CF 1727 2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I grant permission to appeal and, with the consent of both parties, allow the appeal. For the reasons below, the decision of the tribunal is wrong in law and I set it aside. The appeal is to be reconsidered as directed below.

2 Miss H, the claimant and appellant, is appealing against the decision of the Newcastle-upon-Tyne appeal tribunal on 13 02 2006 under reference U 44 237 2005 00074.

3 My formal decision, in place of that of the tribunal is:

Appeal adjourned.

The appeal is referred to the Commissioners for Her Majesty's Revenue and Customs for formal determination of the employment status of the appellant's partner in and from March 2003 to August 2004.

Unless those Commissioners supersede the decision under appeal in the light of that decision, the matter is then to be referred to a new tribunal in accordance with the directions below.

DIRECTIONS FOR A REHEARING

4 (1) The matter is adjourned to be heard, if listed, by a new tribunal at an oral hearing.

(2) Once the decision on employment status has been made, and subject to any appeal against that decision, HMRC is to prepare a full new submission before that hearing taking into account:

(a) the formal decision on the employment status of the appellant's partner and any formal determination of the ordinary residence of the appellant and/or partner during the relevant periods,

(b) the points made both in the submission to the Commissioner by HMRC and in this decision, and in particular

(i) the position before HMRC became responsible for child benefit,

(ii) the change of responsibilities with regard to child benefit in April 2003

and (iii) any entitlement of the appellant and her partner to receive child benefit under European Union law.

This submission is to be copied to the appellant on receipt by the tribunal.

(3) The appellant may make any further submission or provide any further written evidence in support of that submission to the tribunal before its hearing. Any further submission or evidence is to be provided by the appellant not later than four weeks after receipt of the copy of the new submission by HMRC from the tribunal.

(4) This is without prejudice to, and subject to any exercise of, the separate rights of appeal of the appellant's partner against any decision of HMRC on employment status if on receipt of the decision on that question the appellant's partner exercises those rights of appeal.

These directions are subject to any later direction by a district chairman.

REASONS FOR THE DECISION

The facts

5 Miss H received child benefit for her two children. She and the children left Britain for France in March 2003. When later asked whether she had intended to return, she commented "unsure - needed to find a house and live here for a period of time to establish ourselves and ensure children were happy". She also stated that they moved into their house on 1 07 2003, and had been on holiday until that time. They are still living in France.

6 Miss H's partner (the children's father) was, she stated, self-employed. She stated in late 2004 that "he works in various countries but pays his taxes and contributions in the United Kingdom. He did work and pay taxes in the USA between May 2002 and February 2003. He started paying into the UK system again in May 2003." She also stated that he had moved to France in March 2003. She later added that he remained working in the United Kingdom to December 2003, and she produced evidence of his income tax and National Insurance contribution payments for the 2003-2004 income tax year.

7 On 03 06 2005 an officer decided that Miss H had not been entitled to child benefit since 16 03 2003. This was because the appellant was not, and could not be treated as being, in Great Britain from that date, and her absence was not when it began intended to be temporary. The officer also decided that there had been an overpayment of child benefit of £2,050.30 between 17 03 2003 and 29 08 2004, when payment was stopped. It was also decided that the sum was repayable because Miss H had failed to disclose the relevant circumstance that she had left the United Kingdom.

8 Miss H appealed. In the correspondence she stated that she and her partner were still waiting in December 2005 to hear from the Centre for Non-Residents about his income tax and national insurance position. She complained that their treatment was in breach of European Union law. This was because they were still being required to pay UK taxes while being denied UK benefits.

The tribunal decision

9 The tribunal confirmed "the decision of the Secretary of State" at a paper hearing. It issued a full statement of reasons. But, as Mr Eland for HMRC agrees, it is fatally flawed throughout because the tribunal completely failed to note that the decision was not a decision of the Secretary of State and that no part was played in the decision making process by the Secretary of State or his officers after the end of March 2003.

10 The submission to the tribunal starts with the accurate statement:

> "From 1. 04. 2003 decisions of the Secretary of State in relation to child benefit and guardian's allowance transferred to the Board of Inland Revenue. From 7. 04. 2005 the Commissioners for Her Majesty's Revenue and Customs replaced the Board of Inland Revenue following the integration of the Revenue and Customs departments."

I refer to both the Inland Revenue and its successor (but not the Secretary of State or the Department for Work and Pensions) as HMRC in this decision.

11 The error by the tribunal is not merely cosmetic. For the overpayment to be repayable it has to be decided if Miss H failed to disclose any material facts to the government department that paid the benefit to her: R(SB) 54/83. This was properly referred to in the submission to the tribunal. The tribunal found that Miss H had failed to notify the Department for Work and Pensions ("DWP"). That covers payments only to the end of March 2003. From April 2003 DWP was the wrong government department. Thereafter it was HMRC. As a result, the tribunal also missed the point that the Centre for Non-Residents (which is part of HMRC) did have some relevant information. It was the Centre that alerted the Child Benefit Office (also part of HMRC) to the issue. The tribunal failed to consider whether the information given to that Centre by Miss H - and later passed within HMRC to the Child Benefit Office - amounted to a relevant disclosure to the relevant government department either in fact or in law. That may require consideration of the decision of the House of Lords in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, reported as R(IS) 7/05. Was any information given to the Centre for Non-Residents, or a local tax office, adequate to meet the duty to inform the Child Benefit Office? That first requires establishing on the facts what any office HMRC had been told by the appellant and her partner (or their accountant) and when. As this point may not arise in any event because of other issues that have also not been determined, I do not need to take that matter further in this decision.

12 Behind this are further points that need clarification. The tribunal referred in its statement at some length to *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 99, [2005] 1 WLR 3796, reported as R(IS) 9/06. It correctly cites it as authority for the point that there is no exception to the duty to report where there is an obligation to do so of which the individual is not aware. But it did not take from that decision the necessity to identify in each case the duty - outside section 71 - under which disclosure is required. It is clear from *B v Secretary of State* that the tribunal should have looked first to regulation 32 of the Social Security (Claims and Payments) Regulations 1987. See CIS 1996 2006, CIS 2125 2006 and CIS 4422 2002, decided together by Commissioner Howell QC, with which I respectfully agree. After HMRC took responsibility that duty was migrated to regulation 23 of the Child Benefit and Guardian's Allowance (Administration) Regulations (SI 2003 No 492) ("the CB Administration Regulations") although not in identical language. That refers to a duty to inform HMRC "or a relevant authority" of such information as HMRC may require. The submission to the tribunal contains submissions on this point in so far as it applies to HMRC - but not DWP - but the tribunal did not consider them.

13 More generally, as Mr Eland for HMRC commented in his submission: "the seemingly inappropriate references to 'the Secretary of State' may well be accidental, but they hardly inspire confidence in the tribunal's decision".

14 The tribunal also repeated an error in the submission to it. It had no evidence about what, if anything, had been said to anyone at the DWP about the relevant material fact that Miss H was leaving Britain with the children. Perhaps it might be simpler and more cost-effective if the overpayment decision had started in early April 2003. But it did not. If the tribunal is to uphold the initial part of the decision, then it needs at least (a) to identify what Miss H was required by law to tell the DWP at that time, and (b) some evidence from the DWP or elsewhere about the failure to disclose (or misrepresentation) by Miss H that the HMRC submission has assumed during the first few weeks of the alleged overpayment. At the moment the submission to the tribunal, and the decision it made, identify neither the relevant law nor any relevant evidence. Those deficiencies clearly need to be addressed if the full case is to proceed.

15 There are also further issues behind the tribunal's decision on entitlement. As Mr Eland states in his helpful submission for HMRC on the appeal, although the tribunal decided the matter of entitlement by reference to DWP and not HMRC, it referred to the version of the child benefit legislation (the amended version of section 146 of the Social Security Contributions and Benefits Act 1992 and the implementing regulations) that applied to HMRC rather than DWP. The absence of Miss H and family from the United Kingdom started before the amendment came into effect. So the tribunal should have started by referring to the previous law and then noted the change of departmental responsibility and the new law. That error is also in HMRC's original submission to the tribunal but the tribunal failed to notice and deal with it.

The European law question

16 But the core of this case - once the facts are known - is, I suspect, the question of European law put expressly in issue by Miss H. The submission to the tribunal and the tribunal both fail to deal with this properly. Her central complaint, in the letter of 12 10 2005, was that she and her partner were being deprived of child benefit while being required to pay income tax and national insurance contributions. If that assertion is correct, it opens up an issue of European law. The submission to the tribunal notes correctly - though in outline only - that Miss H and her partner may have rights under European law to the child benefit if he is employed or self-employed in Great Britain and so liable to Class 1 or Class 2 National Insurance contributions and the family are living in another member state of the European Union.

17 The submission comments: "The claimant and her partner must contact the Centre for Non-Residents to decide on his liability." That is wrong. If the national insurance contribution liability, and therefore the employment status, of Miss H's partner is in issue - and it is - then that must be decided properly before the rest of the appeal goes forward. The tribunal tried to repair the error by making its own decision. That is wrong for three separate reasons. (1) It heard the matter in the absence of the claimant. She was given no notice that the tribunal proposed to decide it. (2) A tribunal cannot decide the issue until it has first been decided by HMRC. As Miss H pointed out to the tribunal, there is no HMRC decision. (3) Most fundamental is the point that the tribunal had no jurisdiction to make the decision in any event. The tribunal that decides such appeals is the tax appeal tribunal not the social security appeal tribunal. See the Social Security (Transfer of Functions) Act 1998, particularly section 8.

18 The papers sent in by Miss H since the tribunal decision clearly suggest, as - less clearly - did papers before the tribunal, that her partner was an employee or director of a British registered company in 2003-2004. The limited information before the tribunal suggests that he has a National Insurance number and that he and his employer were paying Class 1 National Insurance contributions on a contracted-out basis in 2003-2004. So the tribunal decision on these points may also have been wrong in substance. The papers now also suggest that this was so also in 2004-2005, and that Miss H's partner appears to have had a British address throughout the period of the appeal. This suggests that Miss H is wrong in claiming that her partner was self-employed. And it raises questions about ordinary residence. The matter of the partner's employment status clearly needs formal determination by HMRC.

19 There appears to be a gap in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 on procedure for determining this. If the decision on child benefit had been that of the Secretary of State, his officers would have been required to refer the contribution question to HMRC under regulation 11A of those regulations. If the Secretary

of State had failed to do this, then the tribunal is required to refer the matter to the Secretary of State for onward reference to HMRC rather than proceeding with the appeal. That is required by regulation 38A of those regulations. The Secretary of State would then be empowered by that regulation to decide how to deal with the decision under appeal.

20 Since the transfer of both questions of employment status and child benefit to HMRC, those regulations strictly do not apply to child benefit although they continue to apply to all other major benefits. The matter should, nonetheless, have been referred for formal decision to the National Insurance Contributions Office before being sent to the tribunal. In my view, the best practical approach at this stage is for me, acting in place of the tribunal, to direct the matter back to HMRC for the relevant decision to be made, as again Mr Eland has suggested. As the powers in regulation 38A do not apply, I can do little else under the current procedure but to adjourn this appeal while that is done. That is therefore my formal decision.

David Williams
Social Security Commissioner
25. 10. 2006

[signed on the original on the date stated]