

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CTC/3179/2009

1. This is an appeal by the Claimant, brought with the permission of the chairman, against a decision of a First-tier Tribunal sitting at Liverpool on 11 August 2009. For the reasons set out below I dismiss the appeal.

2. The Claimant is a man now aged 60. He and his wife were granted a residence order in respect of their granddaughter (Dominique), who is now aged 6, and they were awarded child tax credit in respect of Dominique from 6 April 2005.

3. The Claimant and his wife moved to Spain in October 2006, taking Dominique with them. The Claimant continued after the move to Spain to be in receipt of an ill-health pension from his employer, incapacity benefit and child benefit (in respect of Dominique).

4. Child tax credit also continued to be paid to the Claimant and his wife after the move to Spain. For the period 6 April 2007 to 5 April 2008 the amount of child tax credit awarded was £2,281.53.

5. However, it appears that at some time after the move to Spain payment of child tax credit was stopped, but was then reinstated again after a complaint by the Claimant, and payment of the arrears which had built up in the meantime was made, and a payment of £100 by way of compensation for distress and expense was apparently also made. The exact timing of these events is unclear, as no documentation relating to it is before me, but it appears from what the Claimant has said that payment was stopped in about February 2008, and then reinstated in about October 2008.

6. However, as a consequence of another case which HMRC was dealing with in the summer of 2008 HMRC received legal advice to the effect that child tax credit was not payable to persons living in an EEC country in the Claimant's circumstances, and accordingly a decision was made on 21 January 2009 that the Claimant and his wife were not entitled to child tax credit from 6 April 2008. HMRC accepts that the child tax credit which was paid in respect of the period from 6 April 2008 is not repayable.

7. The Claimant appealed against that decision, but the First-tier Tribunal, by the decision now under appeal to me, dismissed that appeal.

8. In June 2010 the Claimant's wife in fact returned to the UK with Dominique, but the Claimant has remained in Spain.

9. There can in my judgment be no doubt that the Tribunal was right to hold that the Claimant and his wife ceased to be entitled to child tax credit when they moved to Spain. That is undoubtedly so under the UK legislation: section 3(3) of the Tax Credits Act 2002 requires the claimant(s) to be "in the United Kingdom". However, account must of course also be taken of the overriding provisions of EEC legislation, and in particular Article 77 of Council

Regulation (EEC) No 1408/71. However, Article 77.1 only applied in respect of “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 ..” As is explained in the thorough and very helpful submission of Lynne Davies on behalf of HMRC in this appeal, HMRC did not originally appreciate that the fact that the initial part of Article 77.1 is confined to “family allowances” incorporated the definition of that expression in Article 1(u)(ii):

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

Clearly, child tax credit did not fall within the definition of “family allowances”, as it is a means tested benefit. Child credit therefore did not fall within the words “family allowances for persons receiving pensions for old age, invalidity, or an accident at work or occupational disease” in Article 77.1.

10. However, if Dominique had been the Claimant’s child, as opposed to grandchild, it is possible that the case might have fallen within the subsequent words of Article 77.1: “and increases or supplements to such pension in respect of the children of such pensioners.” In para. 11 of HMRC’s submission it is stated that:

“It is crucial to this appeal that Article 77.1 confines the meaning of benefits in relation to dependant children of pensioners strictly to family allowances within the meaning at Article 1(u)(ii) of the Regulation.”

That seems to me, at any rate as a matter of immediate impression, not to be right in that Article 77.1 goes on to include the additional wording which I have just referred to. The relevant “pension” in the present case was incapacity benefit. In view of the way in which it is calculated, it may possibly be correct to regard child tax credit as and “increase or supplement to” incapacity benefit. This is not a matter which has been canvassed before me, and neither does it seem to have been canvassed in CTC/1853/2009, in which Upper Tribunal Judge Williams held that the claimants there could not rely on Article 77.1. The point is not material in the present case because Dominique is not the Claimant’s child, and so in any event does not fall within the words “the children of such pensioners.” However, it would have been material in CTC/1853/2009, where the claimants were the parents of the child. That case would therefore have been wrongly decided if this is a good point. It is unnecessary for me to express any further view on the point.

11. I agree, for the reasons helpfully set out at length in HMRC’s submission, that there was no other provision of Regulation 1408/71, or of EC law, which could assist the Claimant.

12. As was pointed out in CTC/1853/2009, Regulation 1408/71 was replaced as from May 2010 by Regulation 883/2004. Child tax credit, as a “family benefit” within the definition in Article 1 of that Regulation, does fall

within Article 67. It therefore appears that, even if the Claimant's wife had not returned to England in June 2010, entitlement to child tax credit would have arisen as from the date when Regulation 883/2004 came into force. That is of course not a matter which I have to decide.

13. It is suggested in the Claimant's submission in reply in this appeal that he and his wife took on additional mortgage commitments in Spain on the footing that they would have a continued entitlement to child tax credit (although I note that in a letter dated 7 February 2009 (p.4) the Claimant said that the remortgage was taken out in order to obtain money on which to live when payment of child tax credit was stopped on the first occasion). This can not affect my decision one way or the other, which must be governed simply by whether the Claimant satisfied the statutory conditions of entitlement in accordance with the legislation, taking into account overriding provisions of EC law.

Charles Turnbull
Judge of the Upper Tribunal
3 September 2010