

C F 21/1979

JGM/MW

CHILD BENEFIT ACT 1975

CLAIM FOR CHILD BENEFIT

DECISION OF THE NATIONAL INSURANCE COMMISSIONER

Name: ~~XXXXXXXXXX~~ (XXXX)

Local Tribunal: Stoke Newington

Case No: 14/5

ORAL HEARING

1. My decision is that the decisions awarding child benefit to the claimant in respect of her children Paul and Kevin (to whom I shall refer as "the children") are not to be revised on review for the inclusive period 26 June to 29 October 1978. I reserve for future decision (if I am requested to give such a decision) the question whether child benefit was payable in respect of the children or either of them for any subsequent period.

2. This is the insurance officer's appeal from a decision of the local tribunal reversing the insurance officer's decision that the decision awarding child benefit to the claimant for the children should be reviewed and revised in relation to the period from 26 June 1978 on the ground in substance that the children had been placed in the care of a local authority under section 1 of the Children Act 1948 and that no relevant exception from loss of child benefit in respect of the children from that date was applicable. The local tribunal considered that the exception contained in regulation 16(6)(b)(iii) of the Child Benefit (General) Regulations 1976 below mentioned was applicable and gave an open-ended decision that the claimant was entitled to child benefit for the children from 9 October 1978 as I conceive they had jurisdiction to do under section 102 of the Social Security Act 1975. This is the decision from which the insurance officer now appeals. At the oral hearing of the appeal the claimant was represented by counsel Mr D Watkinson.

3. I shall refer in this decision to the regulations last mentioned as "the Regulations" and to the Child Benefit Act 1975 as "the Act". By virtue of sub-paragraph (c) of paragraph 1 of Schedule 1 of the Act read together with regulation 16(1) and (5) of the Regulations the claimant was not (subject to the effect of regulation 16(6) entitled to child benefit for the children in any week if throughout any day in that week (see regulation 16(1) the children were received into care pursuant to section 1 of the Children Act 1948. It is clear therefore that as the children were received into care pursuant to that section before 26 June 1978 and so remained throughout and beyond the end of the period mentioned in paragraph 1 the claimant was not entitled to

child benefit in respect of them unless some provision of regulation 16(6) assisted her. This so far as relevant reads as follows:-

"A person shall not be disentitled to benefit in respect of a child for any week by virtue of the fact that sub-paragraph (a), (b) or (c) of paragraph 1 of Schedule 1 to the Act (except where regulations otherwise provide no person to be entitled to benefit in respect of a child for any week if in that week the child is in detention, care etc.) applies to that child -

- (a) unless that week is the 9th or a subsequent week in a series of consecutive weeks in which any of those sub-paragraphs have applied to that child; or
- (b) notwithstanding that that week is the 9th or a subsequent week in a series of consecutive weeks in which any of those sub-paragraphs have applied to that child, if
  - (i) .....; or
  - (ii) that week is one during which that person has had the child living with her throughout at least one day, being a day which immediately follows or precedes a week throughout which that person has had the child living with her; or
  - (iii) as at that week that person establishes that she is a person with whom the child, while the said sub-paragraph (a), (b) or (c) applies to him, ordinarily lives throughout at least one day in each week."

4. The children were placed in care on 3 May 1978 and the insurance officer calculated that the week beginning 26 June 1978 was the 9th consecutive week in which sub-paragraph (c) of paragraph 1 of Schedule 1 to the Child Benefit Act 1975 applied to the children (so that regulation 16(6)(a) no longer applied) and concluding as the result of enquiries made that the children had been home only from some time on Saturday until some time on Sunday each week he considered that regulation 16(6)(b) did not assist the claimant. He accordingly reviewed the decision awarding child benefit to her with effect from 26 June 1978. He did not require repayment of benefit overpaid. As however the decision seemingly affected future payments the claimant appealed to the local tribunal. The local tribunal were informed that it had emerged that the children down to 8 October 1978 returned home for a period from Friday until Sunday and to this extent he rightly supported the claimant's appeal down to that date, but no further. The local tribunal found that after that date the children returned home for a total of 28½ hours including 6 meals, and (not having had their attention drawn to any Commissioner's Decision on the point) decided that "day" in regulation 16(6)(iii) meant a period of 24 hours. They held that benefit was payable from and including 9 October 1978. This decision given on 16 May 1979 covered a period beyond that covered by the decision appealed from. I was asked

at the hearing to deal only with the period down to 24 October 1978, the end of the last week for which there had according to the original decision as corrected been an overpayment and I agreed to do so. This means that in effect I am concerned only with the short period from 8 to 29 October. While I am willing for reasons which will appear to confine my decision to that period, it must follow that I shall by doing so leave outstanding the decision of the local tribunal in relation to subsequent weeks, notwithstanding that this is an appeal from the whole decision.

5. The insurance officer's appeal is founded on the argument that in regulation 16(6)(b)(iii) the word day means a period of 24 hours from midnight to midnight and that as from 8 October the children were home for something over 24 hours from 1 00 pm on Saturday until 5 30 pm on Sunday they were not living with the claimant throughout a day in each week. It is to be noted, however, that regulation 16(6)(iii) does not require that a child shall be living with the claimant throughout one day in the week in question, but that he should as at that week be ordinarily living with the claimant throughout at least one day in the week. The children were undoubtedly ordinarily living with the claimant throughout one day in each week down to 8 October. I do not think that in the absence of evidence of a prearranged change of plans from that date I can infer that the children ceased to be ordinarily living with the claimant throughout at least one day in the week immediately a change occurred. In considering the position as at a particular time I do not think I can take note of events of which hindsight acquaints me. I know now that for a period until the middle of 1979 (when the old pattern was resumed) the claimant subject to exceptions (as at Christmas and the New Year), had the children living with her only from 1 00 pm Saturday until 5 30 pm on Sunday, but I do not consider that I ought to hold that as at any week down to and including the week ended 29 October 1978 they were ordinarily living with her only for that period. On that ground I dismiss the insurance officer's appeal in relation to the period with which I have been asked to deal.

6. In the light of events it may well be that for a period to be ascertained (the evidence before me was not directed to this question) the children could be found to have been ordinarily living with the claimant throughout this period from Saturday to Sunday. If so and if the view that I provisionally accept in the following paragraphs were adhered to it would be right to review and revise the decision awarding benefit for such period. As this would involve reversing the decision on this case of the local tribunal I reserve leave to re-open this appeal in relation to periods subsequent to 29 October with which I do not deal. As the claimant would not be required to repay any amount found to be overpaid and as circumstances have now changed again I doubt if it would be profitable to do so and I would if asked grant leave to the insurance officer to withdraw the appeal in relation to such periods.

7. The conclusion that I have reached on the period that I am dealing with makes it unnecessary to consider the point on which the local tribunal decided in favour of the claimant. But I heard full argument on it and I think it best that I should record a provisional view. Briefly the insurance officer contends that the word "day" in regulation 16(6)(b)(iii) means a period of 24 hours from midnight to midnight while the claimant contends that it means any period of 24 consecutive hours.

8. There is no definition of the word "day" in either the Act or the regulation, but section 24(1) of the Act defines "week" as a period of seven days beginning with a Monday. This definition is carried into the Regulations by regulation 1(2) "unless the context otherwise requires". I have no doubt that Monday starts at midnight Sunday/Monday so that the week in this definition is a calendar week made up of seven days each beginning at midnight between it and the preceding day. This does not however mean that "day" necessarily has this meaning throughout the regulations.

9. Mr Watkinson drew my attention to the decision of the House of Lords in Cozens v Brutus [1973] A.C. 854 where it was said that the meaning of common English words is not a question of law and to Regina v National Insurance Commissioner, Ex parte Secretary of State for Social Services [1974] 1 W.L.R. 1290 where it was indicated that nevertheless where a word has different shades of meaning it becomes a matter of construction and therefore of law to determine the particular shade of meaning a word has in a particular enactment. This latter case was concerned with the meaning of the word "night" as used in contrast to the word "day" in what is now section 35 of the Social Security Act 1975. It was said that night in that section meant the household's night and as a corollary that day meant the household day (from getting-up time till bedtime). It would not help the claimant here to establish that day in regulation 16(6)(b)(iii) meant the household day as on no view did the children at the critical time live with her throughout a household day. But the decision does show that "day" can be given the shade of meaning that best fits that context.

10. In the present case it is I think clear that day is a unit of time, and means either any period of 24 hours or any period of 24 hours starting at midnight. Decisions of the Commissioner exist (which were not drawn to the attention of the local tribunal) that under the National Insurance Acts (now the Social Security Acts) day normally means the 24 hours from one midnight until the next (see Decisions C.S. 363/49 (KL) and R(S) 1/66 at paragraph 13). As there are frequent cross-references between the Social Security Acts and the Child Benefit Acts these decisions may well be relevant to child benefit.

11. Mr Watkinson submitted forcefully that there is here a context which gives the word a different meaning from its primary meaning. Clearly, he says, a claimant is intended to be allowed child benefit if she incurs the expense of having the children living with her for 24 hours, and the expense is the same whatever time the 24 hours start. Moreover, he says, the practical effect of the insurance officer's interpretation is that a claimant has to have the child living with her for two nights (36 hours) in order to qualify. I feel the force of this. Although it would not appear to me to be unreasonable for a person to have to have a child living with her for 36 hours before qualifying for one week's child benefit, I think it unfortunate that the requirement should be couched in language that suggests that 24 hours is sufficient.

12. The insurance officer's representative pointed to regulation 16(6)(b)(ii) which refers to a day immediately following or preceding a week. In this sub-paragraph therefore the day referred to must, he says, be a day from midnight to midnight because no other period of 24 hours can immediately follow or precede a week. The same meaning must therefore, he submits, be given the word "day" in sub-paragraph (iii). I am not sure that this is based on sound reasoning. If the phrase "period of 24 hours" had been used in place of the word "day" in both of sub-paragraphs (ii) and (iii) it would be given the meaning of a period of 24 hours starting at any time in sub-paragraph (iii) even though it was confined by the context to a period beginning and ending at midnight where it appears in sub-paragraph (ii). The same could apply to the word "day".

13. The insurance officer's representative also pointed out that if the day could start at any hour then a person who lived with the claimant from 1 30 pm on Sunday until 6 00 pm on Monday would do so for 24 hours falling partly in one week and partly in another and thus be somewhat anomalously in an inferior position to that of a child who spent a like period of 24 hours at some other period in the week. This he suggested was a strong pointer to the fact that day was used in the sense that it is used in the definition of the week. There is much force in this, as the anomaly can be avoided only by giving the word "week" in sub-paragraph (iii) a meaning other than that in the definition in section 24(1) of the Act.

14. I find the question difficult and I have been considerably influenced by this last point in taking the provisional view that the insurance officer's submission is correct. I have been influenced also by the use of the word "throughout". I think that the phrase "throughout one day" is more appropriate to a household day or (as in this case) to a day from midnight to midnight than to a day from, say, midday to midday. For the reason that I have given, however, I am dismissing the insurance officer's appeal.

(Signed) J G Monroe  
Commissioner

Date: 19 November 1979

Commissioner's File: C.F. 21/1979  
C I O File: I.O. 16/CMB/79  
Region: Child Benefit Centre, Washington