



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: CTC/0225/2018
[2019] UKUT 306 (AAC)**

RI

V

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC088/17/02663

Decision date: 24 November 2017

Venue: Liverpool

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the claimant is not entitled to child tax credit for his daughter Courtney in the tax years 2015-2016 and 2016-2017.

REASONS FOR DECISION

1. This case is about the claimant's entitlement to a child tax credit for his daughter Courtney in the tax years 2015-2016 and 2016-2017. I held an oral hearing on 3 October 2019. The claimant attended on his own. Ms Michelle Turkie attended for the Commissioners. I am grateful to both of them for their contributions.

A. What this case is about

2. Courtney lives with a friend in Spain and has lived there for about nine years; she was born in 2003. The claimant does not live in Spain and has never

UPPER TRIBUNAL CASE NO: CTC/0225/2018
RI v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (TC)
[2019] UKUT 306 (AAC)

lived or worked in any other country than the United Kingdom, although he has gone abroad on visits. The same is true of Courtney's mother. He told me that Courtney visited about eight or nine times a year, sometimes just for the weekend, and sometimes for longer periods in school holidays. He told me repeatedly that he was responsible for her and that he had sent her money. More recently, in order to have control over how she would use the money, he sent her clothes or other items. He was less clear about what financial support he gave to the friend she lives with. I got the impression that this was not what he meant when he said he was responsible for his daughter.

3. There is evidence from the Spanish authorities that €24.25 a month of family benefit would be awarded in Spain for Courtney if a claim were made. No claim has ever been made in Spain.

B. The decision-making

4. Ms Turkie graciously acknowledged the mistakes that had been made in the decision-making and the lack of control that the claimant felt as a result. He had, she said, always correctly reported the arrangements for his daughter and he was not responsible for the mistakes that occurred. In recognition of that, he would not be required to repay tax credits to which he had not been entitled.

C. The argument for the Commissioners

5. In those circumstances, I will not rehearse the decisions that were made at different times, the grounds for them, or the submissions that have been at earlier stages of this case. What matters is the correct legal position. I will deal with that.

6. The best place to start is with the email sent to the Upper Tribunal on the afternoon of the day before the hearing, which set out the final arguments on which the Commissioners relied. It read:

HMRC will be attending the hearing tomorrow and will make the following submissions. We apologise sincerely for the late notice of these points, but thought it better to ensure they are made late, rather than not at all.

- HMRC ask the UT to uphold the FTT decision in this matter, but for different reasons: that [the claimant] was not entitled to CTC because he was not 'responsible' for his daughter under domestic legislation; and that he was not entitled to rely on EU law because he was not exercising any treaty rights. [The claimant] is a British citizen who has never left the UK.
- Alternatively, HMRC ask the Tribunal to refer this matter back to the FTT in order that they can reconsider their decision in the light of this new argument. This will give [the claimant] the chance to put forward any arguments to contest it.

UPPER TRIBUNAL CASE NO: CTC/0225/2018
RI v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (TC)
[2019] UKUT 306 (AAC)

- Alternatively, HMRC ask the Tribunal to delay the substantive hearing to give [the claimant] the chance to address the new arguments being put forward by HMRC.

DETAILED SUBMISSIONS

1. [The claimant]'s daughter Courtney lives in Spain, and [the claimant] lives in the UK. He was in receipt of contributions-based Employment Support Allowance. He applied to HMRC for Child Tax Credits (CTC) and was awarded CTC on 21 March 2016.

2. In July 2017, HMRC stopped the award of CTC because [the claimant]'s Employment Support Allowance had changed from being based on his income to being based on contributions. According to HMRC at the time, this shift meant that, under EU law, Spain became the competent state to pay benefits. (This is correct as a legal point, but HMRC had failed to address the issue of [the claimant]'s entitlement to rely on EU law in the first place).

3. [The claimant] appealed against this decision on the basis that he was entitled to rely on EU law. No details were given of the exact provisions, but [the claimant] had read this on the internet and HMRC literature. Unfortunately, but understandably, this was being read out of context. The rights to claim benefits for a child abroad only apply to EU citizens who are moving to or residing in a state other than their own (see below).

4. In HMRC's current view, it was correct to stop entitlement to CTC, but the wrong reasons were given. [The claimant] was not entitled under domestic law because his daughter did not live with him the majority of the time; he was also not entitled to rely on EU law because he was not exercising any rights under the EU treaty. HMRC were wrong to consider that Spain were the competent authority to pay CTC. In this case, neither the UK nor Spain were obliged to pay CTC to [the claimant]. Indeed, [the claimant] should never have been entitled to CTC in the first place.

5. HMRC failed to consider whether EU law should apply in the first place. It is HMRC's current view that EU law does not apply in [the claimant]'s case because:

- (a) [The claimant] is a UK national who has not worked or lived in the EU (outside of the UK). Therefore he has not exercised his rights under the EU Treaty. Therefore EU law does not apply. Directive 2004/38 supports 'the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States'. It is based on the rights of free movement of workers and residence. [The claimant] is not moving within the territory of the Member States, nor is he residing in a Member State that is not his own. He is the holder of

UPPER TRIBUNAL CASE NO: CTC/0225/2018
RI v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (TC)
[2019] UKUT 306 (AAC)

a British passport and the rights under Directive 2004/38 are not available to him. Article 3 of that Directive sets out:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them'.

(b) Notwithstanding the point above, [the claimant] would have failed the test for entitlement to CTC under Directive 2004/38 because his child is not 'mainly dependent' on him – see my submission to the Tribunal in the email chain below.

6. [The claimant] is not entitled to CTC under domestic law because under s. 8 of the Tax Credits Act 2002, to be entitled to CTC the claimant must be responsible for one or more children. And under the CTC regulations 2002, 'A person shall be treated as responsible for a child who is normally living with him, that is, a member of the claimant's household'. [The claimant]'s daughter does not normally live with him. Even if HMRC were to accept his claim that she lives with him 5 months of the year, this would still not be enough to meet the test of responsibility as set out in the regulations.

7. Originally HMRC Solicitor's Office asked for the hearing to be vacated so that HMRC could re-make their decision. We have since been advised that HMRC cannot re-make their decision and it is the FTT decision which stands and which must be decided by the Upper Tribunal. This is the correct point which we should have put to the Tribunal.

8. HMRC asks the Tribunal to uphold the decision of the FTT but to make it clear that the reasons for refusing entitlement to [the claimant] are because:

- a. he fails the test under domestic law, and;
- b. the rights under EU law are not available to him as a person who is not exercising treaty rights. Alternatively, he fails the entitlement test under Directive 2004/38.

9. HMRC apologises for the time and effort expended by all parties in addressing the wrong points (that Spain was the competent authority).

10. The Claimant has been notified by HMRC that HMRC will not seek to recover the tax credits paid to him despite the fact that he was not entitled. This is to recognise that the wrong reasons were given and that [the claimant] at no point misled HMRC as to the fact of his daughter living abroad.

7. There are a couple of slips in that argument. The relevant EU instrument is Regulation (EC) 883/2004, not Directive 2004/38/EC. And the quotation in

UPPER TRIBUNAL CASE NO: CTC/0225/2018
RI v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (TC)
[2019] UKUT 306 (AAC)

paragraph 6 should not include the words 'that is, a member of the claimant's household'.

8. I now come to how domestic and EU law applies to this case.

D. The claimant is not entitled in domestic law

9. In order to be entitled to child tax credit, a claimant must be 'responsible for' the child: section 8(1) of the Tax Credits Act 2002. The claimant told me that he was responsible for Courtney and I accept what he says in a general sense. By that I mean, that he feels responsible for her as her father, that he makes decisions about her as any parent does, and that he has provided financially for her, either by sending her money or, more recently, by providing her with clothes and other items that a teenage girl needs. That, however, is not the way in which a person has to be responsible under the legislation.

10. Section 8(2) authorises regulations to make provision for the circumstances in which a person is or is not responsible for a child. Those regulations are the Child Tax Credit Regulations 2002 (SI No 2007). The rules are in regulation 3(1); only Rules 1 and 2 are potentially relevant:

Rule 1

1.1 A person shall be treated as responsible for a child or qualifying young person who is normally living with him (the 'normally living with test').

1.2 This rule is subject to rules 2 to 4.

Rule 2 (Competing claims)

2.1. This Rule applies where—

(a) a child or qualifying young person normally lives with two or more persons in—

(i) different households, or

(ii) the same household, where those persons are not limited to the members of a couple, or

(iii) a combination of (i) and (ii), and

(b) two or more of those persons make separate claims (that is, not a single joint claim made by a couple) for child tax credit in respect of the child or qualifying young person.

2.2. The child or qualifying young person shall be treated as the responsibility of—

(a) only one of those persons making such claims, and

(b) whichever of them has (comparing between them) the main responsibility for him (the 'main responsibility test'),

UPPER TRIBUNAL CASE NO: CTC/0225/2018
RI v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (TC)
[2019] UKUT 306 (AAC)

subject to Rules 3 and 4.

11. The claimant does not satisfy either of those rules. Rule 1 applies if the claimant is 'normally living with' the child. It does not apply, because Courtney does not normally live with him, but in Spain. She visits her father, a lot given the distance between them, and the visits during the holidays are long, but she is living and being educated in Spain. Even the claimant spoke of her visiting him rather than of her going to Spain just for her schooling. Rule 2 introduces the concept of 'main responsibility'. It does not apply here, because it only applies when there are competing claims. The only claim in this case has been made by the claimant.

12. Accordingly, the claimant is not entitled in domestic law.

E. EU law does not help the claimant

13. The relevant EU law is contained in Regulation 883/2004. Article 2(1) provides that it 'shall apply to nationals of a Member State, ... who are or have been subject to the legislation of one or more Member States, as well as to the members of their families'.

14. Ms Turkie argued that the claimant was not covered by the Regulation, because he had never exercised his treaty rights. That argument was based on Directive 2004/38. For the purposes of the Regulation, it is sufficient for the claimant to have been subject to the legislation of just one Member State, which he has been.

15. As the claimant resides in the United Kingdom, this country is competent under Article 11(3)(e) of the Regulation for family benefits. Residence 'means the place where a person habitually resides': Article 1(j).

16. A child tax credit is within the definition of 'family benefit' in Article 1(z), as it is a benefit 'in cash intended to meet family expenses'.

17. Article 67 provides:

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.

What that means in this case is that the claimant is entitled to benefits under British law for Courtney, despite the fact that she lives in Spain, as if she were habitually resident in this country. This may appear to help the claimant, but it does not. It only bypasses a domestic residence condition. It does not bypass other domestic conditions of entitlement, such as the requirement that the child be normally living with the claimant. This may seem a strange result, but it is important to remember that benefits take different forms in different countries.

UPPER TRIBUNAL CASE NO: CTC/0225/2018
RI v COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (TC)
[2019] UKUT 306 (AAC)

The Regulation, as its title makes clear, provides for 'the coordination of social security systems'. It does not affect the conditions of entitlement under domestic legislation. Article 67 makes sense for countries whose family benefits do not have conditions like those in regulation 3(1). So, even if Courtney were habitually resident in the United Kingdom, the claimant would not be entitled to child tax credit for her because she does not normally live with him and Article 67 does not treat her as if she did.

18. Finally, I need to explain why the definition of 'Member of the family' in Article 1(i) of the Regulation does not help the claimant:

'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; ...

19. Head 1(i) is not relevant, because Courtney is not defined or recognised as a member of the claimant's family or household under domestic legislation. Head (1)(ii) is not relevant, because it does not apply to family benefits.

20. Head (2) may seem helpful in that it refers to minor children. But it only provides for minor children to be considered members of the claimant's family; it does not treat them as living with the claimant.

21. Head (3) may seem helpful in that it would deem Courtney to be living in the same household as the claimant, but only if she were 'mainly dependent' on him. That condition is not satisfied, because the claimant has not shown that his daughter is dependent on him to that extent. He may give her money or clothing or other items, but he has not shown that he makes any contribution to the costs of her daily living and housing. There is, I accept, more to dependence than money, but that does not mean that money is irrelevant. And he is not on the

spot to provide all the forms of dependence that may arise when she is in Spain. I do not mean to underrate his contribution to her upbringing, only to make the point that it does not satisfy head (3).

F. Benefits in this country are more generous than in Spain

22. The claimant told me that as child tax credit was higher than the benefits available in Spain, it was for this country to pay rather than Spain. That is the effect of the priority rules in Article 68 of Regulation 883/2004. But they do not help the claimant, because those rules only apply if there are overlapping awards. There are no overlapping awards in respect of Courtney, because no one has made a claim for her in Spain and no award has been made there. The only claim and the only award were in this country, and the rules do not apply if benefit has only been paid in one State. See the decisions of the European Court of Justice in *Schwemmer v Agentur für Arbeit Villingen-Schwenningen – Familienkasse* (Case C-16/09 EU:C:2010:605) and *Bundesagentur für Arbeit – Familienkasse Sachsen* (Case C-378/14 EU:C:2015:720).

G. Other points made by the claimant

23. Finally, I deal with a couple of points made by the claimant that I have not covered so far.

Nothing has changed in the claimant's situation

24. The claimant emphasised that nothing had changed, except for the decisions that had been made about his tax credits. I accept that, as did Ms Turkie. What has changed is the decision-making and, as I have explained, the issue is what should the correct decision have been.

The claimant has been awarded child benefit

25. The claimant told me that he had an award of child benefit in respect of Courtney. That may be, but (a) this case is not about child benefit and (b) that benefit is governed by different rules from those that apply to child tax credit.

H. The final outcome

26. The final outcome is not favourable to the claimant. he should never had been awarded child tax credit for the tax years in question and I have re-made the tribunal's decision to that effect. To repeat, he will not be asked to repay any of the money that should not have been paid to him.

**Signed on original
on 09 October 2019**

**Edward Jacobs
Upper Tribunal Judge**