IN THE UPPER TRIBUNAL **Appeal No.** CF/2239/2019
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

HMRC

Appellant

- v –

AD

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 10 December 2020
Decided on consideration of the papers

Representation:
Appellant: Solicitors Office, HMRC.
Respondent: Lindsay Fletcher, Manchester CAB.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 2 April 2019 under SC946/18/01172 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal at an oral hearing.

REASONS FOR DECISION

1. I am satisfied based on the arguments before me that the First-tier Tribunal erred materially in law in its decision of 2 April 2019 ("the tribunal") and that its decision should be set aside as a result. In short, the tribunal simply misunderstood the relevant law and as a result came to the wrong conclusion.

2. This is an unusual case in that I am able to come to this decision even though the tribunal did not provide a 'statement of reasons' for its decision. The tribunal's error of law is, however, clear from what it said in its decision notice.

3. The appeal concerns the law on 'right to reside' as it applies to entitlement to child benefit. At the material time the sole relevant test was found in regulation 23(4)(b)(i) of the Child Benefit (General) Regulations 2006 ("the CB Regs"). This provided, insofar as relevant, as follows:

> "23.-(4) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of the Social Security Contributions and Benefits Act 1992 where he makes a claim for child benefit on or after 1st May 2004 and…..
>
> (b) has a right to reside in the United Kingdom by virtue of
>
> (i) regulation 15A(1) of the Immigration (European Economic Area) Regulations 2006, but only in a case where the right exists under that regulation because the person satisfies the criteria in regulation 15A(4A) of those Regulations…"

4. Section 146(2) of the Social Security Contributions and Benefits Act 1992 provides that "No person shall be entitled to child benefit for a week unless he is in Great Britain in that week".

5. At a late stage in these Upper Tribunal appeal proceedings I raised a concern with the parties about the basis on which the above regulation could have disentitled the claimant to child benefit at the 2 February 2018 date of HMRC's decision to that effect given that by that date regulation 15A(1) and 15A(4A) of the Immigration (European Economic Area) Regulations 2006 no longer existed. I set out my concern as follows:

> "I regret the need for these further directions on this appeal but they concern a point potentially of some importance which has not arisen previously on this appeal (or elsewhere as far as I am aware). The point arose as I was writing the narrative part of decision on the appeal. The effect of the point may be that the First-tier Tribunal came to the correct decision, albeit by the wrong route. In the circumstances, the parties need to have the opportunity to address the point.
>
> The point concerns the form regulation 23(4)(b)(i) of the Child Benefit Regulations 2006 was in as at the date of HMRC's 2 February 2018 decision which was under appeal to the First-tier Tribunal. The potentially important point is that by that time regulation 23(4) had still not been amended to take account of the fact that the Immigration (European Economic Area) Regulations 2006, to which regulation 23(4) still referred, had been revoked and replaced by the Immigration (European Economic Area) Regulations 2016. That change had taken place on 25 November 2016 and 1 February 2017. On the face of regulation 45 and Schedule 4 of the Immigration (European Economic Area Regulations) 2016, regulation 15A of the Immigration (European Economic Area) Regulations 2006 was not saved from the revocation or otherwise given any continuing legal effect. If this is correct then on what basis did regulation 23(4)(b)(i) of the Child Benefit (General) Regulations have any application in

February 2018 given regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006, and the right to reside conferred under it, no longer existed in UK law?

The basis of HMRC's decision of 2 February 2018 was that [AD] (only) had a right to reside under regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 and on that basis was excluded from being entitled to child benefit in 2018. The statutory foundation for this is section 146(3) of the Social Security Contributions and Benefits Act 1992. This enables a person who is in fact in Great Britain (as [AD] was in 2018) to be treated <u>in prescribed circumstances</u> as not being in Great Britain. By 2 February 2018 the prescribed circumstances remained those set out regulation 23(4)(b)(i) however, arguably, those prescribed circumstances could not treat [AD] as not being in Great Britain because at that time [AD] arguably did not have, and could not have had, a right to reside in the United Kingdom by virtue of regulation 15A(4A) of the Immigration (European Economic Area) Regulations 2006 as that statutory basis for having a right to reside in the UK no longer existed. Moreover, the right to reside in the UK that [AD] may have held under domestic law in February 2018 under regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 was, at least arguably, not a prescribed circumstance in February 2018 which could, as a matter of law, treat her as not being in Great Britain.

Put another way, did regulation 23(4)(b)(i) of the Child Benefit (General) Regulations simply misfire until it was amended on 21 March 2019 so as to refer to the Immigration (European Economic Area) Regulations 2016?

Sections 17(2), 20 and 23(1) of the Interpretation Act 1978 may have a bearing on the above point: see the discussion of that Act in *RT v SSWP* (PIP) [2019] UKUT 207 (AAC)."

6. I now accept that the concern I raised above was misplaced and failed to take account of the full extent of the Immigration (European Economic Area) Regulations 2016. My fuller understanding of the correct legal position is largely down to the commendably frank submission from Ms Fletcher of the Manchester CAB for the claimant/respondent, even though that submission did not assist the claimant. The CAB's submission drew my attention to Schedule 7 to the Immigration (European Economic Area) Regulations 2016. This provides as follows and is I think largely self-explanatory.

SCHEDULE 7

CONSEQUENTIAL MODIFICATIONS

1.—(1) Unless the context otherwise requires—

(a)any reference in any enactment to the 2006 Regulations, or a provision of the 2006 Regulations, has effect as though referring to these Regulations, or the corresponding provision of these Regulations, as the case may be;

(b)but—

(i)any reference to a provision of the 2006 Regulations in column 1 of the table has effect as though it were a reference to the corresponding provision of these Regulations listed in column 2; and

(ii)any reference to a provision of the 2006 Regulations with no corresponding provision in these Regulations ceases to have effect.

(2) Unless otherwise specified in the table, sub-divisions of the provisions of the 2006 Regulations listed in column 1 correspond to the equivalent sub-division in the corresponding provision of these Regulations.

(3) […]

Table of equivalences

(1)	*(2)*	*(3)*
Provision in the 2006 Regulations	*Corresponding provision in these Regulations*	*Description of provision*
[…]	[...]	[…]
15A	16	Derivative right to reside
15A(1)	16(1)	
15A(2)	16(2)	
15A(3)	16(3)	
15A(4)	16(4)	
15A(4A)	16(5)	
15A(5)	16(6)	
15A(6)	16(7)	
15A(7)	16(8)	
15A(7A)	16(9)	

7. It is clear to me that the effect of Schedule 7, and paragraph 1(b) of it in particular, is that regulation 23(4)(b)(i) of the Child Benefit Regulations 2006 as set out in paragraph 3 should be read as follows.

"23.-(4) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of the Social Security Contributions and Benefits Act 1992 where he makes a claim for child benefit on or after 1st May 2004 and…..

(b) has a right to reside in the United Kingdom by virtue of

(i) regulation [16(1)] of the Immigration (European Economic Area) Regulations [2016], but only in a case where the right exists under that regulation because the person satisfies the criteria in regulation [16(5)] of those Regulations…"

8. There is therefore no need to have regard to the Interpretation Act 1978, and regulation 23(4)(b)(i) of the Child Benefit Regulations did not misfire at the time of HMRC's entitlement decision of 2 February 2018 in this case. The effect of Schedule 7 to the Immigration (European Economic Area) Regulations 2016 was to amend and update regulation 23(4)(b)(i) of the Child Benefit Regulations to take account of those 2016 regulations having come into effect until regulation 23(4)(b)(i) could formally be amended and updated. I proceed in the rest of this decision to treat regulation 23(4)(b)(i) as being in the form set out in paragraph 7 above.

9. Before turning to why the First-tier Tribunal erred in law in the decision to which it came, I want to touch on one aspect of the First-tier Tribunal's approach to applications for permission to appeal made to it. That approach remains a concern. In order to put that concern in context I need to explain the decision to which the First-tier Tribunal came and what occurred thereafter when HMRC sought to challenge that decision.

10. The First-tier Tribunal allowed the claimant's appeal against HMRC's decision of 2 February 2018. It said this about why it did so in its decision notice of 2 April 2019.

> "The Matter was listed on 02/04/2019 with a direction that a Presenting Officer attend from HMRC. The Tribunal waited until 1430hrs but no Presenting Officer from HMRC attended.
>
> The appeal is allowed on the basis of the recent decision of DM v SSWP (PIP) [2019] UKUT 26. This decision, on the facts of the case, found that a British Citizen would be deprived of EU membership if the Zambrano Carer did not have a derivative right to reside. In this Appeal the Appellant's Representative has asked for evidence in respect of the Father of the children following a breakdown in the relationship. HMRC have not assisted the Appellant in that regard. HMRC have also not assisted the Tribunal by their failure to attend the hearing today. In these circumstances the Tribunal has been deprived of an opportunity to determine whether HMRC's decision would compel children to leave the EU. Given that this was a case of relationship breakdown, this was a matter that required positive input from HMRC.
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> [AD – the claimant] requested an oral hearing but did not attend today. Having considered the appeal bundle to page 34 and the requirements of Rules 2 and 31 of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 the Tribunal is satisfied that reasonable steps were taken to notify [AD] of the hearing and that it is in the interests of justice to proceed today.
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> Having considered all the evidence and applied the law the Tribunal finds that the Appeal succeeds."

11. HMRC applied late, on 24 July 2019, for the reasons for the First-tier Tribunal's decision. It said it had not been sent the original decision notice and had only found out about the tribunal's decision from the claimant. The First-tier Tribunal refused to extend time for the reasons to be provided. That was on 8 August 2019 and the refusal to extend time was notified to the parties on 12 August 2019. HMRC then applied in time to the First-tier Tribunal for permission to appeal to the Upper Tribunal. It received no judicial determination on that application for permission to appeal. All HMRC received was a letter from a Clerk to the Tribunal, dated 10 September 2019, which stated, insofar as may be relevant, the following:

> "On 02/09/2019 I received your application for permission to appeal to the Upper Tribunal against the Tribunal's decision made on 02/04/2019.
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> Your application has been rejected because:
>
> ……. a statement of reasons has not been prepared.
>
> If you have given reasons for the delay in making your application, these will have been considered when deciding if a statement should be prepared.
>
> I am returning your application as I can take no further action…."

12. I have proceeded on the basis that behind the First-tier Tribunal's letter of 10 September 2019 lay a decision of a judge of the First-tier Tribunal under rule 38(7)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 <u>refusing to admit</u> (*not* 'rejecting') the application for permission to appeal: see *JP v SSWP* (ESA) [2016] UKUT 48 (AAC). However, HMRC, just as any other party to an appeal, were entitled to receive, and ought to have received, a copy of the judicial determination on its application for permission to appeal. (And it should not need saying that a judge ought to have made a ruling on the application for permission to appeal.)

13. HMRC then renewed its application for permission to appeal to the Upper Tribunal and I admitted it because in my judgment it was in the interests of justice to do so. I do not need to set out here my reasons for so doing, though some of those reasons overlap with why I am allowing HMRC's appeal to the Upper Tribunal. I should add that my allowing the appeal has not been opposed by the CAB who act for the claimant

14. In my judgment the First-tier Tribunal erred materially in law in coming to its decision for the reasons advanced by HMRC. In short, and as HMRC correctly argue, the determinative issue was not, as the First-tier Tribunal considered, whether the claimant had a *Zambrano* derivative right of residence in respect of her two youngest

children, who had been naturalised as British Citizens. HMRC has always accepted the claimant has a *Zambrano* right of residence in respect of these two British children (see, for example, section 4.4 of HMRC's appeal response to the First-tier Tribunal). Instead, the determinative issue was, and is, whether that particular right of residence could assist the claimant. In my view it plainly could not as under regulation 23(4)(b)(i) of the Child Benefit (General) Regulations 2006, as properly read (see paragraph 7 above), that right meant that she was to be treated as <u>not</u> being in Great Britain.

15. This statutory result is clear from the terms regulation 23(4)(b)(i) of the Child Benefit Regulations read with regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. Regulation 23(4)(b)(i)'s plain effect is that if a person's right of residence in Great Britain arises under regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 that person will be treated as not being in Great Britain for the purposes of the child benefit scheme. Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016 confers the *Zambrano* right of residence. Indeed, it is the only derivative right of residence arising under regulation 16 of the Immigration (European Economic Area) Regulations 2016 which is carved out from providing a right residence under the child benefit scheme. The legality of this *Zambrano* carve out was confirmed by the Supreme Court in *R(HC) v SSWP and others* [2017] UKSC 73; [2019] AC 485.

16. The decision in *DM v SSWP* (PIP) [2019] UKUT 26 (AAC), on which the First-tier Tribunal relied, was irrelevant to this issue. It was concerned with a different benefit and statutory scheme. More importantly, it was concerned with whether a *Zambrano* right of residence could arise in respect of those caring for adults as well as for those caring for children, and found that it could. The issue in *DM*, therefore, was whether the claimant **had** a *Zambrano* right. That point was not in dispute in this case. But such a right does not provide the person with that *Zambrano* right with any qualifying right of residence for the purposes of the child benefit scheme.

17. The First-tier Tribunal was therefore fundamentally wrong as a matter of law in deciding that the claimant's *Zambrano* right of residence in respect of her two youngest children meant she could qualify for child benefit for those two children. The new First-tier Tribunal to which this appeal is being remitted must, accordingly, decide that any *Zambrano* right the claimant may have cannot assist her on this child benefit appeal.

18. However, HMRC concede that different considerations might apply in respect of the claimant and her eldest child, who has a different father from the younger children of British nationality to whom the *Zambrano* right of residence applies. In these circumstances, HMRC accepts that the child benefit entitlement appeal should be remitted to a new First-tier Tribunal to consider (only) the claimant's entitlement to child benefit in respect of the eldest child. I agree.

19. For the reasons given above, the tribunal's decision dated 2 April 2019 must be set aside. The Upper Tribunal is not able to re-decide the first instance appeal itself.

20. The appeal will therefore have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing.

21. HMRC's success on this appeal to the Upper Tribunal on an error of law says nothing one way or the other about whether the claimant's appeal will succeed on the facts before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Stewart Wright
Judge of the Upper Tribunal
Signed on the original on 10 December 2020