MR/MB/

Commissioner's file: CF/22/92

CHILD BENEFIT ACT 1975

SOCIAL SECURITY ADMINISTRATION ACT 1992

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal by the claimant is allowed. The decision of the Sunderland Social Security Appeal Tribunal dated 6 February 1991 is erroneous in point of law. I set that decision aside and give the decision which I consider that the tribunal should have given. The claimant is entitled to child benefit in respect of his daughters Colleen and Meghann from 1 January 1989 at a rate equal to the amount by which the standard rate of United Kingdom child benefit exceeds the amount of Irish children's allowances paid to the claimant's wife in respect of those children.

2. I have been greatly assisted in my consideration of this case by a written submission made by Mr. A.E. Middleton, the Adjudication Officer now concerned with this case, and by both written submissions and oral submissions made by Miss Naomi Mallick of the Office of the Solicitor to the Department of Social Security who represented Mr. Middleton at the hearing of this appeal. The claimant did not attend the hearing himself, having indicated that he was content to allow the hearing to take place in his absence because he would be at sea when it took place.

3. The claimant is Irish and lives in the Republic of Ireland. Since 1975 he has been employed by a British company on ships flying either the United Kingdom or the Irish flag and although he has been based in Ireland he has been paying Class 1 social security contributions under legislation of the United Kingdom (more specifically, of Great Britain). There was at one time a question whether he should have been subject to United Kingdom social security legislation at all but the Contributions Agency in the United Kingdom and the Social Welfare Services Office of the Department of Social Welfare in Ireland have agreed under Article 17 of Regulation (EEC) 1408/71 that he has been and will remain subject to United Kingdom legislation. The claimant's wife is also Irish and she lives with her husband in the Irish

Republic. She was employed by one company from 4 April 1983 until 29 March 1991. She was pregnant at the time she left their employment. She then successively had periods of entitlement to sickness benefit, maternity benefit and unemployment benefit until November 1992, since when she has again been in employment. At the time of the tribunal hearing, the claimant and his wife had three children, Colleen born on 11 August 1986, Meghann born on 6 November 1987 and Shonagh born on 5 April 1989. The receipt of maternity benefit suggests the birth of a fourth child in 1991 after the tribunal hearing. The claimant's wife has received Irish children's allowances in respect of the children since they were born. The claimant has also claimed United Kingdom child benefit in respect of the three oldest children. I do not know anything about any further claim in 1991. United Kingdom child benefit was paid at a reduced rate in respect of Colleen from 18 August 1986 to 8 November 1987 and in respect of both Colleen and Meghann from 9 November 1987 to 31 December 1988. The amount paid represented the amount by which entitlement to standard United Kingdom child benefit exceeded entitlement to Irish children's allowances.

4. In 1989 the adjudication officer began to have doubts as to whether the claimant was entitled to any United Kingdom child benefit at all. After some considerable delay, the question whether reduced child benefit was payable was referred, on 25 July 1990, to the social security appeal tribunal with a written submission by the adjudication officer suggesting that it was not and that the previous awards should be reviewed on the ground that the decisions of the adjudication officers had been erroneous in point of law. It was conceded that any overpayment would not be recoverable. The tribunal accepted the adjudication officer's submission. The claimant was granted leave to appeal by the chairman of the tribunal. His appeal was lodged more than three months after the grant of leave but a Commissioner has extended the time for appealing. In the event, both Mr. Middleton and Miss Mallick made open submissions to me suggesting that the tribunal might well have erred in point of law.

5. Child benefit is not usually payable in respect of a child unless he or she is in Great Britain (Section 13(2)(a) of the Child Benefit Act 1975, now section 146(2)(a) of the Social Security Contributions and Benefits Act 1992). Regulations provide that benefit may sometimes be payable if the child is absent from Great Britain. However Regulation 2(2) of the Child Benefit (Residence and Persons Abroad) Regulations 1976 requires that the child's absence should be temporary and none of the children in this case can be said to be temporarily absent from Great Britain. Regulation 2(3) has effect when a child is born abroad but it applies only for eight weeks and only if the mother's absence is temporary. Manifestly, the claimant is not entitled to United Kingdom child benefit under domestic legislation.

6. However, as both the United Kingdom and Ireland are members of the European Community, it is necessary to have regard to community legislation and, in particular, to Article 73 of Regulation (EEC) 1408/71 and Article 10 of Regulation (EEC) 574/72. Those provisions have been the subject of attention in Commissioners' decisions R(F)2/83, R(F)1/88 and R(F)2/88 but it is important to note that the community legislation has been amended on several occasions and consequently those Commissioners' decisions must be treated with great care.

7. It is convenient to deal at the outset with one question raised by Miss Mallick concerning the amendments. The tribunal's decision was given on 6 February 1991. Article 10 of Regulation 574/72 was amended on 30 April 1992 with effect from 15 January 1986. Miss Mallick suggested that I should consider the legislation as it was at the time of the tribunal's decision and should ignore the latest amendment because, she submitted, I can set aside the decision of a tribunal only if it is erroneous in point of law and a tribunal cannot be said to have erred in law in failing to give effect to legislation that had not been made at the date of their hearing. She initially indicated that she would like an adjournment in order to instruct counsel on that point. However, she agreed that the point was not of great practical importance in the present case because, as shall be seen, the 1992 amendments were made largely to incorporate into the legislation an interpretation given to the previous version of the legislation by the European Court of Justice. I therefore asked her to argue the point herself. She relied on the decision of the Court of Appeal in McKiernan v. Chief Adjudication Officer (unreported, 8 July 1993) and Commissioners' decisions R(G)3/58, R(G)1/80, R(A)4/81 and R(SB)4/92 for the proposition that a retrospective change in the law is a change of circumstances entitling an adjudication officer to review a decision under Section 25(1)(b) of the Social Security Administration Act 1992. I accept that proposition. She then argued that the retrospective change in the law could not also make an earlier decision erroneous in point of law so as to enable it either to be reviewed under section 25(2) of the Social Security Administration Act 1992 (if it was made by an adjudication officer) or to be made the subject of an appeal. I do not see why a retrospective change in the law should not be both a change of circumstances and a matter rendering an earlier decision erroneous in point of law. Of course, no opprobrium attaches to a tribunal who have applied the law as it was at the time of the hearing but I take the view that the decision may nevertheless be set aside by a Commissioner, as being erroneous in point of law in the light of a subsequent retrospective change in the legislation just as a Commissioner may overturn a decision of a tribunal who properly applied as binding authority a Commissioner's decision that has since been overturned in the Court of Appeal. It is the very nature of retrospective legislation that it may make wrong something that was right at the time it was done and vice versa. That is why it is generally regarded as being undesirable unless it makes no practical difference to the existing law. I therefore take the view that I must consider the legislation in its present form.

8. In this case there is no dispute that the claimant is within the personal scope of Regulation 1408/71, under Article 2, and that United Kingdom child benefit and Irish children's allowances are both family benefits for the purposes of Article 4. Article 73 of Regulation 1408/71 was substituted with effect from 15 January 1986 by Article 1(1) of Regulation 3427/89. It now provides:

> "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."

There is nothing relevant in Annex VI. As I have already mentioned, it is now clear that the claimant is subject to the legislation of the United Kingdom. It therefore follows that, read by itself, Article 73 would entitle the claimant to United Kingdom child benefit notwithstanding that his wife is entitled to Irish children's allowances in respect of the same children.

9. The tribunal took the view that there was no entitlement to United Kingdom child benefit under Article 73 because they took the view that Article 73 applied only to preserve entitlement already acquired under national legislation. Since there was no entitlement to United Kingdom child benefit before the claimant's wife became entitled to Irish children's allowances, there was no pre-existing entitlement to the United Kingdom child benefit to be preserved. That view was taken in reliance upon decisions of the European Court of Justice in Caisse de Compensation des Allocations Familiales des Regions de Charleroi et de Namur v Laterza (Case 733/79) [1980] ECR 1915 and Gravina v. Landesversicherungsanstalt Schwaben (Case 807/79) [1980] ECR 2205 and upon decision No. 129 of the Administrative Commission of the European Communities on Social Security for Migrant Workers (OJ C.141 7.6.86) made in consequence of the decisions in Laterza and Gravina. Those decisions were concerned with the application of Articles 77 and 78 of Regulation 1408/71 which are respectively concerned with family allowances paid to pensioners and family allowances paid in respect of orphans. In Laterza, the Court held:

> "Article 77(2)(b)(i) of Regulation No. 1408/71 must be interpreted as meaning that entitlement to family benefits from the State in whose territory the recipient of an invalidity pension resides does not take away the right to higher benefits awarded previously by another Member State. If the amount of family benefits actually received by the work in the Member State in which he resides is less than the amount of the benefits provided for by the legislation of the other Member State, he is entitled to a supplement to the benefits from the competent institution of the latter State equal to the difference between the two amounts." (my emphasis).

In Gravina, the Court held:

> "Article 78(2)(b)(i) of Regulation No. 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that the entitlement to benefits payable by the State in whose territory the orphan to whom they have been awarded resides does not remove the entitlement to benefits greater in amount previously acquired under the legislation of another Member State alone. Where the amount of the benefits actually received in the Member State of residence is less than that of benefits provided for by the legislation of the other Member State alone the orphan is entitled to supplementary benefits, payable by the competent institution of the latter State, equal to the difference between the two amounts." (My emphasis).

In paragraph 5 of decision No. 129, the Administrative Commission decided:

> "This supplement shall be determined taking account solely of children or orphans in respect of whom entitlement existed before the place of residence was transferred, before the occupational activity was pursued, before the acquisition of the new rights of benefit in accordance with the legislation of a second Member State, or at such time as rights are simultaneously required under the legislation of one Member State alone and under the legislation of another Member State in accordance with the community provisions."

As decisions of the Administrative Commission have "only the status of an opinion" (Bestuur der Sociale Verzekeringsbank v. van der Vecht) (Case 19/67) [1967] ECR 345) and as the preamble of that decision shows that it was based upon the opinion of the Administrative Commission as to the effect of Laterza and Gravina, I need only consider those decisions of the Court.

10. The tribunal in the present case, like the Administrative Commission, took the view that the word "previously" in those parts of the decisions Laterza and Gravina that I have quoted implied a limitation to the scope of Articles 77 and 78 which should also be applied to Article 73. They took the view that that interpretation was justified because the purpose of Regulation 1408/71 was "the facilitation of labour mobility" and a claimant suffered no loss if he had never had United Kingdom child benefit before becoming entitled to Irish children's allowances. However, in his written submission, Mr. Middleton drew my attention to a decision of the European Court of Justice given some four months after the decision of the tribunal in this case. In Athanasopoulos v. Bundesanstalt fur Arbeit (Case C-251/89) [1991 - I] ECR 2797, the European Court of Justice made it clear that, in respect of Articles 77 and 78, where the amount of benefits paid by the State of residence is less than the amount of benefits paid by another Member State where the claimant formally resided, the pensioner or orphan is entitled

to receive from the competent institution of the latter Member State a supplement equal to the difference between the two amounts even where the legislation of that State imposes a residence condition and even though, in the case of a pensioner, entitlement to the pension arises after the residence has been transferred and even in respect of children born after the transfer of residence. It therefore follows that the word "previously" in the decisions in Laterza and Gravina is not to be taken as implying a limitation to the scope of Articles 77 and 78. Miss Mallick was inclined to the view that none of the decisions in Laterza, Gravina and Athanasopoulos had any bearing on the present case because they were all concerned with Articles 77 and 78 rather than Article 73. Further, there was no transfer of residence at all in the present case. However, it seems to me that the reasoning of the Court in Athanasopoulos makes it plain that the claimant in this case was entitled to United Kingdom child benefit under Article 73 not withstanding that all the children were born during the period that the claimant had been living in Ireland. In paragraphs 30 to 38 of the Judgment of the Court, it was made plain that entitlement to benefit under Article 77 of Regulation 1408/71 was linked to entitlement to the grant of a pension and so continued while that right existed so as to prevent any obstacle arising to the freedom of movement for workers. In the present case, entitlement to benefit under Article 73 is linked to the employment of the claimant and it seems to me it must continue for as long as the claimant remains subject to the legislation of the United Kingdom by virtue of that employment so as to prevent exactly the same obstacle arising to the freedom of movement for workers as was feared by the Court in Athanasopoulos. In any event, I take the view that the tribunal in this case erred in considering that the decisions of the European Court of Justice in Laterza and Gravina implied any limitation to the scope of Article 73. For the sake of completeness, I should add that decision No. 129 of the Administrative Commission was amended by decision No. 150 (OJ C.229, 25.8.93) in the light of the decision in Athanasopoulous.

11. As Article 73 gives entitlement to United Kingdom child benefit notwithstanding the fact that the claimant's wife is entitled to Irish children's allowances, it is necessary to consider those provisions of community legislation which prevent the overlapping of benefits. Article 76 of Regulation 1408/71 provides:

> "1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

2. If an application for benefits is not made in the Member States in whose territory the members of the family are residing, the competent institution of the other Member States may apply the provisions of paragraph 1 as if benefits were granted in the first Member State."

Like Article 73, Article 76 was substituted by Article 1(1) of Regulation 3427/89, but Article 76 was substituted only with effect from 1 May 1990. However, the difference between the two versions is not material to the present case. What is clear is that Article 76(1) cannot apply to the claimant in this case because entitlement to Irish children's allowances does not arise "by reason of [either the claimant or his wife] carrying on an occupation". One must therefore look at Article 10 of Regulation 574/72 which was made for the purpose of implementing Article 12 of Regulation 1408/71 which makes general provision against the overlapping of benefits acquired under community legislation. Article 10 was substituted by Article 2(1) of Regulation 1249/92 with effect from 15 January 1986. So far as is relevant to the present case, Article 10(1) now provides:

"(a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first Member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State:

(ii) ...."

The interpretation of Regulation 10 is made simpler by an appreciation of its purpose which was explained in Kromhout v. Raad van Arbeid (Case 104/84) [1985] ECR 2205 at paragraphs 27 and 28 of the decision of the European Court of Justice:

> "27 .... One of the principles underlying the Community rules against overlapping benefits is that a right acquired by virtue of the pursuit of a professional or trade activity takes precedence over a right the acquisition of which does not depend on the pursuit of such an activity. That is clear from the general scheme of the rules against overlapping in the case of family benefits or family allowances, and more particularly, from the fact that Article 10(1) of Regulation No. 574/72 supplements the rule in Article 76 of Regulation No. 1408/71 which provides that 'entitlement to family benefits or family allowances under the provisions of Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefit or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing'. It follows that the provision in question must be interpreted as also applying to a national system which, whilst restricting the right to family benefits or family allowances to persons insured under it, makes the acquisition of that right conditional on residence alone.
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> 28. That conclusion is confirmed by the origin of Article 10(1) of Regulation No. 574/72. That provision, as amended by Regulation No. 878/73, was adopted precisely in order to take account of the specific features of the national legislation of the three new Member States of the Community which based the right to family allowances exclusively on the criterion that the recipient had to be resident within national territory but did not contain any internal or external provision against overlapping."

The "three new Member States of the community" were Denmark, Ireland and the United Kingdom. Article 10(1)(a) therefore contains the general rule that entitlement to family benefits acquired simply by virtue of residence gives way to entitlement acquired by virtue of employment. If neither the claimant nor his wife were working in Ireland, Irish children's allowances would be suspended and the United Kingdom child benefit would be paid in full. However, where, as in this case, a professional or trade activity is being carried out in the State of residence, the scheme of the legislation appears to be based upon a view that the acquisition of family benefits in the State of residence is then at least as much due to employment as is the acquisition of family benefits in any other State. Therefore, under Article 10(1)(b)(i), United Kingdom child benefit is suspended up to the sum of Irish children's allowances. Irish children's allowances are paid in full with a supplement paid by way of reduced United Kingdom child benefit to take the total sum paid up to the level

of standard United Kingdom child benefit.

12. I do not think that it matters whether it is the claimant or his wife who is carrying on a professional or trade activity in the State of residence. In the earlier version of Article 10, considered in R(F)2/83 and R(F)1/88, it was important that the claimant's spouse should be carrying out such an activity. In R(F)2/83, the couple were divorced and, upon a reference by the Commissioner, the European Court of Justice decided in Robarts v. Insurance Officer (Case 149/82) [1983] ECR 171 that "spouse" had to be interpreted so as to include a divorced spouse. Article 10 was subsequently amended so that the opening words of paragraph (1)(b) read as they do now. Plainly the amendment goes further than a mere codification of the decision in Robarts and it was intended to do so (see. McMenamin v Adjudication Officer 9 Case c-119/91) [1993] 1 CMLR 509). The preamble to the relevant amending regulation (Regulation 1660/85) includes the following paragraphs which explain the purpose of the amendments:

> "Whereas the experience gained from implementing Regulations (EEC) No. 1408/71 and (EEC) No. 574/72 has revealed the need to improve the provisions dealing with the overlapping of family benefits or family allowances in Regulation (EEC) No. 574/72:
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> Whereas the rule in Article 10 of Regulation (EEC) No. 574/72, which provides that the rights to family benefit arises under the legislation of the Member State in the territory of which the children reside, takes effect solely where the person who exercises the professional or trade activity in the Member State of residence activating the transfer of priority is the spouse of the employed or formerly employed person, whether that spouse is himself or herself entitled to the benefit or not;
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> Whereas those provisions have been seen to operate unfairly in circumstances in which the person entitled to the benefit and exercising the professional or trade activity was not or was no longer the spouse of the employed or formerly employed person; whereas these provisions should therefore be amended so as to correct this anomaly".

However, it is not necessary for me to decide whether the claimant in the present case is himself carrying out a professional or trade activity in Ireland and, if so, whether that would bring Article 10(1)(b) into play (although the decisions of the European Court of Justice in McMenamin and Dammer v VZW Securex Kinderbijslagfonds (Case C-268/88) [1989] ECR 4553 rather suggest that it would), because it is accepted that his wife has been carrying out such an activity at all material times, notwithstanding her periods of entitlement to sickness benefit, maternity benefits and unemployment benefit. The Irish authorities have expressly accepted responsibility for paying children's allowances under Article 10(1)(b)(i) by virtue of paragraph 2 of decision No. 119 of the Administrative Commission (OJ C295, 2.11.1983) which provides:

"For the purposes of Article 10(1) of Regulation (EEC) No. 574/72 there shall be regarded as exercise of 'a professional or trade activity':

(a) the actual exercise of any professional or trade activity, whether salaried or not; and also

(b) the temporary suspension of such profession or trade activity

(i) as a result of sickness, maternity, accident at work, occupational disease or unemployment, as long as wages or benefits, excluding pensions, are payable in respect of these contingencies; or

(ii) during paid leave, strike or lock out."

13. In passing, I draw attention to the introduction into both Article 10(1)(a) and Article 10(1)(b)(i) (and also into Article 10(1)(b)(ii)) of the words "only under the national legislation or" by Article 2(2) of Regulation 2332/89. The preamble of that amending regulation shows that that was for the purpose of reversing in part the effect of the decision of the European Court of Justice in Burchell the Adjudication Officer (Case 377/85) [1987] ECR 3329 and therefore also reverses the effect of paragraph 7 of R(F)2/88. The precise form of words has now been slightly altered, but the effect is the same.

14. Although the whole of Article 10 was substituted by Article 2(1) of Regulation 1249/92, the only alteration of any substance relevant to the present decision was the addition of the words "up to the sum of those benefits" at the end of Article 10(1)(a) and the similar amendment in Article 10(1)(b)(i). Those are the words that make it clear in the present case that United Kingdom child benefit is payable to the extent that the standard rate of the United Kingdom child benefit exceeds the amount of Irish children's allowances. That is merely a codification of the decision of the European Court of Justice in Beeck v. Bundesantalt fur Arbeit (Case 1040/80) [1981] ECR 503 upon which the Commissioner deciding R(F)1/88 relied. Miss Mallick told me that 15 January 1986, the date from which the substitution took effect, was the date of the decision of the European Court of Justice in Pinna v. Caisse d'Allocations Familiales de la Savoie (Case 41/84) [1986] ECR 1 and it was of course the date from which Article 73 of Regulation 1408/71 was substituted by Regulation 3427/89. She pointed out that the choice of date did give rise to some anomalies but it is unnecessary for me to speculate further as to the reason behind it.

15. It therefore seems to me that, despite the subsequent amendments to the Community legislation, the result in this case is exactly the same as that reached in R(F)1/88 where the facts were indistinguishable from the present case but where, of

course, the Commissioner was considering an earlier version of the Community legislation. Entitlement to United Kingdom child benefit in respect of Colleen and Meghann continued from 1 January 1989 at a rate equal to the difference between the standard rate of United Kingdom child benefit and the rate of Irish children's allowances. If there is any dispute about the amount of benefit payable, the matter must be restored before me. I make no decision in respect of Shonagh because the claim in respect of her was not before the tribunal (not even having been submitted to an adjudication officer despite what is said on the front of form AT2) and although I could probably deal with it under section 36 of the Social Security Administration Act 1992 it seems more appropriate to leave it to be determined by the adjudication officer who must in any event deal with the calculation of benefit in respect of Colleen and Meghann and must also deal with any further claim if I am right in believing that a further child was born in 1991.

(Signed) M Rowland
Commissioner

(Date) 24 January 1994