



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

**UPPER TRIBUNAL CASE No: CF/2685/2018  
[2020] UKUT 65 (AAC)**

**MZ 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: SC068/17/04610  
Decision date: 25 January 2018  
Venue: Birkenhead

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

**REASONS FOR DECISION**

**A. History and background**

1. The claimant works in Poland, where she lives with her daughter; neither has ever lived in this country. She and her daughter's father separated in 2005 and divorced in 2010. He lives and work in this country. He is subject to a child maintenance order from Poland and an order from the Wrexham Family Court, but he has not made any contribution towards the maintenance of the claimant or their daughter. Nor has he claimed child benefit. The claimant does not qualify for a family benefit in Poland, because her income is too high. Her claim for a Polish benefit was forwarded to the United Kingdom by the Polish authorities and treated as a claim for child benefit, which was refused on 26 March 2014. The First-tier Tribunal dismissed the claimant's appeal, but I gave her permission to appeal to the Upper Tribunal. The representative for the Commissioners has not supported the appeal.

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**B. The claimant does not satisfy the conditions in domestic law for an award**

2. The relevant provisions of domestic law are set out in Appendix 1.

3. The claimant is not entitled under domestic law. Neither she nor her daughter have been present here in any relevant week; so they do not satisfy section 146(1) or (2) of the Social Security Contributions and Benefits Act 1992. And as neither has ever been ordinarily resident in the United Kingdom, they are treated as not being present here: regulation 23(1) of the Child Benefit (General) Regulations 2006 (SI No 223).

**C. The claimant's former husband does not satisfy the conditions in domestic law for an award**

4. The claimant's former husband is ordinarily resident here; so he satisfies section 146(2). But his daughter is not ordinarily resident here; so she does not satisfy section 146(1) read together with regulation 23(1).

5. The claimant's former husband also fails to qualify because he is not 'responsible for' his daughter as required by section 141. That expression is defined by section 143(1) to mean that the child is 'living with him' or that he is 'contributing to the cost of providing for' her. She does not live with him and, although he is liable to make payments towards her maintenance, he is not doing so.

**D. EU law does not help the claimant**

6. The relevant EU law is contained in Regulation (EC) 883/2004 and Regulation (EC) 987/2009; the relevant provisions are set out in Appendix 2 and Appendix 3.

7. From the claimant's point of view, she is pursuing an activity as an employed person in Poland, so she is subject to the legislation of Poland which is the competent State for any claim she might make in her own right by virtue of Article 11(3(a)). Article 67 does not help her. It allows her to claim family benefits in respect of other members of her family living in a different Member State from her. But: (a) her daughter is not living in another State; and (b) the Article does not alter the competent State, which is Poland, where she has no entitlement. She has never been awarded child benefit in this country, so Article 7 of Regulation 883/2004, which preserves the right to benefits when a claimant moves from one State to another, does not apply.

8. From the point of view of the claimant's former husband, he is pursuing an activity as an employed person in this country, so he is subject to the legislation of the United Kingdom which is the competent State for any claim he might make for child benefit, but it would not succeed. Article 67 would apply 'as if [his daughter] were residing in' this country. But that would not mean that he could qualify for child benefit. As I explained in *RI v Commissioners for Her Majesty's*

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*Revenue and Customs* [2019] UKUT 306 (AAC) at [17], this bypasses the domestic residence condition, so his daughter is treated as being habitually resident in this country. But it does not provide that she is to be treated as if she is living with her father. Nor does it overcome the fact that he is not contributing towards her maintenance. In other words, Article 67 does not mean that section 143(1) is satisfied.

9. This is a convenient moment to deal with the decision of the European Court of Justice in *Slanina v Unabhängiger Finanzsenat, Außenstelle Wien* (Case C-363/08 EU:C:2009:732), which the claimant has relied on. The claimant in that case was divorced from her husband, who was required to pay maintenance for their daughter but was not doing so. She received a family benefit for her daughter while they lived in Austria, where the father was working. She continued to do so when she and her daughter moved to Greece. When Austria realised that she was no longer living there, it reclaimed benefit that she had been paid after moving to Greece. There are some passages in the Court's judgment that appear to support the claimant, but they do not do so.

10. It is important to take account of the fact that that decision was made under Regulation (EEC) 1408/71, not Regulation 883/2004. The effect of the decision was to allow the claimant to retain the family benefit when she moved to Greece. Under Regulation 883/2004, that would now be covered by Article 7, which allows a claimant to retain a benefit on moving to another State. There was a similar provision in Regulation 1408/71 (Article 10), but it did not apply to family benefits. So it would not be necessary for the family benefit provisions of the current Regulation to be interpreted in the same way.

11. The claimant has referred to what the Court said at [28], that it was irrelevant that the child's father was not paying the maintenance for which he was liable. That remark was made in the context of whether the child was a member of his family. Again, the current Regulation is different, as the claimant's daughter in this case falls within the express language of the definition in Article 1(i)(2); she is a member of both her mother's family and her father's.

12. EU law provides some help for parents who live with a child in one State when the other parent is in a different State. If that other parent does not claim a family benefit to which they are entitled, Article 60(1) of Regulation 987/2009 provides in effect that the parent caring for the child may do so instead. If the parent in the other State claims and receives a family benefit, but does not pay it to the parent caring for the child, Article 68a of Regulation 883/2004 provides that the State may discharge its obligation by paying the benefit to the parent with care instead. Neither of those provisions assists the claimant in this case, because her former husband does not qualify for child benefit either under domestic law or under that law as it applies by virtue of EU law, for the reasons I have explained.

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**E. Conclusion**

13. It follows that the First-tier Tribunal came to the correct decision when it confirmed the decision that the claimant was not entitled to child benefit in respect of her daughter.

**Signed on original**  
**on 27 February 2020**

**Edward Jacobs**  
**Upper Tribunal Judge**

## APPENDIX 1

### DOMESTIC CHILD BENEFIT LAW

#### **The Social Security Contributions and Benefits Act 1992**

##### **141. Child benefit**

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.

##### **146. Presence in Great Britain**

- (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 subsection (1) or (2) above as being, or as not being, in Great Britain.

##### **143. Meaning of 'person responsible for child or qualifying young person'**

- (1) For the purposes of this Part of this Act a person shall be treated as responsible for a child or qualifying young person in any week 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.

#### **The Child Benefit (General) Regulations 2006**

##### **23. Circumstances in which person treated as not being in Great Britain**

- (1) A person shall be treated as not being in Great Britain for the purposes of section 146(2) of SSCBA if he is not ordinarily resident in the United Kingdom.

## APPENDIX 2

### REGULATION (EC) 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**

For the purposes of this Regulation:

- (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

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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.

*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.

*Article 3*

**Matters covered**

1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(j) family benefits.

*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.

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-

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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;
- (b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him is subject;
- (c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;
- (d) a person called up or recalled for service in the armed forces or for civilian service 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.

...

TITLE III

SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

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



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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.

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*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.

## APPENDIX 3

### REGULATION (EC) 987/2009

#### TITLE VI

#### SPECIAL PROVISIONS CONCERNING THE VARIOUS CATEGORIES OF BENEFITS

#### CHAPTER 4

#### *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

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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.

*Article 61*

**Procedure for applying Article 69 of the basic Regulation**

For the purposes of applying Article 69 of the basic Regulation, the Administrative Commission shall draw up a list of the additional or special family benefits for orphans covered by that Article. If there is no provision for the institution competent to grant, by priority right, such additional or special family benefits for orphans under the legislation it applies, it shall without delay forward any application for family benefits, together with all relevant documents and information, to the institution of the Member State to whose legislation the person concerned has been subject, for the longest period of time and which provides such additional or special family benefits for orphans. In some cases, this may mean referring back, under the same conditions, to the institution of the Member State under whose legislation the person concerned has completed the shortest of his or her insurance or residence periods.