

CF 23/1980

Decision C.F. 23/1980

This decision is "starred" because it considers the meaning of "receiving full-time education by attendance at a recognised educational establishment" in section 2(1) of the Child Benefit Act 1975 and contains a reservation as to the vires of regulation 5 of the Child Benefit (General) Regulations 1976 (concerning education at e.g. parents' home under "special arrangements").

M J Goodman

MJG/EFM

CHILD BENEFIT ACT 1975

CLAIM FOR CHILD BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows:
 - (i) The decisions of the insurance officer were properly reviewed and revised so as to make child benefit not payable to the claimant for her son K as from 4 April 1977 and for her daughter C from 26 December 1977 because the children K and C had attained the age of 16 years on those dates and they were not then or thereafter receiving full-time education by attendance at a recognised educational establishment: Child Benefit Act 1975, sections 2, 5, 7, 8 and 24; Child Benefit (General) Regulations 1976, regulations 1(2) and 5(a); Child Benefit (Claims and Payments) Regulations 1976, regulations 18 and 19; Child Benefit (Determination of Claims and Questions) Regulations 1976, regulation 9(1)(b); and the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, regulation 2(1).
 - (ii) As a result an overpayment of child benefit was made to the claimant for the period from 4 April 1977 to 24 April 1977 amounting to £4.50 but as I am satisfied that the claimant throughout used due care and diligence to avoid overpayment in obtaining and receiving that benefit, repayment of the sum of £4.50 is not required: Child Benefit Act 1975, section 8 and the Social Security Act 1975, section 119.

The claimant's appeal against the decision of the local tribunal is therefore dismissed.

2. This appeal was the subject of an oral hearing before me on 24 May 1980. The claimant did not appear at the hearing, neither was she represented. In correspondence to the Commissioner's Office she has given detailed reasons why this was so and in the circumstances

I saw no point in adjourning the hearing from 24 May 1982. The insurance officer was represented by Miss K Lee of the Solicitor's Office of the Department of Health and Social Security. I am indebted to Miss Lee for her careful argument at the oral hearing, I am also indebted to the claimant and to her husband for the great pains they have taken to put documentary evidence before me. Unfortunately, for the reasons that henceforth appear, almost all of that documentary evidence is irrelevant to the issues before the Commissioner, however.

3. The claimant is a married woman living with her husband and their 9 children in a house in a city. This appeal concerns two of the children, a boy K and a girl C, whose 16th birthdays were on 23 January 1976 and 21 December 1977 respectively and who were stated by the claimant to be being educated at home. They did not attend a university, college, or school. The substance of the appeal, shorn of some procedural technicalities (dealt with in paragraph 1 above), is whether as from their 16th birthdays, the two children were so circumstanced that the claimant would be entitled to child benefit for them. I should emphasise at the outset that the Commissioner as an independent judicial authority is solely concerned with interpretation of the legal provisions in Acts of Parliament and Regulations duly made thereunder. He has no power to widen the scope of the inquiry beyond those statutory provisions, neither does he have any administrative functions. Those functions are of course confided by the legislation to the Secretary of State and the Department of Health and Social Security.

4. The relevant statutory provisions are as follows:

Section 2(1) of the Child Benefit Act 1975 provides,

"(2)(1) For the purposes of this Part of this Act a person shall be treated as a child for any week in which -

(a) he is under the age of sixteen; or

(b) he is under the age of nineteen and receiving full-time education by attendance at a recognised educational establishment."

[The word "he" is also deemed to include the word "she" - Interpretation Act 1978, section 6.]

The two children K and C were at the relevant times under the age of 19 and over 16 and the sole question for my determination therefore is whether they were "receiving full-time education by attendance at a recognised educational establishment".

5. The inquiry therefore then passes to section 24(1) of the Child Benefit Act 1975, which provides,

"24(1) In this Act

.....

'Recognised educational establishment' means an establishment recognised by the Secretary of State

as being, or as comparable to, a university, college or school, and regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this Act as receiving full-time education by attendance at such an establishment."

It is immediately clear from that definition that it is the sole province of the Secretary of State to decide whether or not to recognise an 'establishment' for the purposes of the Child Benefit Act 1975. His decision on the point is not made subject by the 1975 Act (or regulations made under it) to any appeal and the Commissioner is given no jurisdiction by the legislation on the question of whether or not an establishment should be recognised for the purpose of the Child Benefit Act 1975. For that reason almost all of the voluminous documentary material submitted by the claimant is irrelevant to the proceedings before the Commissioner. I have no power whatsoever to say whether an establishment should or should not be recognised as being, or as being comparable to, a university, college or school. For that reason the desire of the claimant to introduce evidence as to the alleged dangers of sending children to state schools is entirely misconceived. The Commissioner has no power whatsoever to adjudicate on such matters. The only matter before the Commissioner is whether the claimant's children come within the definitions in section 2(1) and 24(1) of the Child Benefit Act 1975.

6. The documentary evidence before me establishes beyond any doubt that the claimant's home has not been recognised by the Secretary of State as an "educational establishment" within the definition in section 24(1) of the Child Benefit Act 1975. There are a number of documents in the appeal papers by which a duly appointed officer on behalf of the Secretary of State has stated that the claimant's home is not so recognised. Moreover, it is clear from section 7(3) of the Child Benefit Act 1975 that the decision of the Secretary of State on this matter may be retrospective. Section 7(3) provides,

"7(3) Any decision of the Secretary of State on any such question mentioned in subsection (2) above [ie a question whether an educational establishment is recognised for the purposes of the Child Benefit Act - see below] may be given so as to have effect with respect to a period before the date of the decision; and the Secretary of State may at any time and from time to time reconsider the exercise of his discretion with respect to any such question and decide it again with such other effect as may seem to him to be proper in the circumstances of the case."

7. A legal point arises in connection with regulations made under section 24(1) of the Child Benefit Act 1975. The definition in section 24(1) of "recognised educational establishment" provides,

"..... and regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this Act as receiving full-time education by attendance at such an establishment."

In my judgment the regulation making power is confined therefore to prescribing what constitutes full-time education (as distinct from e.g. part-time education or no education) at an educational establishment which has been recognised by the Secretary of State. The regulation making power does not allow a regulation of itself in any way to affect the definition of what can be a "recognised educational establishment". The definition of such an establishment is to be found only in section 24(1) of the Child Benefit Act 1975 and cannot be varied or added to by regulations. The definition is in fact (section 24(1)) "an establishment recognised by the Secretary of State as being, or as comparable to, a university, college or school ...". That means, in my view, that the Secretary of State cannot recognise any place where education is given as being "an establishment" unless that place is or is comparable to a university, college or school. Moreover, although the word "establishment" is not defined in the Child Benefit Act 1975 or elsewhere in the legislation, there would in my view be considerable doubt whether the word "establishment" could include a private house or home, particularly in the context of the whole of the definition in section 24(1) of the 1975 Act which requires the establishment to be comparable to a university, college or school. A private house cannot normally, in my judgment, be physically so comparable.

8. I have gone into this matter in detail because I doubt whether, even if the Secretary of State had purported to recognise the claimant's home as an "educational establishment", such a recognition would have been within his powers (see below). Moreover, Miss Lee made the point at the hearing that in so far as any regulation (see regulation 5 of the Child Benefit (General) Regulations 1976, paragraph 9 below) would appear to envisage that a claimant's home could be an "educational establishment", the regulation was of doubtful validity, as very possibly not being within the powers conferred by section 24(1) of the 1975 Act. Although I do not finally decide that issue in this case, because it is not necessary for me to do so, I nevertheless should say that the point had independently occurred to me before Miss Lee made her submission and I am inclined to accept her submission on the point as being correct.

9. The relevant regulations are the Child Benefit (General) Regulations 1976, regulations 1(2) and 5. Regulation 5 provides,

"Circumstances in which a person is to be treated as receiving full-time education"

5. A person shall be treated for the purposes of the Act as receiving full-time education [defined in Regulation 1(2)]

as meaning "full-time education by attendance at a recognised educational establishment"] if he is receiving -

- (a) primary or secondary education in England or Wales otherwise than at school under special arrangements made under section 56 of the Education Act 1944; or
- (b) [relates to education in Scotland]".

10. The definition in regulation 1(2) therefore of full-time education, defining it as such education by attendance at a recognised educational establishment, recognises that only such education within the definition in section 24(1) of the Child Benefit Act 1975 can qualify for the purposes of child benefit (see above). Consequently, where regulation 5(a) purports to extend the definition in section 24(1) of the Child Benefit Act 1975 of a recognised educational establishment to places which are not a university, college or school (or comparable to them), it is in my view very possibly ultra vires.

11. Regulation 5(a) refers to education otherwise than at school under special arrangements made under section 56 of the Education Act 1944, which (as amended) provides:

"56. Power to provide primary and secondary education otherwise than at school

If a local education authority are satisfied that by reason of any extraordinary circumstances a child or young person is unable to attend a suitable school for the purpose of receiving primary or secondary education, they shall have power with the approval of the Secretary of State to make special arrangements for him to receive education otherwise than at school, being primary or secondary education, as the case may require, or, if the authority are satisfied that it is impracticable for him to receive full-time education and the Secretary of State approves, education similar in other respects but less than full-time."

12. No doubt there are cases where local education authorities have made special arrangements for the education of children at home under the power given by section 56 of the Education Act 1944. The present case is not one such and indeed there is before me a document from the local education authority making it clear that they have not exercised their power under section 56 of the 1944 Act in the case of the claimant's children or their home. In any event, I accept Miss Lee's submission that there are considerable doubts whether a recognition by the Secretary of State of a child's home where he was being taught by his parents would, for the purposes of child benefit, be valid, for the reasons which I have given above. Miss Lee drew my attention to the fact that

she considered that a Departmental leaflet dealing with the matter might also be misleading. She was not able to cite the exact leaflet but it would appear to be Child Benefit leaflet CH7 (November 1980 edition) which states,

"Recognised educational establishments

For child benefit purposes a recognised educational establishment can include:

[some defined schools and colleges]

A hospital or the child's home if the education is being specially arranged by the local authority."

In my view there is some doubt whether that passage in the leaflet is legally correct, although of course it merely summarises what is stated in regulation 5 of the Child Benefit (General) Regulations 1976 (see above). If it is the intention of the Department that specially arranged education at home should qualify for child benefit, it may be that the definition of a recognised educational establishment in section 24(1) of the Child Benefit Act 1975 may require amendment. That is not of course directly a matter for me but as Miss Lee's submission on the point had arrived at a conclusion which I had also reached before I heard her submission, it may be that the matter should be looked at by the Department.

13. I have dealt with these matters in detail in this decision because the various statutory provisions have been the subject of close examination in connection with the claimant's appeal. I should however make it abundantly clear that in my view the claimant's appeal is bound to fail because no question of recognition by the Secretary of State of her home as an educational establishment arises. There is no such recognition and I have no jurisdiction to say whether there ought or ought not to be recognition.

14. A further point arises on the jurisdiction of the 'statutory authorities' (the local insurance officer, the local tribunal, and the Commissioner) to adjudicate on issues of this kind. That is because of regulation 1(2) of the Child Benefit (Determination of Claims and Questions) Regulations 1976, which was in fact inserted by regulation 2(1) of the Child Benefit (Miscellaneous Amendments) Regulations 1978 [S.I. 1978 No. 540] with effect from 5 May 1978. That date is after the initial question arose in this case as to whether the claimant's two children gave entitlement to child benefit (the question arising on their 16th birthdays). Regulation 1(2) of the Determination of Claims and Questions Regulations 1976 (as amended in 1978) reads:-

"'Special question' means ... any question whether an establishment is a recognised educational establishment as defined in section 24(1) of the [Child Benefit] Act."

15. Under section 7(2) of the Child Benefit Act 1975, "special questions" are those which are reserved for decision by the Secretary of State and cannot be the subject of adjudication by the statutory authorities (see also regulations 8 and 9 of the Child Benefit (Determination of Claims and Questions) Regulations 1976). That means that so far as this appeal concerns a period after 5 May 1978 (see paragraph 14 above) the question whether the claimant's home is a recognised educational establishment is not a question which the statutory authorities (including the Commissioner) can adjudicate on at all. That means in my view that the statutory authorities, including, the Commissioner, must accept the decision of the Secretary of State in answer to the question "Is the claimant's home a recognised educational establishment or not?", i.e. the special question relates to an evidentiary matter. I have already indicated above that in my view the separate question whether or not an educational establishment can be or should be recognised by the Secretary of State is one that is exclusively in any event confided by the legislation to the Secretary of State's discretion. It cannot be adjudicated on by the statutory authorities, except that the statutory authorities can, in the exercise of their general jurisdiction to construe the legislation, indicate the statutory limits of the Secretary of State's discretion, e.g. as to whether or not a home is an "establishment" within the meaning of section 24(1) of 1975 Act. Consequently, it is in my view immaterial that part of the appeal period in this case precedes the amendment regulation of 1978 because, even without that regulation, the statutory authorities in my view must simply ask themselves of any alleged educational establishment "Is it in fact recognised by the Secretary of State?". If satisfied by proper evidence that there has been no such recognition (as I am satisfied in this case - there is documentary evidence in the appeal papers, which I have no reason to suppose is not accurate), then the statutory authorities (including the Commissioner) must disallow a claimant's appeal in respect of child benefit.

16. A subsidiary point in this appeal is that the claimant also appeals against the refusal of the local tribunal on 19 May 1980 to adjourn its hearing on a second occasion. I have considered all the evidence and documentation before me on this point but I consider that the local tribunal were acting perfectly properly in refusing a second adjournment, their power so to refuse being contained in regulation 13(2) of the Child Benefit (Determination of Claims and Questions) Regulations 1976. In any event in a case of this complexity, where all relevant facts are before me, even if I had found that the local tribunal were in error in refusing an adjournment (which I do not), I would have exercised my discretion not to send the matter back for rehearing to a local tribunal, but to decide the case myself.

(Signed) M J Goodman
Commissioner

Date: 14 July 1982

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Region: Child Benefit Centre, Washington