THE UPPER TRIBUNAL **Appeal No.** CTC 1853 2009
ADMINISTRATIVE APPEALS CHAMBER

PF and SF v HMRC

DECISION

The appeal is dismissed for the reasons below.

REASONS FOR DECISION

1 On 1 October 2008 the respondents ("HMRC") issued a notice to the appellants ("Mr and Mrs F") awarding them child tax credit from 6 04 2008 to 26 08 2008. The award followed a claim made by Mr and Mrs F linked to the award to Mr F of incapacity benefit. This was later amended to be an award to 15 07 2008 only. The award was stopped because Mr and Mrs F were in Sweden not Britain. The appellants appealed because they considered that they remained entitled to child tax credit under European Union law and that the award should not have been stopped. The First-tier Tribunal confirmed the HMRC decision, and the appellants appeal again.

2 The dispute between the parties is limited to this issue of general entitlement. HMRC did not contend that any specific aspect of the award was wrong or had changed. What had changed with the view taken by HMRC as to the entitlement of someone outside the United Kingdom but inside the European Union to claim child tax credit.

3 The HMRC view is best summarised in a letter dated 3 04 2009 sent to Mrs F by HMRC in reply to a letter she wrote to the Prime Minister:

> "When we originally started awarding Child Tax Credit, we did so on the basis that this was a "family allowance" under EC rules. However, we have recently received legal advice to the effect that the Child Tax Credit does not fall within the definition of a "family allowance" because it also takes into account the income of the pensioner. As a result, we have reviewed our awards of the Child Tax Credit in relevant cases, and have concluded that in view of the provisions of EC law, such awards should, strictly, bet terminated. However, you will not have to repay any Child Tax Credit you have received so far.

4 Mrs F rejected this on two linked grounds. First, she contended, quoting the Financial Secretary to the Treasury, that tax credits were part of the tax system and not the social security system. She then contended, by reference to the jurisprudence of the European Court, that refusing her and her husband child tax credits was a breach of their rights to free movement as European citizens under Article 18 of the European Treaty, and also to Article 48 in imposing a higher tax rate on his pension income.

5 The tribunal accepted the following as undisputed facts:

> "The appellant and her husband are UK citizens who have never worked in any other country. They now live in Sweden with their 4 children. The appellant's husband is retired because of ill-health and receives a police pension. He has an underlying entitlement to long term incapacity benefit. He does not receive any payment of incapacity benefit because his income is greater than the level at which payments are made. He does receive NI credits on the basis of his incapacity for work. Child benefit is paid for the children."

Save that Mr F should have been an appellant to that tribunal, and is an appellant to this appeal, I accept those findings.

6 The tribunal then set out a reasoned analysis of the relevant regulations in EC Council Regulation 1408/71, which HMRC contended as setting out the relevant European Union legal provisions, and of four cases that Mrs F put to the tribunal as showing that she was entitled under European law. It accepted that child tax credit was not a "family allowance" under European law and therefore rejected her appeal.

7 In a full submission on this appeal, Mr Inglese, the Solicitor and General Counsel to HMRC, explained, again quoting the Financial Secretary to the Treasury, that the British government regarded tax credits as a social security benefit for the purposes of Regulation 1408/71. He cited a Ministerial announcement on 2 February 2009 of recent legal advice that child tax credit was not a "family allowance" within the meaning in that regulation. Rather, he submitted, it was a social advantage within Article 7(2) of EC Regulation 1612/68. It was payable to EEA nationals working in the UK and to cross-border workers under that regulation but not otherwise. He concluded by drawing attention to the replacement of Regulation 1408/71 by Regulation 883/2004 in May 2010. This replaced the relevant provisions from that date with wider provisions and, he stated "it is accepted that from that date UK state pensioners living elsewhere in the EEA will be able to claim the child tax credit."

8 Mrs F was not persuaded by this, and contended that the Financial Secretary to the Treasury was wrong and that her rights were clear from the European Court jurisprudence.

My decision

10 Given the nature of the argument, and the frank acceptance that the British government had changed its mind about the extent to which child tax credits could be claimed by British pensioners living with children elsewhere in the European Economic Area to their detriment, I considered whether I should refer the matter to the European Court. I decided not to do so for two linked reasons. The first is that I concluded that the current view of HMRC and the British government about family allowances was clearly right, and its previous view clearly overgenerous. The second is that the European law changes in any event in a few weeks' time in Mr and Mrs F's favour. Any reference will take far longer than that even if I had a genuine doubt as to the outcome.

11 The starting point is the dispute about whether child tax credits are part of the United Kingdom tax system or part of the European social security system. In my view, the answer is that they are both. It is not a matter of "either … or". A full answer might justify an extended legal and economic analysis, but that is not necessary here. A more pragmatic answer is that child tax credits have some features that the United Kingdom Treasury regard as being part of the personal tax system in the United Kingdom and other features that bring them within the scope of European law as a social security benefit. The answer relevant to this appeal is even narrower. It is that child tax credits do fall within some European laws about social advantages and do not fall within others. There are no equivalent specific European regulations dealing with, or relevant to the treatment of, child tax credits as part of the United Kingdom tax system. And from a European standpoint, I have no doubt that the question is whether any specific regulations apply before reference is made to general principles about free movement.

12 At the time relevant to this appeal, the main provisions under which United Kingdom and European citizens who are not in the United Kingdom but who are elsewhere in the European Economic Area are entitled to social security benefits are those in Regulation 1408/71. The specific provision relevant to Mr and Mrs F's claim on the undisputed facts is in Chapter 8 (Benefits for Dependent Children of Pensioners and for Orphans), and in particular

Article 77 (Dependent children of pensioners). Briefly, Chapter 8 is preceded by Chapter 7. Chapter 7 deals with claims made by employed and unemployed persons. Those provisions are not relevant to Mr and Mrs F. Mr F is for these purposes a pensioner. So entitlement can arise only under Chapter 8. The relevant provisions are:

> "Article 77
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> Dependent children of pensioners
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> 1. The term 'benefits', for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.
>
> 2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing;
>
> (a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension
>
> …
>
> Article 79
>
> Provisions common to benefits for dependent children of pensioners and for orphans
>
> 1. Benefits, within the meaning of Articles 77 and 78, shall be provided in accordance with the legislation determined by applying the provisions of those Articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased worker had been subject only to the legislation of the competent State.
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> However:
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> (a) if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of insurance or employment, such lengths shall be determined taking account where necessary of Articles 45 or 72 as appropriate;
>
> (b) if that legislation provides that the amount of benefits shall be calculated on the basis of the amount of the pension, or shall depend on the length of insurance periods, the amount of these benefits shall be calculated on the basis of the theoretical amount determined in accordance with Article 46 (2).
>
> …"

13 What is sometimes overlooked when applying these regulations is the definition of "family allowances" in Article 1 of the Regulation. This is:

> "'family allowances' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family".

Child tax credits take full account of the income of claimants, so cannot be within the scope of this definition. I can only assume that the original view taken by HMRC of Article 77 was formed without reference to this definition. Perhaps it was because child benefit is equally clearly within the scope of the Article, and no proper thought was given to the distinction. In any event, my view is that the current view of HMRC is clearly right as a matter of law, and that therefore the decision of the tribunal, which agreed with HMRC, is also clearly right in law.

14 As Mr Inglese drew attention to the matter, and as I took this into account in deciding to deal with the matter without a reference, I note the provisions in Regulation 883/2004 that will replace these provisions from May 2010. The general provision dealing with family benefits will be Article 67 (members of the family residing in another member State) of Chapter 8 (Family benefits). This 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."

The definition of "family benefit" in Article 1 is:

> "(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."

15 In her final submission, Mrs F questioned why the award to her and Mr F had been stopped on the date on which it was stopped while in other cases (of which she presented some evidence) awards had been stopped later. This point was not brought before the tribunal below. However, it is not something on which that tribunal, or the Upper Tribunal, can comment as between specific cases. If some legitimate expectation as to entitlement had arisen because of a general announcement then there might have been a matter to consider that was within the jurisdiction of the tribunal. However, no tribunal or court can comment on comparisons between individual cases unless all those cases are in issue before it. That is not so here. There may be an issue of administration arising that Mrs F can pursue with the Adjudicator's Office (see www.adjudicatorsoffice.gov.uk) but there is no issue of law on which I can comment.

David Williams
Upper Tribunal Judge
22 02 2010

[Signed on the original on the date stated]