

[2018] AACR 32
(Commissioners for Her Majesty's Revenue and Customs v MB
[2018] UKUT 162 (AAC))

Judge Jacobs
8 May 2018

CF/2872/2017

Child Benefit – Regulation (EC) No. 883/2004 – whether a step child is a child of the claimant for the purposes of Head (2) of the definition of “member of the family” in Article 1(i)

The claimant is a Polish national living and working in the UK since 2015. His wife lives in Poland with two children and receives family benefits. One child is the claimant's son. The other is his step son and spends every other weekend with his natural father. The claimant applied for child benefit. In respect of the claimant's step son, the Commissioners decided that he was not entitled to child benefit. The claimant appealed to the First-tier Tribunal (Ft-T). The Ft-T allowed the appeal and decided that the step son was one of the claimant's family members. The Commissioners appealed to the Upper Tribunal. The issue in the appeal is how Regulation 883/2004 applies, and in particular, how it applies to a step child.

Held, allowing the appeal, that:

1. a step child was not a “minor child” within the definition of “member of the family”. Head (2) in Article 1(i) has to be read in the context of Article 67. Head (2) provides that “the spouse, minor children, and dependent children...shall be considered members of the family.” That has to mean “the claimant's spouse, minor children, and dependent children.” It cannot be read as “any minor children.” In its proper, formal meaning, “child” does not include step children unless the description was qualified in some way to make the position clear; (paragraph 11 and 12)
2. if a step child is the claimant's child for the purposes of the claim, what about the position of the natural father? If he were to make a claim in respect of the child from another country, what would his position be? Would Head (2) mean that the child was not his child, despite his biological paternity? The Ft-T reasoning brought the step child within the claimant's claim, but it did not exclude him from a claim by his natural father. There is no basis in interpretation that would allow that result; (paragraph 14)
3. treating a step child as the claimant's child for the purposes of the claim would raise the possibility that he could be a member of two families in different States. In fact, he could be the member of more. Suppose his natural father has a spouse, his step mother, and she lives in a different State from both the step son and the natural father. That now makes him a member of three families in different States. As a child has two parents, this is always potential for the child to be a member of two families. But if step relationships are taken into account, the number of potential families multiplies and loses touch with reason; (paragraph 15)
4. including step children produces anomalous results. Why include a step child who is the natural child of the claimant's spouse, but exclude a child who is not a natural child of either the claimant or their spouse but is being brought up by them? (paragraph 16)

The Judge set aside the Ft-T decision and re-made the decision to the effect of confirming the Commissioners' decision.

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

As the decision of the First-tier Tribunal (made on 19 May 2017 at Southampton under reference SC203/16/00766) 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 Commissioners' decision, made on 25 April 2016 as subsequently revised on 30 July 2016 and 17 January 2017 is confirmed. The result is that the claimant is not entitled to child benefit in respect of Damian. He is entitled to child benefit in respect of Eryk, but it is not payable.

REASONS FOR DECISION

A. The issue and how it arises

1. The claimant is Polish. He has been in this country since 2 February 2015 and is a worker here. His wife lives in Poland with two children and receives family benefits. One (Eryk) is the claimant's son. The other (Damian) is his step son and spends every other weekend with his natural father. This case concerns the claimant's entitlement to child benefit in respect of the children. There is no dispute that the claimant is responsible for both children. The issue is how the EU social security co-ordination Regulation 883/2004 applies. In particular, the issue concerns Damian and how the Regulation applies to a step child.

B. Regulation (EC) No. 883/2004

Child benefit is covered by the Regulation

2. The Regulation applies to 'family benefits': see Article 3(1)(j).

3. 'Family benefit' is defined in Article 1(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.

There is no entry for the United Kingdom in Annex I.

4. Accordingly, child benefit is a family benefit and one of the matters covered by the Regulation.

The United Kingdom is the competent State on the claim

5. Article 67 deals with the situation where the family lives in different States:

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.

6. In this case the claimant's competent State at the time of his claim was the United Kingdom on the basis that he was a person pursuing an activity here as an employed person: see Article 11(3)(a). There were some changes, but they do not affect the outcome of this case and can therefore be ignored.

7. So the United Kingdom is the competent State for paying child benefit to the claimant in respect of 'members of the family'. This is defined in Article 1(i):

- (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.

This definition is important in the Regulation, because it is not confined to family benefits. It is part of the definition of the scope of the Regulation as a whole:

Article 2

Persons covered

1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in 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 and to their survivors.

8. Coming to child benefit, Head (1)(i) does not apply because the child benefit legislation does not depend on a person being a member of a family or a household. Head (1)(ii) does not apply because child benefit is not a benefit within Chapter 1 of Title III. Therefore, Head (2) applies. The question is whether Damian and Eryk are 'minor children' within the meaning of that provision. Eryk certainly is as he is the claimant's biological child. Damian is not the claimant's biological child, although the claimant considers him to be and treats him as his own child.

C. The First-tier Tribunal's reasoning

9. The First-tier Tribunal decided that Damian was one of the claimant's family members. The judge gave two reasons for that conclusion. For ease of reference, I have numbered them:

- 1. '... it would mean that a child who seldom or never spent time with his natural father could nevertheless be a member of his family for the purposes of the Regulation. That cannot be correct.'

2. 'Further, the word "household" suggests that the Regulation is looking at a group of related people who are living together as a family even if they are not necessarily blood relatives.'

10. Both those reasons are flawed. The flaw in (1) is that the Regulation is concerned with co-ordination. It does not deal with issues of domestic entitlement. The point that the judge made could be taken into account in the domestic scope of the legislation. There is no reason why the point made by the judge 'cannot be correct' (to use his words) for the purpose of co-ordination. The flaw in (2) is that household is a concept used only in Head (1) and, as a qualification to Head (1), in Head (3). It is not used in Head (2). They deal with different situations and the absence of any reference to household in Head (2) can only be significant given its express inclusion in Head (1)(i) and (ii), where it is used in contrast to 'family'.

D. Analysis – Damian

11. I have to decide whether a step child is a 'minor child' within the definition of 'member of the family'. I have decided that a step child is not a minor child within that definition for these reasons.

12. On the face of it, it might appear obvious that Damian is a minor child and so within Head (2), but that definition has to be read in its context. The immediate context is Article 67, which deals with a person's entitlement and so with that person's family members. Head (2) provides that 'the spouse, minor children, and dependent children ... shall be considered members of the family'. That has to mean 'the claimant's spouse, minor children, and dependent children'. It cannot be read as 'any minor children'.

13. In its proper, formal meaning, 'child' does not include step children. It is significant that, when used formally, the word has to be qualified. So a child is referred to as a person's step child or as someone who is treated as if they were the person's child. The child may, no doubt, be referred to as such in general conversation but for formal or official purposes it would be appropriate, even necessary, to qualify the description in some way to make the position clear.

14. If Damian is the claimant's child for the purposes of his claim, what about the position of Damian's natural father? If he were also to make a claim in respect of Damian from another country, what would his position be? Would Head (2) mean that Damian was not his child, despite his biological paternity? The First-tier Tribunal's reasoning brought Damian within the claimant's claim, but it did not exclude him from a claim by his natural father. I can see no basis in interpretation that would allow that result. It might be said that this argument contains the same flaw as the one I accused the First-tier Tribunal of at [10]: taking account of domestic considerations of entitlement in an international co-ordination instrument. That may be a good point in the case of child benefit, but remember that this definition is not confined to family benefits; it applies generally to determine the personal scope of the Regulation by virtue of Article 2.

15. On my reasoning so far, treating Damian as the claimant's child for the purposes of the claimant's claim would raise the possibility that he could be a member of two families in different States. In fact, he could be the member of more. Suppose his natural father has a spouse, his step mother, and she lives in a different State from both Damian and his natural father. That now makes him a member of three families in different States. Now, I accept that as a child has two parents, there is always the potential for the child to be a member of two families. But if step relationships are taken into account, the number of potential families multiplies and loses touch with reason.

16. Including step children produces anomalous results. Why include a step child who is the natural child of the claimant's spouse, but exclude a child who is not the natural child of either the claimant or their spouse but is being brought up by them? It may be relatively easy to stretch the meaning of 'child' to include 'step child', but it is less easy to extend the meaning to cover any child who has no natural or legal relationship with either the claimant or their spouse.

17. I accept that this reasoning produces a narrow scope for the Regulation that is based on biological or legal relationships, but the same is the case for spouses. Head (2) includes spouses, but not others who are in some equivalent form of relationship. There is confirmation for my narrow reading in the contrast with the citizenship Directive 2004/38. The relationships covered by that Directive are defined more widely and provided an obvious model if a similar, wider approach applied to the Regulation.

18. I also accept that the position would be different if the claimant's wife had come to this country to work and he had stayed in Poland with the children. But that is the result of the focus on the claimant and the claimant's family. If their roles were reversed, she would be the claimant and it would be necessary to identify the members of her family. For the reasons I have explained, it is the focus on the claimant that produces the reasoning I have set out.

E. *KT v Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 151 (AAC)

19. This is a decision of Upper Tribunal Judge Turnbull. The judge decided the case under the different wording of Regulation 1408/71 and decided that the child in question were not members of the claimant's family. The First-tier Tribunal had found that the claimant was the children's uncle. This was not disputed, but the judge could not find any evidence to support that finding and said at [2] that the position was the same even if 'they are wholly unrelated to him.' In the absence of any definition relevant to the case, the judge reasoned:

18. ... Even assuming that the Claimant is the uncle of the children and is contributing to the cost of their care, I do not think that they are members of his 'family', within any ordinary meaning of those words. The children live with their mother in a different country and the Claimant is not in any way acting in loco parentis.'

This cannot help in this case as there is now a definition and the issue for me is what it covers. However, the judge went on to consider the position under Regulation 883/2004 and said of this:

21. ... under that definition it is clear that only the claimant's spouse and children satisfy the definition. The Claimant in the present case would therefore be no better off by making a further claim to child benefit, to which Regulation 883/2004 would apply.'

That supports my reasoning in [12] that the children must be the claimant's children.

F. Analysis - Eryk

20. I come now to the position of Eryk. It is more straightforward. As a family benefit is already in payment in Poland to the claimant's wife, the claimant is only entitled to child benefit to the extent that it exceeds the amount of the Polish award. As the Polish award is in fact higher, nothing is payable to the claimant. That is the effect of Article 68. Child benefit can be used as a top-up, but there is nothing to top-up and so nothing is payable.