Child benefit - cost of providing for child - benefits in kind are included. Value is value in GB.

JM/1/LM Commissioner's File: CF/028/90

CHILD BENEFIT ACT 1975

DECISION OF THE SOCIAL SECURITY COMMISSIONER

10/91

Name: Janina Moore (Mrs)

Appeal Tribunal: Plymouth

Case No: 328 02687

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the social security appeal tribunal dated 26 January 1990 which confirmed the effect but varied the grounds of a decision issued by the adjudication officer on 26 January 1988. My decision is that the aforesaid decision of the appeal tribunal is not erroneous in point of law.

2. I held an oral hearing of the appeal. The claimant has gone to work in Canada. Unsurprisingly, she did not attend the hearing. She was, however, most ably represented by Mr D Williams of the Cornwall Welfare Rights Unit. The adjudication officer was equally ably represented by Mr B Osman of the Office of the Chief Adjudication Officer. The facts of the case are somewhat distressing; and, in places, somewhat obscure. Mr Williams has some knowledge of the more recent events in the narrative - and was able to assist me in respect of certain passages in the papers which I myself had found ambiguous. All three of us, however, were much in the dark as to certain earlier events - and in the absence of the claimant we had to remain so. Those earlier events in no way bear upon how the appeal falls to be decided. I mention my ignorance simply to disarm any criticism to the effect that my summary of the facts leaves certain matters inadequately explained.

3. The claimant originates from Poland. It would appear that at some time unknown to me she married a man to whom I shall refer as "Mr C". (When I use "C" hereunder his full surname is to be understood.) Practically nothing about Mr C emerges from the papers - not even his forename. However, on the claim for child benefit which the claimant signed on 18 December 1987 she entered the surname which stands in the heading to this decision and added these words:

> "(previously C) Janina C - from the first marriage."

And she entered C as the surname of the two children in respect of whom the claim was made, ie Natasza, born on 12 June 1968, and Nicola, born on 13 September 1971. (The manuscript on that form is obviously the claimant's - and the name "Nicola" is clearly printed in block capitals. The claimant also refers to that

daughter as "Nicole". For example, both forms are to be found in the manuscript letter dated 24 May 1989. But that is the least of the anomalies presented by the papers.) In a letter dated 5 October 1987 the claimant wrote:

> "I 'run away' from my husband in 1980 and went abroad with my three children age 12, 9 and 5 at that time. It was the only way I could end my unhappy marriage.
>
> We were in Greece for a year and in 1981 we went to Zimbabwe ....
>
> Natasha's [sic] and Nicole's father has been working in this country since 1961 - never unemployed - and paying tax." (The claimant's emphasis in each case)

And that is all that we certainly know about Mr C.

4. I say "all that we certainly know" because there is an indication in the papers that the claimant's marriage to Mr C resulted in a court order for or a deed of legal separation. But at this point Mr M enters the narrative. (He bears the same surname as that under which the claimant has pursued these proceedings.) It seems that the claimant met Mr M in Zimbabwe in 1981 and that they embarked upon living together as husband and wife. In her letter of 5 October 1987 the claimant wrote that she "started a relationship without knowing that my partner had a drink problem". When she learnt of the problem, she thought that she would be able to help him. But her comment in that letter was: "I was very wrong." Certainly the claimant had at least two children by Mr M. When on 1 October 1987 she completed a claim form for one parent benefit she entered Elizabeth, born on 24 March 1982, and Susan, born on 2 January 1984, and attributed to them Mr M's surname. But I am puzzled by the daughter Nancy. She too was entered on that form, with Mr M's surname; but her date of birth is entered as 6 May 1987. I feel that the year of birth so entered must have been a slip of the claimant's pen. Elizabeth and Susan are entered according to the respective dates of birth; but Nancy tops the list, which would suggest that she is the eldest of the three. Moreover, in her aforesaid letter of 5 October 1987 the claimant makes it clear that she has five children, neither more or less. It would appear, therefore, that Nancy is the youngest of the three children whom the claimant took to Greece in 1980 (cf the quotation in paragraph 3 above). I cannot say, however, why Nancy's surname was entered as that of Mr M and not that of Mr C.

5. In April 1983 the claimant returned to England, along with Mr M and all of her children except Natasza. Natasza stayed behind and continued her schooling in Zimbabwe. She lived with and was looked after by a Polish lady friend of the claimant. The friend is a dentist, never had any children of her own and appears to have been more than happy to care for Natasza and to meet all consequent expenses out of her own pocket. The original idea was that Natasza would join her own family in England once

a suitable home had been established. But things did not work out happily. After six months in England the claimant, Mr M and the four children were living in a council house which contained only three bedrooms. Mr M appears to have added drug addition to his alcoholism; and was at times very violent. Mr M had a temporary job for a few months. For the remainder of the time, however, the family was on supplementary benefit, a substantial part of which Mr M spent on drink. The conditions and atmosphere in the house were wholly inimical to any sort of studying. So far from attempting to bring Natasza back to that environment, the claimant decided that the only hope for Nicola was to send her back to Zimbabwe, (to be looked after by the aforesaid dentist friend) so that she could there complete her studies at a Zimbabwean school. Although unfortunate in many respects, the claimant seems to have had some luck in making her friends. A friend in London lent her the £200 for Nicola's air fare, saying "Give it back when you can. It wasn't your fault you had to borrow it." On 20 September 1986 Nicola left England and went to join her elder sister in Zimbabwe.

6. I complete the narrative so far as Mr M is concerned. By the middle of 1987 the claimant was on the verge of a nervous breakdown. She obtained an injunction against Mr M, of whom she had been terrified. On or about 27 June 1987 Mr M went, or was removed from, the house. At that point he drops out of the narrative.

7. I return briefly to the issue to which I referred in the first sentence of paragraph 4 above. The one parent benefit claim form which the claimant signed on 1 October 1987 contained the question: "On what date did you last live with your husband/wife?" The claimant inserted "27.06.87", so she clearly had Mr M in mind. The next question ran: "Did you obtain a legal separation? YES or NO". The claimant inserted "Yes". The printed form then continued: "If YES, state the date of the court order or deed of separation". The claimant wrote "27.03.87". I am somewhat mystified by that. At the hearing, Mr Williams and I both assumed that there had been a marriage between the claimant and Mr M; and that it was in respect of that marriage that a formal separation was effected. I have, however, carefully reread the papers. Practically nowhere does the claimant refer to Mr M as having ever been her husband. (In the first of the answers which I have quoted above, the claimant was merely falling in with the words printed on the form.) The claimant normally refers to Mr M as her "partner". Nowhere can I find any hint that there was a marriage between Mr M and the claimant - either in Zimbabwe or anywhere else. If there was no such marriage, there cannot, of course, have been a "legal separation" in respect thereof; which leaves the marriage to Mr C as the only possible subject of the separation. But after so many intervening years, that, too, seems unlikely. My own view is that in one or more places the claimant's terminology has fallen short of legal precision. It is possible that the date "27.03.87" fits somewhere into the history of the proceedings which resulted in the injunction.

8. The claimant was paid child benefit in respect of Nicola until 16 November 1986; ie for the eight weeks following Nicola's departure from England (cf regulation 2(2) of the Child Benefit (Residence and Persons Abroad) Regulations 1976). There the matter rested until 22 December 1987, when the Department of Health and Social Security received the claim form for child benefit, in respect of Natasza and Nicola, which the claimant had signed on 18 December 1987. The claim in respect of Natasza was doomed to failure. She had not been in Great Britain since 1980. All the prescribed time limits for a claim in respect of her had long since expired (for example, the 156 weeks maximum period referred to in regulation 2(2)(c)(ii) of the 1976 Regulations). That is accepted by Mr Williams. Natasza drops out of the picture. I concentrate upon Nicola.

9. Section 13 of the Child Benefit Act 1975 lays down certain basic rules in respect of persons (both parents and children) who are outside Great Britain; but the section also provides for the making of modifying regulations. I quote so much of regulation 2 of the 1976 Regulations as is material to this appeal:

> "2.-(1) Section 13(2)(a) of the Act (subject to regulations, benefit not to be payable in respect of a child for any week unless that child is in Great Britain in that week) shall have effect subject to the following provisions of this regulation and the provisions of Parts II and III of these regulations.
>
> (2) The said section 13(2)(a) shall not operate to make benefit not payable in respect of a child for any week in which that child is absent from Great Britain if -
>
> (a) a person is entitled to benefit in respect of that child for the week immediately preceding the first week of the child's absence from Great Britain; and
>
> (b) the child's absence was when it began intended to be temporary and has throughout continued to be so intended; and
>
> (c) that week -
>
> (i) falls within a period of 8 weeks beginning with the first week of the child's absence; or
>
> (ii) being a week in which the child's absence is by reason only of his receiving full-time education by attendance at a recognised educational establishment but not falling within the period specified in sub-paragraph (c)(i), falls within a period of 156 weeks beginning with the first week of the child's absence; or ....." (My emphasis)

10. In the decision which was issued on 26 January 1988 the adjudication officer refused all child benefit in respect of Nicola on the grounds that her absence from Great Britain had exceeded 8 weeks and was not for the sole purpose of receiving full-time education by attendance at a recognised educational establishment. (He also referred to the subject of regulation 2(2)(c)(iii) - the specific purpose of medical treatment - but that is not and has never been a live issue in this case.) He alluded to the highly stressful domestic situation from which Nicola had been sent to Zimbabwe; and submitted that that had played a significant role in the claimant's decision to return Nicola to Zimbabwe. The claimant carried her case to the appeal tribunal. On 18 April 1988 she appeared before the tribunal, but she was not at that stage represented. No doubt because of the lack of a representative, the tribunal seems to have misapprehended certain elements in the narrative. Be that as it may, the tribunal confirmed the decision of the adjudication officer. The claimant sought leave to appeal to the Commissioner. The chairman of the tribunal refused such leave; but it was granted by a Commissioner.

11. The adjudication officer then concerned supported the claimant's appeal. In his written submission to the Commissioner he pointed out that the claimant's partner (Mr M) had left the household in June 1987, whereafter conditions might well have been sufficiently congenial for Nicola to have studied with that household as her base. But his submission continued thus:

> "If it were considered possible for Nicola to return to the household now that the claimant's partner had departed, it was for consideration whether the fact that she was engaged in 'O' level examinations or a course leading up to them, at that time was sufficient reason to be able to hold that the continuing absence had then become by reason only of receiving full-time education .... If that is so, then Nicola would qualify for child benefit for that part of the 156 week period remaining, dating from the day she left Great Britain."

The Commissioner (not myself) accepted that submission. In his decision dated 13 March 1989 he set aside the decision of the first appeal tribunal and referred the case for rehearing by a differently constituted tribunal. He also drew attention to certain other aspects of the case which would require determination before entitlement to child benefit would be established.

12. The fresh appeal tribunal sat on 30 August 1989. By that time the adjudication officer had confirmed the Secretary of State's recognition of the school which Nicola attended in Zimbabwe. There was obviously a careful hearing - and Mr Williams was on the scene for the claimant. The tribunal reached (and duly recorded) its unanimous decision in the following terms:

> "1. There can be no entitlement to child benefit in

respect of Natasha.

2. From September 1966 [which, of course, must mean 1986] to June 1987 Nicola was not absent from Great Britain by reason only of her receiving full-time education in Zimbabwe.

3. From June 1987 to November 1988 she was so absent for that reason only within Regulation 2(2)(c)(ii) of the Child Benefit (Residence and Persons Abroad) Regulations 1976.

4. She continued to be so absent for that reason only, from November 1988 to the present date.

5. To adjourn the hearing of the appeal in respect of Nicola on the issue of the claimant making sufficient contribution within Section 3(1)(b) of the Child Benefit Act 1975."

Paragraphs 2, 3 and 4 were, of course, well within the fact-finding province of the tribunal - and before me no very strenuous challenge was mounted to them. Paragraph 5 related to an aspect of the case which had been briefly referred to by the Commissioner who gave the decision dated 13 March 1989; and briefly referred to by the adjudication officer who wrote the submission which was before the appeal tribunal when it sat on 30 August 1989. But at the conclusion of that day's hearing the tribunal considered that it required further guidance upon the relevant law and further evidence as to the relevant facts. In paragraph 5 of its recorded reasons were carefully set out the issues of law and the nature of the evidence to which the resumed hearing would be principally directed.

13. Section 1(1) of the Child Benefit Act 1975 provides that child benefit shall, basically, be awarded, in respect of any given week, to the person who in that week "is responsible for" the relevant child. And section 3(1) provides thus:

> "3.-(1) For the purposes of this Part of this Act a person shall be treated as responsible for a child in any week if -
>
> (a) he has the child living with him in that week; or
>
> (b) he is contributing to the cost of providing for the child at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child for that week."

The further guidance and further evidence underlying the adjournment were set out thus:

> "(i) Must a contribution for the purpose of Section 3(1)(b) of the Child Benefit Act 1975 be necessarily financial?

(The Presenting Officer referred to the observation of Bonner, etc. at p. 154 of the 1989 edition, but the Tribunal had also noted the contrary observations of Ogus and Barendt, 3rd edition, at p. 400 and p. 346.)

(ii) If the contribution can be in kind -

(a) more precise and considered information is needed as to the frequency and contents of parcels sent out by the claimant;

(b) should books and educational tapes be taken into account?

(c) should postage be taken into account?

(d) how are the items to be valued, at the cost to the claimant in this country or at the value of equivalent new items in Zimbabwe?"

Those issues were - if I may be permitted to say so - admirably identified; and apart from (ii)(a), all are issues of law.

14. The adjudication officer made a further submission to the appeal tribunal. He submitted that the answer to issue (i) should be negative; that the answer to issue (ii)(b) should be positive; and that the answer to issue (ii)(c) should be negative. In respect of issue (ii)(d) he submitted that the items fell to be valued at their cost to the claimant in this country.

15. The adjournment was not, in the event, as productive as might reasonably have been expected. The appeal tribunal sat again on 26 January 1990. But by then the claimant had gone to Canada; and Mr Williams informed the tribunal that he had been unable to obtain any information about the parcels (sent by the claimant to Nicola in Zimbabwe) further to that which had been before the tribunal on 30 August 1989. The findings of fact in respect of the parcels were recorded thus:

"10. From 16.11.86 the claimant sent parcels to Nicola from time to time, perhaps once every two months, especially on her birthday and at Christmas, containing clothes, shoes, educational tapes and books.

11. From 16.11.86 the claimant's only income was social security benefits payable to her for herself and her other children, amounting on her own evidence, to a total of £66.00 per week (her letter of 4.5.88) and of £57.00 per week (her letter of 24.5.89)."

(On the relevant form AT3 "87" was typed in each place where I myself have put "86". At the hearing before me, Mr Williams suggested that "87" was, in fact, what the tribunal had indeed

meant. I do not myself accept that. Child benefit was paid in respect of Nicola until 16 November 1986 - see paragraph 8 above. I am satisfied that that was the date to which the tribunal intended to refer. Either way, however, it makes no difference to the outcome of this appeal.)

16. On the outstanding issues of law, the appeal tribunal came to conclusions which reflected those submitted by the adjudication officer (cf paragraph 14 above). In respect of the parcels themselves the tribunal, after reminding itself that throughout the relevant period the weekly rate of child benefit had been £7.25, reasoned thus:

> "Accepting that a parcel was sent on average once every two months, the value of its contents would have to be at least £60.00, and the cost of postage would have to be added to the expense incurred by the claimant, and would be very expensive in the case of the heavier articles, like books, as the claimant herself said. Moreover, in so far as a parcel might consist of lighter articles like clothes, these, if bought cheaply at jumble sales, would be very bulky, with corresponding increase of postage. All things considered, and in the light of observations made by the claimant herself in her letters, and bearing in mind her very limited resources, the Tribunal, with some regret - because they thought that, if the claimant had received child benefit for Nicola, she would have contributed that sum towards her maintenance - could not realistically envisage a sufficient contribution being made by the claimant week in, week out, over the period when she was receiving no benefit for Nicola, so that Section 3(1)(b) of the Act was not satisfied."

Not the least moving passages in the papers are those in which the claimant reflects, not only the anguish of a loving mother separated from two of her daughters, but her aching desire to do something material for them despite her own highly straitened financial circumstances. The sympathy of the appeal tribunal is obvious. But its reasoning in the passage just quoted cannot be effectively assailed.

17. So what of the aforesaid issues of law? I propose to deal with them under the numbering given to them in the record of the proceedings on 30 August 1989 (see my paragraph 13 above).

18. Issue (i)

> The note in Bonner reads:
>
> "It seems from the change of wording over that in earlier legislation that provision in kind does not count. Only financial contributions qualify."

The reference to change of wording is made, presumably, with an eye to section 18 of the Family Allowances Act 1965:

"18.-(1) In this Act the expression 'providing for' a child means making available for the child food, clothing, lodging, education and all other things reasonably required for the child's benefit having regard to all the circumstances.

(2) For the purposes of this Act -

(a) the making available in kind of anything used for providing for a child shall be treated as a contribution to the cost of providing for the child of an amount equal to the value thereof;

(b) money paid or a thing made available in kind shall be treated as contributed by any person so far, and so far only, as it is paid or made available at that person's own expense or out of property belonging to that person beneficially."

Although child benefit was the direct successor to family allowances, it was, in fact, a new benefit, with its own statutory provisions. For my part, I am not persuaded that the change of wording between section 18 of the Family Allowances Act 1965 and section 3(1) of the Child Benefit Act 1975 was intended to eliminate contributions in kind from the picture. The phrase "contributing to the cost of providing for the child" rides quite harmoniously with contributions in kind. Had it been the legislature's intention to exclude contributions in kind, the insertion of two or three simple words would have put the issue beyond all doubt. No such words were inserted. Indeed, if one looks to the rationale underlying section 3(1), it is far from obvious why the relevant contributions should be restricted to contributions in money. Mr Osman assured me that adjudication officers (formerly insurance officers) have always taken the view that contributions in kind rank for consideration under section 3(1). Bonner's somewhat tentative suggestion is not supported by any cited authority. Mr Osman knew of no authority (either way) at Commissioner level. On so basic an issue of interpretation, I myself would, in any circumstances, hesitate long before upsetting an approach (favourable to claimants) which has stood unchallenged for almost 14 years. (The 1975 Act took effect from 4 April 1977.) As I have indicated, however, I regard the long-standing approach as well founded in law.

19. Issue (ii)(b)

I am in no doubt that in the context of "the cost of providing for the child" books and educational tapes fall to be taken into account.

20. Issue (ii)(c)

I do not take that view in respect of the costs of posting the parcels. That expenditure, although undoubtedly a

significant burden upon the claimant, was in no way a direct contribution to the cost of providing for Nicola in Zimbabwe. I take the analogy of a parent who actually provides £7.25 a week in money. To get that sum into the hands of a carer in Zimbabwe would inevitably incur banking transfer charges. Unless they were borne by the parent, the carer would not, in fact, receive the full £7.25. If the carer did not receive the full £7.25, section 3(1) would not, in my view, be of avail to the parent.

21. Issue (ii)(d)

I personally doubt whether, when section 3(1) was drafted and enacted, anyone gave any real thought to the full implications of contributions which went overseas from Great Britain. Was it ever intended, for example, that the adjudicating authorities should have to delve into such refined matters as exchange rates (which vary from day to day) and the relative cost of living between Great Britain and other countries? I think not. Pragmatism, surely, must override international economics. I revert to the analogy which I offered in paragraph 20 above. I consider that all that the parent there would have to show would be that the carer in Zimbabwe had available to him (or her) £7.25 sterling for exchange into local currency. I am not, I hope, falling into chauvinism when I say that the basic standpoint must be that of Great Britain. Child benefit is prescribed in terms of British money. In the great majority of cases it is paid to claimants who are in Great Britain in respect of children who are in Great Britain. Where the relevant child is abroad, rates of exchange and relative costs of living will inevitably throw up some gainers and some losers. That, in my confident view, is how the system must be accepted. Regard must be had to the nature of the adjudicating authorities to whom Parliament has entrusted the adjudicational function. Those authorities have their own merits - but they are not the Commercial Court of the Queen's Bench Division. In the immediate context of the appeal before me, I am of the firm view that the relevant criterion is what the claimant expended upon the contents of the parcels; and not what those contents would have cost if purchased in Zimbabwe. To some extent, that impinges upon my conclusion in paragraph 20 above. A refined argument could be developed on these lines:

(a) Some of the things in the parcels would have cost very much more in Zimbabwe than they did in England.

(b) It was, accordingly, in the financial interests of the claimant's dentist friend that she (the dentist) should not have to purchase the items at Zimbabwean prices.

(c) The cost of the postage fell short of the price differential.

(d) The claimant should, therefore, be entitled to have the cost of postage carried into her contribution.

I dare say that that line of argument has attractions in strict logic. I reject it on the (largely pragmatic) ground that it is over-refined. It would plunge the adjudicating authorities into a morass of international price comparisons some of which (as in the instant case) would reach back a number of years.

22. I have already observed that one cannot but be moved by the (manifestly sincere) desire which the claimant had to be able to do more for her distant daughter. I entirely accept (as, I am sure, did the appeal tribunal) that if the claimant had been paid child benefit in respect of Nicola, the claimant would have seen that the whole of the benefit thus paid went to the support of Nicola. In that context, Mr Williams urged upon me that what should be scrutinised was, not the contribution made by the claimant when bereft of the relevant child benefit, but what the claimant would have contributed had she been in receipt of the benefit; and that could be tested by looking at what the claimant did with the child benefit for Nicola in the days when the claimant did receive that benefit. I cannot accept that argument. It puts the cart before the horse. As Mr Osman submitted, the primary condition upon which entitlement to child benefit depends is that the claimant should be "responsible for" the relevant child (see section 1(1) of the 1975 Act). Section 3(1) of the Act furnishes two alternative ways of showing that one is responsible for a child (cf paragraph 13 above). One way is to show that the child was living with the claimant in the relevant week. The other is to show that the claimant was or is contributing, at not less than the prescribed rate, to the cost of providing for the child in the relevant week. That is not the same thing as showing that the claimant <u>would be</u> so contributing if the claimant had the means so to do. That may seem a little hard on emotional grounds; but the test is clear - and it has a rational basis.

23. By virtue of the 156 weeks rule (cf my quotation in paragraph 9 above from regulation 2(2) of the 1976 Regulations) 19 September 1989 was the last possible day in respect of which child benefit could be awarded to the claimant in respect of Nicola. But, of course, the appeal tribunal's conclusion upon the "contributing" issue meant that there was no entitlement in respect of any day after 16 November 1986. As appears from the foregoing, I cannot find any error of law either in the appeal tribunal's overall conclusions or in the manner in which the relevant form AT3 was completed.

24. The tribunal which sat on 26 January 1990 differed in respect of one lay member from the tribunal which had sat on 30 August 1989. If that factor had been noticed by either Mr Williams or Mr Osman, certainly neither of them mentioned it at the hearing before me. The form AT3 completed in respect of the hearing on 26 January 1990 indicates that on that day the members of the tribunal had before them all the relevant papers, including those specifically relating to the earlier hearing. That form AT3 records <u>all</u> the material findings of fact; the unanimous decision of the tribunal is recorded in respect of <u>all</u> the issues raised by the case; and full reasons are recorded in

respect of all of those issues. Since the claimant had gone to Canada, an oral rehearing of her evidence was not possible. I am satisfied that the differently constituted tribunal afforded to the case as complete a rehearing de novo as was in the circumstances possible. Mr Williams is obviously an able and experienced advocate in this type of case. Neither on 26 January 1990 nor before me did he voice any criticism of the manner in which the case was dealt on 26 January 1990. The point is one which I myself first noticed whilst I was drafting this decision. I say no more about it.

25. The claimant's appeal is disallowed.

(Signed) J Mitchell
Commissioner

Date: 30 January 1991