



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

**UPPER TRIBUNAL CASE NO: CF/5039/2014
[2019] UKUT 289 (AAC)**

**WC v THE 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: SC237/14/00025

Decision date: 10 July 2014

Venue: Newcastle

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: there were no grounds to supersede the decision awarding child benefit to the claimant when her family moved to Spain on 29 August 2011 and no overpayment arose.

REASONS FOR DECISION

1. This case decides that child benefit can be exported under Article 7 of Regulation (EC) 883/2004 and that the priority rules for overlapping family benefits in Article 68 do not apply when the claimant is receiving benefit in only one State.

A. History and background

2. The claimant was receiving child benefit in respect of her son when the family, to use the claimant's own words, 'retired to Spain'. They left Great Britain on 29 August 2011. Child benefit continued in payment. When the claimant's move to Spain came to light, the decision-maker superseded the decision awarding child benefit from and including 5 September 2011 and further decided

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that the claimant was liable for the overpayment that had arisen from that date to 31 July 2013 inclusive.

3. The claimant exercised her right of appeal to the First-tier Tribunal, but without success. The tribunal confirmed the decision-maker's finding that the claimant had ceased to be ordinarily resident on her departure from this country, relying on her own description of the circumstances. It confirmed that the claimant no longer satisfied the domestic conditions of entitlement and that the resulting overpayment was recoverable from her. On EU law, the tribunal decided that this 'does not assist the appellant for the reasons set out in Appendix 1 to the response to the appeal.'

4. The First-tier Tribunal gave the claimant permission to appeal to the Upper Tribunal. The case was stayed in this tribunal until a question of EU law had been resolved by the European Court of Justice. The stay was then lifted and the parties made their submissions.

B. Child benefit can be exported under Article 7

5. There is no dispute that this case is governed by Regulation 883/2004. Child benefit is a family benefit for the purposes of that Regulation under the definition in Article 1(z) by virtue of being a benefit 'in cash intended to meet family expenses'.

6. As the claimant was receiving child benefit when the family moved to Spain, the issue is whether she can retain her award. In the language that is usually used, the issue is whether she can export it. That depends on Article 7:

Article 7

Waiving of residence rules

Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated.

7. The representative for the Commissioners has submitted that this Article applies. I accept that argument. It is consistent with my approach in *KR v Secretary of State for Work and Pensions* [2019] UKUT 85 (AAC). Article 7 is a general provision that applies to all benefits covered by Regulation 883/2004 unless it provides otherwise. There is no provision that expressly overrides Article 7 in the case of family benefits and I can see no reason why this might be implied.

C. No issue of overlapping arises

8. Article 68 of the Regulation provides for the possibility that a family benefit may be payable under the law of more than one Member State by setting out

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rules of priority between the States. The representative for the Commissioners has relied on this Article. I do not accept that it applies.

9. I am sure, as the representative submits, that Spain has a benefit that is equivalent to child benefit, but there is no evidence to show that the claimant had applied for, let alone been awarded, such a benefit during the period with which this case is concerned. In those circumstances, Article 68 does not apply. The priority rules only apply if there are overlapping awards. They 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).

10. The representative for the Commissioners has relied on Article 59 of Regulation (EC) 987/2009, which provides for the implementation of Regulation 883/2004:

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.

I do not accept that argument. If the representative were right, this Article would override Article 7 and the decisions that I have cited. The simple answer to the argument is that Article 59 only applies when the applicable legislation changes. When Article 7 applies, as it does here, that legislation remains the same.

D. The European Court of Justice's decision in *Bogatu*

11. I will deal with the decision in *Bogatu v Minister for Social Protection* (Case C-322/17 EU:C:2019:102), as it was the reason why this appeal was stayed. As with all stays pending a decision of the European Court of Justice, the one in this case was precautionary, given that it is not always possible to predict the precise issue that the Court will consider determinative. In *Bogatu*, the Court decided that a person did not have to be employed or self-employed in order to rely on Article 67 of Regulation 883/2004. In the event, my reasoning does not depend on Article 67.

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E. In summary

12. There were no grounds to supersede the decision awarding child benefit to the claimant when her family moved to Spain. Accordingly, no overpayment arose. I have re-made the tribunal's decision to that effect.

**Signed on original
on 19 September 2019**

**Edward Jacobs
Upper Tribunal Judge**