation. I do not myself attach significant weight to this factor in arriving at the conclusion that this appeal should be dismissed. I would wish to leave over for consideration on another occasion, should it ever be necessary, whether the guidance given in *Jones* might need to be modified in a case of uncertainty regarding the proper interpretation of EU legislation. It is unlikely that the CJEU would accord special weight to the view of a subordinate tribunal in one Member State on a point of construction of EU law; so where there is the possibility of a reference to the CJEU it might arguably be thought to be impermissible for the domestic courts in that Member State to do so.