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Commissioner's File: CF/35/1986

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Region: London North

CHILD BENEFIT ACT 1975

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: David Maxwell Middleburgh

Appeal Tribunal: Luton

Case No: 99/01

[ORAL HEARING]

1. My decision is that child benefit in respect of the claimant's son Aaron is payable at the standard weekly rate of £6.50 for the inclusive period from 16 April 1984 to 29 April 1984 and for the inclusive period from 30 July 1984 to 19 August 1984, but that such benefit is not payable for the inclusive period from 30 April 1980 to 29 July 1984 or for the inclusive period from 20 August 1984 to 2 December 1984.
2. This is an appeal by the claimant, brought with my leave, against the decision of the social security appeal tribunal varying the adjudication officer's decision shown in Box 1 of Form AT2. The claimant asked for an oral hearing, a request to which I acceded. At that hearing the claimant was present, but unrepresented, whilst the adjudication officer appeared by Miss K Lee of the Solicitor's Office of the Department of Health and Social Security. I am indebted to both of them for their submissions.
3. On 7 December 1983 the claimant, who had come from the Irish Republic to Great Britain on 18 October 1983, claimed child benefit in respect of his two children Sarah and Aaron. At that time he was in the process of obtaining a divorce from his wife who was still living in the Irish Republic. Sarah was with her, whilst Aaron was living with the claimant's then common law wife - subsequently they have married - again in the Republic. In a letter received on 11 April 1984 the claimant notified the Department of Health and Social Security that he had been granted a divorce from his wife, but that because maintenance and access arrangements in respect of his daughter had not been resolved, he wished to withdraw his claim for child benefit in respect of her. The claimant was employed by BUPA Hospitals from 15 November 1983 to 13 April 1984 and, although Aaron was not present in Great Britain, the adjudication officer decided that, since the claimant was maintaining his son and was, as an employed person, paying national insurance contributions subject to United Kingdom legislation, child benefit was, pursuant to Article 73 of Council Regulation (EEC) no.1408/71 as amended, payable in respect of the inclusive period from 21 November 1983 to 15 April 1984. The difficulty relates to the period subsequent to the claimant's employment by BUPA Hospitals, and it is not in dispute that the period before me is from 16 April 1984 to 2 December 1984 (both dates included).
4. Section 13 of the Child Benefit Act 1975 provides as follows:-

- "13. - (1) Regulations may modify the provisions of this Part of this Act in their application to persons who are or have been outside Great Britain at any prescribed time or in any prescribed circumstances.
- (2) Subject to any regulations under subsection (1) above, no child benefit shall be payable in respect of a child for any week unless -
- (a) he is in Great Britain in that week; and
  - (b) either he or at least one of his parents has been in Great Britain for more than one hundred and eighty-two days in the fifty-two weeks preceding that week.
- (3) Subject to any regulations under subsection (1) above, no person shall be entitled to child benefit for any week unless -
- (a) he is in Great Britain in that week; and
  - (b) he has been in Great Britain for more than one hundred and eighty two days in the fifty-two weeks preceding that week."

Manifestly, section 13(2) relates to conditions which must be satisfied in order to establish that there is a child benefit payable, and section 13(3) stipulates the conditions which must be satisfied by a claimant if he is to establish his personal entitlement to that child benefit. In the event, I do not have to consider section 13(3) because the claimant is unable to satisfy section 13(2), which is a precondition of entitlement. Aaron was at no time during the relevant period present in Great Britain, so that the claimant is caught by paragraph (a) of section 13(2). Moreover, he can derive no assistance from regulation 2 of the Child Benefit (Residence and Persons Abroad) Regulations 1986 because condition (b) of paragraph (2) requires that "the child's absence was when it began intended to be temporary and has throughout continued to be so intended". Since Aaron had never lived in Great Britain during the relevant period, he could not be regarded as temporarily absent from this country, and accordingly there could be no question of condition (b) being satisfied.

5. It follows from what has said above that child benefit could not, in respect of the period with which I am concerned, be paid under the United Kingdom legislation, and as there was no reciprocal convention between the United Kingdom and the Irish Republic, the claimant could only succeed, if at all, under the European Community Regulations on Social Security.

6. It is not in dispute that the claimant, being subject to United Kingdom legislation and a British national, is a person to whom Regulation (EEC) no. 1408/71 as amended applies. Moreover, it is accepted that, in the light of Article 1(f) thereof and sections 1 to 3 of the Child Benefit Act 1975, that that regulation applies to his children as members of his family. Article 4(1)(h) of Regulation (EEC) no. 1408/71 provides that the regulation shall apply to "family benefits", which are defined in Article 1(u)(i) as meaning "all benefits in kind or in cash intended to meet family expenses...." Article 1(u)(ii) defines "family allowances" as "periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family". In decision R(F)2/83 the Commissioner assumed that "family benefits" was a wider term than "family allowances" and that it embraced anything (including child benefit) that constituted a family allowance. The Commissioner pointed to the inclusion of child benefit in the Declarations made by the United Kingdom Government under Article 5 of Regulation (EEC) no. 1408/71, and published in the Official Journal of the European Communities, among United Kingdom family benefits. Furthermore, in the light of the judgment of the European Court of Justice in

Case 35/77 Beerens v. Rijksdienst voor Arbeidsvoorziening, Brussel [1977] ECL 2249 (quoted in R(P)2/84), it must be accepted that child benefit is a family benefit for the purposes of Article 4(1)(h) and other provisions of the regulation.

7. From 16 April 1984 to 29 April 1984 and again from 30 July 1984 to 19 August 1984 (both dates included) the claimant was unemployed. However, by virtue of Article 74 he is able to claim child benefit for those periods. Article 74(1) provides as follows:-

"74. (1) An unemployed person who was formerly employed and who draws unemployment benefits under the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State as though they were residing in the territory of the first State."

In the present instance, the claimant had formerly been employed by BUPA Hospitals, and he was drawing unemployment benefit. Accordingly, he satisfied the provisions of Article 74, and is entitled to child benefit in respect of Aaron, notwithstanding the latter's absence in Ireland, for the two periods set out above. It must be borne in mind that during those two periods Aaron's mother remained the claimant's common-law wife, so that there can be no question of Article 10(1) of Regulation (EEC) 574/72 applying.

8. The real difficulty in this case concerns the period from 30 April 1984 to 29 July 1984 when the claimant was self-employed and the period from 20 August 1984 to 25 November 1984 when he was on a TOPS course. As regards the short final period from 26 November 1984 to 2 December 1984 the claimant was again in employment, and therefore outside Article 74(1), but as such employment did not commence till after midnight 25/26 November 1984 he was not entitled to child benefit until 3 December 1984. As for the period of self-employment the claimant contends that he is entitled to child benefit by virtue of Article 73(1) of Regulation (EEC) 1408/71. This reads as follows:-

"An employed person subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State."

In order to succeed the claimant has to show that the word "employed" encompasses "self-employed".

9. In support of his case the claimant cited Brack v. The Insurance Officer, Case 17/76 where the European Court held that a person who was compulsorily insured as a self-employed person was a worker within the definition of Article 1(a), as it then was, in Regulation (EEC) 1408/71. The claimant seeks to infer from this that the Regulation in all its provisions applies equally to employed and self-employed persons paying compulsory insurance. However, it must be pointed out that that particular case was a contribution case arising under Article 22 and that the point at issue was whether contributions paid as a self-employed person could be aggregated with those paid as an employed person. But be that as it may, Regulation 1390/81 amended Regulation 1408/71 as from 1982 and the term "worker" was replaced by "employed person" and "self-employed person" so that any reliance on the term 'worker' as interpreted in Brack v The Insurance Officer could no longer be of assistance to the claimant. The claimant contends that the purpose of the amendment was to put employed and self-employed persons on exactly the same footing in all respects, and cites the recitals to the amending regulation in support of his contention. I do not consider that the inference can be drawn which the claimant seeks to draw - the reference to the appropriateness of applying the same rules to employed and self-employed persons alike is specifically qualified by the words "to the largest extent possible" - but in the event I am only concerned with the amended regulation in the form in which it now

appears, and which in respect of the Articles that are relevant to this appeal has been unchallenged for more than 15 years. In my judgment, it is quite clear from the terms of the various Articles that the distinction between an employed person and a self-employed person was throughout appreciated, and that there was no intention to equate the two. This I think is apparent from Article 1 which commences as follows:-

"For the purpose of this Regulation:-

(a) "employed person" and "self-employed person" mean respectively:"

I have no doubt in the light of this that where the words "employed person" are used this term was intended to indicate a person of that status, and was not intended to indicate a person of a totally different status, namely a self-employed person. Furthermore, the distinction between employed and self-employed is specifically drawn in very many of the Articles of the Regulation. Moreover, it is interesting to note that item 5310 at page 350 of the Commission of the European Communities Compendium of Community Provisions on Social Security 1983 (Second Edition) says with regard to Chapter 7 of the Regulation as follows:-

"This chapter contains provisions common to employed and self-employed persons (Article 72) and provisions applicable only to employed persons and to unemployed persons, the members of whose families reside in a Member State other than the competent State. Apart from the rules on aggregation of periods, the extension of the scope of Regulation No 1408/71 by Regulation No 1390/81 has not been possible with regard to self-employed persons."

10. The claimant invited me to refer the present matter to the European Court, contending that in the light of Articles 48 to 54 of the Treaty of Rome 1957 the words "employed person" appearing in Article 73 must either be construed as including a "self-employed person" or alternatively the Article must be regarded as void. It was clear to me that the claimant entertained very strong feelings about the treatment of self-employed persons by the rules of the European Community and resented any differentiation in treatment. I think that, swept away by the strength of his feeling and his conviction as to the philosophy underlying European Community Law, he believed that regulation 73 ought to have a wider meaning than clearly on the face of it it bears, and entertained the hope that the European Court with its wide powers might, on some basis or other, construe the provision so as to embrace self-employed persons as well as merely employed persons. In other words, his suggestion was in something in the nature of a "fishing" exercise. Of course, it is incumbent upon me to refer to the European Court any matters on which I seriously entertain difficulty. However, in my judgment, the present issue is clear beyond peradventure, and accordingly it would not be proper for me to make the reference asked for.

11. For completeness, I should say that the claimant also relied on Annex VI, Point J3(b), which provides as follows:-

"(b) If, pursuant to Title II of the Regulation, United Kingdom legislation is applicable in respect of an employment [sic] or self-employed person who does not satisfy the condition imposed by United Kingdom legislation in regard to child benefit concerning:

(i) presence within Great Britain or, as the case may be, Northern Ireland, he shall be regarded, for the purpose of satisfying such condition, as being so present;

(ii) a period of presence within Great Britain, or, as the case may be,

Northern Ireland, periods of insurance, employment or self-employment completed by the said worker under the legislation of another Member State shall, for the purpose of satisfying such conditions, be regarded as periods of presence in Great Britain or, as the case may be, Northern Ireland."

Manifestly, this provision is concerned with section 13(3) of the Child Benefit Act 1975, but as explained earlier, it is unnecessary for me to consider that provision because the claimant fails under section 13(2). Moreover, Point J3(b) has no relevance to Article 73.

12. It follows from what has been said above that the claimant is not entitled to child benefit for the period when he was self-employed, ie for the inclusive period from 30 April 1984 to 29 July 1984. It now remains for me to consider the further period when the claimant was on a TOPS course. The claimant contended that he had been allowed to go on this course only because he was unemployed, and that the payment he received for his attendance thereat was in effect unemployment benefit, with the result that he fell within the provisions of Article 74(1). The first point that must be emphasised is that the claimant was at the relevant time in receipt of a training allowance. I do not see how this could possibly be regarded as the same thing as unemployment benefit. In my judgment, any other view would do a violence to the plain language. But irrespective of this consideration, there may well have been persons engaged on this course who would not have been entitled to unemployment benefit, had they not been on it. Therefore, in their case or no footing could the training allowance be regarded as unemployment benefit. It may, of course, be that in the present instance the claimant would, had he not been on the TOPS course, have been entitled to unemployment benefit, but that does not affect the principle that I have just stated. In other words, the claimant was not drawing unemployment benefit but a training allowance, and he falls outside Article 74. For completeness, I should say that it is perhaps somewhat surprising that Article 74 is expressed in terms requiring the claimant to be drawing as distinct from merely entitled to unemployment benefit. Had entitlement to unemployment benefit been the only requirement, then the question of whether the claimant was available for employment whilst on the course would have arisen. But as the words "draws unemployment benefits" are used and the claimant did not satisfy this condition, the question simply does not arise. It follows from what has been said above that the claimant is not entitled to child benefit for the inclusive period from 20 August 1984 to 25 November 1984, and that the tribunal in reaching the contrary conclusion were mistaken. As regards the final period from 26 November 1984 to 2 December 1984 there continues to be no entitlement to child benefit, the reason being that given in paragraph 8.

13. My decision is as set out in paragraph 1.

(Signed) D.G. Rice  
Commissioner

Date: 5 October 1987

