

Child Benefit - Family Members to
(Spain (not treated as UK) - EC legislation
Child not Assisted

CAAG



5/94

DGR/SH/26

Commissioner's file: CF/018/1992

CHILD BENEFIT ACT 1975

SOCIAL SECURITY ADMINISTRATION ACT 1992

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 22 January 1992 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the award of child benefit for the claimant's two children should be reviewed pursuant to section 104(1)(b) of the Social Security Act 1975 by reason of a relevant change of circumstances since the original award was made, and my revised decision is that the claimant is not entitled to child benefit from an including 30 May 1988, because on that date she was not and could not be treated as being in Great Britain, and her absence from Great Britain had exceeded eight weeks.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 22 January 1992.

3. On 30 March 1988 the claimant and her family left Great Britain for Spain. The question for determination by the tribunal was whether the claimant's absence from Great Britain disentitled her to child benefit, and, if so, from what date. In this connection the tribunal had to consider whether there were any provisions either in domestic or European law which enabled the entitlement to continue. In the event, the tribunal, upholding the decision of the adjudication officer, decided that the claimant was not entitled to child benefit from and including 30 May 1988, because she was not, and could not be treated as being, in Great Britain, and her absence from Great Britain had exceeded eight weeks. The tribunal reached the correct conclusion, but unfortunately they did not give an adequate explanation as to how they arrived at it. Accordingly, there was a breach of regulation 25(2)(b) of the Adjudication Regulations, and I must set aside their decision as being erroneous in point of law. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision.

4. As regards the domestic law, the relevant regulations are regulations 6 and 7 of the Child Benefit (Residence and Persons Abroad) Regulations 1976 [S.I. 1976 No.963]. Regulation 7 provides that, where a person satisfies regulation 6, he or she shall be treated as being present in Great Britain, thereby satisfying the requirements of what was originally section 13(3) of the Child Benefit Act 1975 but is now section 146(3) of the Social Security Contributions and Benefits Act 1992 as to presence in Great Britain. But to fall within regulation 6 a person has to satisfy at least three conditions, or be the spouse of such a person, and living with him or her. The conditions are:-

- (i) that the person in question is temporarily absent from Great Britain
- (ii) that such absence is by reason only of employment outside Great Britain, and
- (iii) that United Kingdom tax is paid on at least half that person's earnings from that employment.

On the facts of this case, it is clear that neither the claimant nor her husband was in employment outside Great Britain from the time they left this country, and that any payment of United Kingdom income tax was in relation to a pension, and not to earnings from employment. Accordingly the claimant could not bring herself within regulation 6 and as a result could not be treated as present in Great Britain. It followed that after the lapse of eight weeks she ceased to be entitled to child benefit.

5. As regards European law, it is not in dispute that the claimant and her husband were within the personal scope of Regulation (EEC) No. 1408/71 by reason of their previous employment within the United Kingdom, and the United Kingdom legislation continued to apply to them after their departure from Great Britain (provided they did not take up employment in Spain) - Articles 1, 2 and 13. However, continued entitlement to child benefit depended on their satisfying the relevant provisions of either Chapter 7 or Chapter 8 of that regulation. On this issue the adjudication officer now concerned has made the following helpful submission:-

" 11. Article 73 deals with employed people whose families are in a Member State other than the competent State. However, neither the claimant nor her husband were in employment at the relevant time and I therefore submit Article 73 cannot apply.

12. Similarly I submit Article 74 has no application because there is nothing to suggest the claimant or her husband were in receipt of United Kingdom Unemployment Benefit.

13. Article 77 provides for a 'pensioner' to receive family

benefit from the Member State responsible for the pension. Pensions must be awarded on the grounds of old age, invalidity, industrial accident, occupational disease (Article 77(1) and must be paid out of public funds (Article 1(t)). It is my submission that the Fire Brigade Medical Discharge pension paid to the claimant's husband does not fall within this category and that Article 77 can therefore have no application."

I accept those submissions.

6. Accordingly, the only outstanding European issue is the effect of Article 13(2)(f), which was introduced into Regulation (EEC) No. 1408/71 as from 29 July 1991. On that matter, the adjudication officer now concerned has submitted as follows:-

"In my submission that Article together with provisions in Annex VI section L, paragraphs 19 and 20 served to make the state of residence the competent state from 29.7.91. No findings of fact were made by the tribunal on this point, but in my submission it is clear that the family became resident in Spain (Article 1(h)) from the date they moved there and that Spain therefore became the competent state from that time.

15. However, should the Commissioner find that the United Kingdom remained the competent State, then I submit the provisions of Regulation (EEC) No. 1408/71 could not assist the claimant for the reasons outlined above."

I accept those submissions. In my judgment, the claimant did become resident in Spain as soon as she and her family moved there, and since 27 July 1991 Spain has become the competent State with the result that Spanish law is applicable.

7. It follows from what has been said above that the claimant ceased, after the expiry of eight weeks from her departure to Spain, to be entitled to child benefit, and accordingly my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 18 January 1994

SCHEDULE

VARIOUS REGULATIONS

Child Benefit (Residence and Persons Abroad) Regulations 1976
[S.I. 1976 No.963]

Regulation 6(1)

The persons to whom this Part of these Regulations applies are:-

- (a)
 - (b)
 - (c) a person who on any day falling within or week beginning in an income tax year is temporarily absent from Great Britain by reason only of the fact that he is in employment (whether under a contract of service or not) outside Great Britain, being an income tax year in relation to which that person proves that at least half of his earnings or other emoluments from that employment are liable to United Kingdom income tax;
 - (d) a spouse of a person mentioned in sub-paragraphs (a) to (c) above who is residing with that person;
 - (e)
7. - (1) Any day on which or week in which such a person as is mentioned in regulation 6 is absent from Great Britain by reason only of his being such a person as is mentioned in that regulation shall in relation to benefit be treated for the purposes of section 13(2)(b) and (3) [now section 146(2)(b) and (c)] of the Act as a day on which or week in which he is present in Great Britain.
- (2) Any week in which or day on which the child is absent from Great Britain shall in relation to benefit be treated for the purposes of section 13(2) [now section 146(2)] of the Act as a week in which or day on which that child is in Great Britain if in that week or on that day that child is living with a person in relation to whom paragraph (1) applies and that person is -
- (a) a parent of that child; or
 - (b) a person who before that day was entitled to benefit in respect of that child;

- (3) Unless in his discretion the Secretary of State otherwise determines any case or class of cases, any day of absence from one another of a child and a person, being a day on which paragraph (1) applies to that person, shall, if that absence is due solely to that person being one to whom that paragraph applies, be a day which shall be disregarded under the provisions of section 3(2) [now section 143(2)] of the Act (circumstances in which a person who has had a child living with him at some time before a particular week is to be treated for the purposes of section 3 [section 143] of the Act as having that child living with him in that week notwithstanding their absence from one another).

Regulation (EEC) No. 1408/71

Article 2 Persons covered

1. This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.

2.

3.

Article 13

General Rules

1. Subject to Article 14c a person to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

- (f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.

Article 73

Employed or self-employed persons the members of whose families reside in a Member State other than the competent State

An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.

Article 74

Unemployed persons the members of whose families reside in a Member State other than the competent State

An unemployed person who was formerly employed or self-employed and who draws unemployment benefit under the legislation of a Member State shall be entitled, in respect of the members of his family residing in another Member State, to the family benefits provided for by the legislation of the former State as if they were resident in that State, subject to the provisions of Annex VI.

Article 77

Dependent children of pensioners

1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

Annex VI Section L

19. Subject to any conventions concluded with individual Member States, for the purposes of Article 13(2)(f) of the Regulation and Article 10b of the Implementing Regulation, United Kingdom legislation shall cease to apply at the end of the day on the latest of the following three days to any person previously subject to United Kingdom legislation as an employed or self-employed person:-

- (a) the day on which residence is transferred to the other Member State referred to in Article 13(2)(f);
- (b) the day of cessation of the employment or self-employment, whether permanent or temporary, during which that person was subject to United Kingdom legislation;
- (c) the last day of any period of receipt of United Kingdom sickness or maternity benefit (including benefits in kind for which the United Kingdom is the competent

State) or unemployment benefit which:-

- (i) began before the date of transfer of residence to another Member State or, if later,
- (ii) immediately followed employment or self-employment in another Member State while that person was subject to United Kingdom legislation.

20. The fact that a person has become subject to the legislation of another Member State in accordance with Article 13(2)(f) of the regulation, Article 10b of the Implementing Regulation and point 19 above, shall not prevent:-

- (a) the application to him by the United Kingdom as the competent State of the provisions relating to employed or self-employed persons of Title III, Chapter I and Chapter 2, Section 1 or Article 40(2) of the Regulation if he remains an employed or self-employed person for those purposes and was last so insured under the legislation of the United Kingdom;
- (b) his treatment as an employed or self-employed person for the purposes of Chapter 7 and 8 of Title III of the Regulation or Articles 10 or 10a of the Implementing Regulation, provided the United Kingdom benefit under Chapter I of Title III is payable to him in accordance with paragraph (a).