

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CF/2762/2016

Before Upper Tribunal Judge Robin C A White

Decision: The decision of the tribunal of 15 April 2016 is erroneous in law. I set it aside. I remake the decision of the tribunal.

My substituted decision: The appellant is entitled to child benefit from 1 April 2013.

REASONS FOR DECISION

Preliminary remarks

1. For ease of understanding, I will refer in this decision to the appellant as “the claimant” and to the respondent as “HMRC”.
2. The representative of HMRC has conceded that the tribunal erred in law, and proposes that I should substitute a decision on entitlement as a pragmatic solution to what is described as an historic mistake in the adjudication of this claim.
3. However, I do not agree with the analysis put forward by the representative of HMRC and so I give a full decision with reasons.

The factual background

4. The factual situation in this appeal is not in dispute.
5. The claimant is a Polish national, who was born on 29 October 1974. He came to the United Kingdom in October 2012 and has worked here ever since.
6. The claimant has a son who was born on 9 September 1998 (“the son”). He is a Polish national.
7. The son lives with his mother (“the mother”) in Poland; she is a Polish national. The claimant and the mother are divorced. There is a maintenance order from the Polish courts requiring the claimant to pay monthly maintenance for the son of 300 Polish zlotys (which equates to around £60.00). The claimant has paid this regularly.
8. In addition, the claimant contributes to the cost of providing for his son by buying things for him, sending him money gifts, and paying for things for him when he visits him in Poland every five or six weeks.
9. The mother has made no claim for a family benefit in Poland.

The adjudication history

10. The claimant made a claim for child benefit on 1 July 2013.
11. On 3 October 2013, HMRC sent a Form F001 (request for determining competence) to the Polish social security institution. That form contained the statement:

The United Kingdom is competent by priority right to pay full rate of Family Benefit. Please confirm the composition of the family as per article 67 of 883/2004.

12. The form also indicated that there was a “start date of entitlement” of 8 April 2013 for coverage by the social security system in respect of the son.
13. Details of the mother in the form indicated that she was self-employed.
14. Part 10 of the form relating to “family benefits per child” is left blank.
15. The Polish institution responded on 17 December 2013. The response stated that the mother was employed (rather than self-employed) and included the note:

[The mother] has worked in Poland from 01.11.2003 to date and she hasn't submitted a claim to Polish child benefit. Enclosed please find letter of [the mother] she wrote us that she didn't accept for paying UK child benefit to [the claimant].
16. The statement of the mother at the end of the form reads:

I do not consent to the processing of my personal data by British institutions. I hereby declare that the Regional Court of Torun annulled my marriage with [the claimant] on 30.03.2009. The regime of separate property was established by me and [the claimant] on 5.09.2005. My son ... has been receiving child maintenance of 300 PLN per month from his father, [the claimant]. I do not receive and I do not consent to receiving on my behalf any kind of family benefits from British institutions.
17. As far as the documents I have disclose, no decision was made until 7 March 2014 when the claim was rejected. That decision was sent to the claimant on 10 March 2014.
18. There was a further process of reconsideration of the claim. The decision was reconsidered on 1 August 2014 but was not changed.
19. A letter from a representative of the claimant dated 28 March 2014 has been validated by the claimant and accepted as his appeal against the refusal to award child benefit.
20. The appeal first came before a tribunal on 4 March 2016. The claimant attended but was not represented. There was an interpreter to assist the tribunal. HMRC were not represented. The hearing was adjourned with directions for the production of further evidence.
21. The appeal next came before the tribunal on 15 April 2016. The appellant attended but was not represented. An interpreter was present to assist the tribunal. HMRC were not represented. There is a helpful record of the proceedings. The outcome of the appeal was that the decision of 7 March 2014 was confirmed. A statement of reasons was subsequently provided on 14 June 2016.
22. The appeal now comes before me with the permission of a judge of the Upper Tribunal.

The grounds of appeal

23. The claimant's grounds of appeal are essentially twofold: that the tribunal erred in excluding from consideration the contributions he made for the son other than the monthly maintenance payments, and that there was no requirement that the son be in the United Kingdom.

Did the tribunal err in law?

24. The representative of HMRC rightly concedes that the tribunal erred in law in taking a restrictive view of what constituted contributing to the cost of providing for a child.
25. The representative of HMRC then offers an analysis of both national law and European Union law governing the claim with an invitation to me to remake the decision of the tribunal in favour of the claimant, and an indication as to how HMRC propose to go forward from here.
26. I am not in agreement with the analysis put forward by the representative of HMRC, and I have decided to remake the decision of the tribunal on a different basis from that proposed by the representative of HMRC.
27. The remainder of this decision is my analysis of the law.

My analysis

28. I reproduce the relevant legal provisions of both national law and European Union law in the Appendix to this decision.

National law

29. Provision for child benefit is made in Part IX of the Social Security Contributions and Benefits Act 1992. The benefit is payable to a person who is responsible for one or more children or “qualifying young persons”. A child is a person under the age of 16. A qualifying young person is, so far as relevant to this appeal, a person who is not a child, is under the age of 20 and is in full-time education: see Part 2 of the Child Benefit (General) Regulations 2006.
30. A person is responsible for a child or qualifying young person if he or she has the child or qualifying young person living with them, or is contributing to the cost of providing for the child or qualifying young person at a weekly rate not less than the amount of child benefit payable in respect of that person.
31. Some aspects of what constitutes contributing to the cost of providing for a child are discussed in *RK v HMRC (CB)* [2015] UKUT 357 (AAC).
32. The rates of child benefit applicable to the son are:
 - April 2013 to April 2014 £20.30
 - April 2014 to April 2015 £20.50
 - April 2015 to April 2016 £20.70
 - April 2016 to April 2017 £20.70
 - April 2017 to April 2018 £20.70
33. Both the person responsible for the child or qualifying young person and the child or qualifying young person must be present in Great Britain.
34. *Commissioners for HMRC v Ruas* [2010] EWCA Civ 291; [2010] AACR 31, decided that the requirement for the child or qualifying young person to be in Great Britain had to be disapplied as incompatible with Article 73 of Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. It

follows that the requirement is also not applicable where Regulation 883/2004 applies.

European Union law

35. The relevant European Union law provisions are to be found in Regulation 883/2004 on the coordination of social security systems, [2004] OJ L200/1, and Regulation 987/2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems, [2009] OJ L284/1.
36. It is common ground in this appeal that the claimant is within the personal scope of Article 2 of Regulation 883/2004. He is a Polish national living in the United Kingdom and working here.
37. This appeal concerns family benefits which are governed by Chapter 8 of Title III of Regulation 883/2004.
38. It is also common ground that the claimant is within Article 11(2) and Article 11(3)(a), since he is a person pursuing an activity as an employed person in the United Kingdom. This makes the United Kingdom the competent State under Title II of Regulation 883/2004.
39. Child benefit is a family benefit falling within Chapter 8 of Regulation 883/2004. The son is plainly a family member for the purposes of the provisions of Regulation 883/2004 on family benefits.
40. Divorce of the parents of a child does not affect the status of children as family members of both parents: Case C-363/08, *Slanina*, [2009] ECR I-11111; EU:C:2009:732.
41. Article 67 of Regulation 883/2004 provides for the situation where a family member is residing in a different Member State from a claimant. Article 67 provides that a claimant's family members living in a different Member State from that in which a claimant is residing are to be treated as residing in that claimant's Member State.
42. This is the point at which I find myself departing from the submission by the representative of HMRC, who proceeds to consider the situation under Article 68. The representative of HMRC argues that Article 68 applies, whereas I conclude that it does not in the circumstances of this case.
43. Article 68 does not apply in this case, since there is no suggestion of any entitlement arising in another Member State. Confirmation has been received from the Polish authorities that the mother has made no claim for a family benefit. There is no overlapping of benefits.
44. I read Article 68 as applying where there is *actual* overlap of entitlement. The heading to Article 68 is "Priority rules *in the event of overlapping*" (my emphasis). Article 68 refers to benefits being "provided for" "during the same period" "for the same family member" under the legislation of another Member State. Article 68 also refers to benefits being "payable by more than one Member State". Article 68 is only relevant where all these preconditions apply. There is simply no overlapping of benefits when only one claim for a specific family benefit is made.

45. The terminology in Article 68 is, however, not crystal clear, but the above interpretation is supported by Case C-378/14 *Trapkowski*, Judgment of 22 October 2015, EU:C:2015:720. In that case, the factual position was very similar, and the Court of Justice found that the priority rules in Article 68 did not apply. The Court said:

As regards the applicability of the priority rules laid down in Article 68(1) of regulation No 883/2004 it should be recalled that, according to the settled case-law of the Court, for a finding that such overlapping is present in a given case, it is not enough for such benefits to be due in the relevant child's Member State of residence and to be, in parallel, merely capable of being due in another Member State, where one of the parents of that child works (judgment in *Schwemmer*, C-16/09, EU:C:2010:605, paragraph 52 and the case-law cited).

46. It would therefore follow that, so long as there is no claim in Poland by the mother, the position of the claimant falls solely within the first sentence of Article 67 on the basis that the United Kingdom is the competent State under Article 11.
47. I do not think that consideration of Article 60 of Regulation 987/2009 results in any different conclusion. In the *Trapkowski* case, the Court said:

35. ... it should be recalled, first of all, that the deeming provisions included in Article 67 of Regulation No 883/2004 has the effect that a person may claim family benefits for members of his family who reside in a Member State other than that responsible for paying those benefits, as if they resided in that Member State.

36. Second, Article 60(1), second sentence, of Regulation No 987/2009 provides that, for the purposes of the application, in particular, of Regulation No 883/2004, the situation of the whole family is taken into consideration as if all the persons concerned were subject to the law of the Member State concerned and were resident there, in particular as regards the entitlement of a person to claim family benefits.

37. Third, Article 60(1), third sentence, of Regulation No 987/2009 states that, where a person entitled to claim the benefits does not exercise his right, 'the other parent' is one of the persons or institutions authorised to apply for such benefits.

38. It is apparent from a combined reading of Article 67 of Regulation No 883/2004 and Article 60(1) of Regulation No 987/2009, first, that a person may claim family benefits for members of his family who reside in a Member State other than that responsible for paying those benefits and, second, that the possibility to apply for family benefits is granted not only to persons who reside in the Member State required to pay the family benefits, but also to all the 'persons concerned', who may claim those benefits, including the parents of the child for whom the benefits are claimed.

39. Accordingly, given that the parents of the child for whom family benefits are claimed fall within the definition of 'persons concerned' within the meaning of Article 60(1) of Regulation No 987/2009, authorised to claim payment of those benefits, it is conceivable that a parent who resides in a Member State other than that required to pay those benefits is the person entitled to receive those benefits, if all the other conditions laid down by national law are also met.

40. It is for the competent national authority to determine the persons who, in accordance with national law, have a right to family benefits.

48. In responding to the second question referred, the Court of Justice said:

43. ... it should be recalled, as a preliminary point, that Regulations No 987/2009 and No 883/2004 do not determine the persons entitled to family benefits, even though they lay down the rules which enable the persons entitled to claim those benefits to be determined.

44. The persons entitled to family benefits are, as is clear from Article 67 of Regulation No 883/200, to be determined in accordance with national law.

45. Furthermore, it must be observed that Article 60(1), third sentence, of Regulation No 987/2009 provides that where a person entitled to claim the benefits does not exercise his right, the competent institutions of the Member States must take into account such applications made by the persons or institutions mentioned in that provision which include the 'other parent'.
46. First, it appears both from the wording and the general scheme of Article 60(1) of Regulation No 987/2009 that a distinction must be made between making a claim for family benefits and the right to receive such benefits.
47. Second, it is also clear from the wording of that article that it is sufficient if one of the persons able to claim the benefit of those family benefits makes an application for such benefits, so that the competent institution of the Member State must take that application into consideration.
48. However, EU law does not preclude such an institution, by applying national law, from finding that the person entitled to receive child benefits is a person other than the person who made the application for those benefits.
49. Therefore, where all the conditions for the grant of child benefits have been met and those benefits are actually granted, the issue as to which parent is regarded under national law as the person entitled to receive such benefits is irrelevant (see, to that effect, judgment in *Hoever and Zachow*, C-245/94 and C-312/94, EU:C:1996:379, paragraph 37).
49. It is now conceded that the claimant is contributing to the cost of the son at the required rate. The son is treated as residing in the United Kingdom by operation of European Union law. It is also accepted that the son is a qualifying young person following his attaining the age of 16 in 2014. The claimant accordingly meets, and has met, all the conditions of entitlement for child benefit from 1 April 2013 (three months prior to his claim made on 1 July 2013).
50. The claimant is accordingly entitled to child benefit from 1 April 2013.

**Signed on the original
on 9 May 2017**

**Robin C A White
Judge of the Upper Tribunal**

Appendix

NATIONAL LAW

Social Security Contributions and Benefits Act 1992

Child Benefit

141.—A person who is responsible for one or more children or qualifying young persons in any week shall be entitled, subject to the provisions of this Part of this Act, to a benefit (to be known as “child benefit” for that week in respect of the child or qualifying young person, or each of the children or qualifying young persons for whom he is responsible.

“Child” and “qualifying young person”

142.—(1) For the purposes of this Part of this Act a person is a child if he has not attained the age of 16.

(2) In this Part of the Act “qualifying young person” means a person other than a child, who—

- (a) has not attained such age (greater than 16) as is prescribed by regulations made by the Treasury, and
- (b) satisfies conditions so prescribed.

Meaning of “person responsible for a child or qualifying young person”

143.—(1) For the purposes of this Part of this Act a person shall be treated as responsible for a child or qualifying young person if—

- (a) he has the child or qualifying young person living with him in that week; or
- (b) he is contributing to the cost of providing for the child or qualifying young person at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child or qualifying young person for that week.

... .

Presence in Great Britain

146.—(1) No child benefit shall be payable in respect of a child or qualifying young person for a week unless he is in Great Britain in that week.

(2) No person shall be entitled to child benefit for a week unless he is in Great Britain in that week.

(3) Circumstances may be prescribed in which any person is to be treated for the purposes of subsections (1) or (2) above as being, or not being, in Great Britain.

EUROPEAN UNION LAW

Regulation 883/2004

Whereas:

...

(34) Since family benefits have a very broad scope, affording protection in situations which could be described as classic as well as in others which are specific in nature, with the latter type of benefit having been the subject of the judgments of the Court of Justice in Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* and in Case C-275/96 *Kuusijärvi*, it is necessary to regulate all such benefits.

(35) In order to avoid unwarranted overlapping of benefits, there is a need to lay down rules of priority in the case of overlapping of rights to family benefits under the legislation of the competent Member State and under the legislation of the Member State of residence of the members of the family.

TITLE I

GENERAL PROVISIONS

Article 1

Definitions

... .

(i) “member of the family” means—

(1) (i) any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided;

(ii) with regard to benefits in kind pursuant to Title III, Chapter 1 on sickness, maternity and equivalent paternity benefits, any person defined or recognised as a member of the family or designated as a member of the household by the legislation of the Member State in which he resides;

(2) If the legislation of a Member State which is applicable under subparagraph (1) does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family;

(3) If, under the legislation which is applicable under subparagraphs (1) and (2), a person is considered a member of the family or member of the household only if he lives in the same household as the insured person or pensioner, this condition shall be considered satisfied if the person in question is mainly dependent on the insured person or pensioner;

... .

(z) “family benefit” means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.

TITLE II

DETERMINATION OF THE LEGISLATION APPLICABLE

Article 11

General rules

1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

...

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.

...

CHAPTER 8

FAMILY BENEFITS

Article 67

Members of the family residing in another Member State

A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his pension.

Article 68

Priority rules in the event of overlapping

1. Where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State the following priority rules shall apply:

(a) in the case of benefits payable by more than one Member State on different bases, the order of priority shall be as follows: firstly, rights available on the basis of an activity as an employed or self-employed person, secondly, rights available on the basis of receipt of a pension and finally, rights obtained on the basis of residence;

(b) in the case of benefits payable by more than one Member State on the same basis, the order of priority shall be established by referring to the following subsidiary criteria:

(i) in the case of rights available on the basis of an activity as an employed or self-employed person: the place of residence of the children, provided that there is such activity, and additionally, where appropriate, the highest amount of the

benefits provided for by the conflicting legislations. In the latter case, the cost of benefits shall be shared in accordance with criteria laid down in the Implementing Regulation;

- (ii) in the case of rights available on the basis of receipt of pensions: the place of residence of the children, provided that a pension is payable under its legislation, and additionally, where appropriate, the longest period of insurance or residence under the conflicting legislations;
- (iii) in the case of rights available on the basis of residence: the place of residence of the children.

2. In the case of overlapping entitlements, family benefits shall be provided in accordance with the legislation designated as having priority in accordance with paragraph 1. Entitlements to family benefits by virtue of other conflicting legislation or legislations shall be suspended up to the amount provided for by the first legislation and a differential supplement shall be provided, if necessary, for the sum which exceeds this amount. However, such a differential supplement does not need to be provided for children residing in another Member State when entitlement to the benefit in question is based on residence only.

3. If under Article 67, an application for family benefits is submitted to the competent institution of a Member State whose legislation is applicable, but not by priority right in accordance with paragraphs 1 and 2 of this Article:

- (a) that institution shall forward the application without delay to the competent institution of the Member State whose legislation is applicable by priority, inform the person concerned and, without prejudice to the provisions of the Implementing Regulation concerning the provisional award of benefits, provide, if necessary, the differential supplement mentioned in paragraph 2;
- (b) the competent institution of the Member State whose legislation is applicable by priority shall deal with this application as though it were submitted directly to itself, and the date on which such an application was submitted to the first institution shall be considered as the date of its claim to the institution with priority.

Article 68a

Provision of benefits

In the event that family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution shall discharge its legal obligations by providing those benefits to the natural or legal person in fact maintaining the members of the family, at the request and through the agency of the institution in their Member State of residence or of the designated institution or body appointed for that purpose by the competent authority of their Member State of residence.

Regulation 987/2009

CHAPTER VI

FAMILY BENEFITS

Article 58

Priority rules in the event of overlapping

For the purposes of applying Article 68(1)(b)(i) and (ii) of the basic Regulation, where the order of priority cannot be established on the basis of the children's place of residence, each Member State concerned shall calculate the amount of benefits including the children not resident within its own territory. In the event of applying Article 68(1)(b)(i), the competent institution of the Member State whose legislation provides for the highest level of benefits shall pay the full amount of such benefits and be reimbursed half this sum by the competent institution of the other Member State up to the limit of the amount provided for in the legislation of the latter Member State.

Article 59

Rules applicable where the applicable legislation and/or the competence to grant family benefits changes.

1. Where the applicable legislation and/or the competence to grant family benefits change between Member States during a calendar month, irrespective of the payment dates of family benefits under the legislation of those Member States, the institution which has paid the family benefits by virtue of the legislation under which the benefits have been granted at the beginning of that month shall continue to do so until the end of the month in progress.
2. It shall inform the institution of the other Member State or Member States concerned of the date on which it ceases to pay the family benefits in question. Payment of benefits from the other Member State or Member States concerned shall take effect from that date.

Article 60

Procedure for applying Articles 67 and 68 of the basic Regulation

1. The application for family benefits shall be addressed to the competent institution. For the purposes of applying Articles 67 and 68 of the basic Regulation, the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim such benefits. Where a person entitled to claim the benefits does not exercise his right, an application for family benefits submitted by the other parent, a person treated as a parent, or a person or institution acting as guardian of the child or children, shall be taken into account by the competent institution of the Member State whose legislation is applicable.
2. The institution to which an application is made in accordance with paragraph 1 shall examine the application on the basis of the detailed information supplied by the applicant, taking into account the overall factual and legal situation of the applicant's family.

If that institution concludes that its legislation is applicable by priority right in accordance with Article 68(1) and (2) of the basic Regulation, it shall provide the family benefits according to the legislation it applies.

If it appears to that institution that there may be an entitlement to a differential supplement by virtue of the legislation of another Member State in accordance with Article 68(2) of the basic Regulation, that institution shall forward the application, without delay, to the competent institution of the other Member State and inform the person concerned; moreover, it shall inform the institution of the other Member State of its decision on the application and the amount of family benefits paid.

3. Where the institution to which the application is made concludes that its legislation is applicable, but not by priority right in accordance with Article 68(1) and (2) of the basic Regulation, it shall take a provisional decision, without delay, on the priority rules to be applied and shall forward the application, in accordance with Article 68(3) of the basic

Regulation, to the institution of the other Member State, and shall also inform the applicant thereof. That institution shall take a position on the provisional decision within two months.

If the institution to which the application was forwarded does not take a position within two months of the receipt of the application, the provisional decision referred to above shall apply and the institution shall pay the benefits provided for under its legislation and inform the institution to which the application was made of the amount of benefits paid.

4. Where there is a difference of views between the institutions concerned about which legislation is applicable by priority right, Article 6(2) to (5) of the implementing Regulation shall apply. For this purpose the institution of the place of residence referred to in Article 6(2) of the implementing Regulation shall be the institution of the child's or children's' place of residence.

5. If the institution which has supplied benefits on a provisional basis has paid more than the amount for which it is ultimately responsible, it may claim reimbursement of the excess from the institution with primary responsibility in accordance with the procedure laid down in Article 73 of the implementing Regulation.