Neutral Citation Number: [2021] EWCA Civ 174

Case No: C3/2020/0248

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Jacobs
Case No. CF/5039/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2021

Before :

LORD JUSTICE DAVID RICHARDS
LADY JUSTICE ROSE
and
LORD JUSTICE DINGEMANS

- -

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellant**
- and -	
WENDY CARRINGTON	**Respondent**

- -

Julia Smyth (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellant**
Ms Carrington did not appear and was not represented

Hearing date : 11 February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 on 18 February 2021.

Lord Justice Dingemans :

Introduction

1. In this second appeal, for which permission was granted by Lewison LJ on 26 October 2020, the Commissioners for Her Majesty's Revenue and Customs ("HMRC") seek to raise points of law about articles 7 and 10 of Regulation (EC) 883/2004 ("the 2004 Regulation"). These points of law were not raised in the Tribunals below.

2. HMRC, at paragraphs 4 and 5 of a very helpful Replacement Skeleton Argument, accepted that they needed permission of the Court to argue these new points of law on appeal, notwithstanding the general grant of permission to appeal to the Court of Appeal.

3. The Court does have jurisdiction to hear appeals on points of law not raised below pursuant to section 14 of the Tribunals, Courts and Enforcement Act 2007, see *Miskovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16; [2011] 2 CMLR 20. The discretion to hear new points of law on appeal should not be exercised if it would be unfair to another party or would place the court in an untenable position. In *Miskovic* the Court made it clear that it would be extremely reluctant to allow such points to be argued if the point of law involved finding further facts.

4. In my judgment, in order to decide whether to exercise its discretion to permit HMRC to raise the new points of law in this appeal, the Court will need to consider a number of issues. These are: (1) the effect of granting such permission on Mrs Carrington; (2) whether the 2004 Regulation is still relevant after the UK's departure from the EU; (3) whether there are sufficient findings of fact to enable the court to determine these points of law; (4) whether the new points of law might have a decisive effect on this appeal; and (5) whether, in circumstances where Mrs Carrington has represented herself throughout the proceedings, there will be adequate representation of the opposite case.

5. Following a remote hearing on 11 February 2021 the Court announced that it would grant permission to HMRC to raise the new points of law for reasons to be set out later in writing. This judgment gives the reasons for permitting the point of law to be raised.

The relevant facts

6. The relevant facts are that Mrs Carrington, who lived in the UK, had a child who was born in May 2000. Child benefit was paid to Mrs Carrington in respect of her child pursuant to the Social Security Contributions and Benefits Act 1992 ("the Benefits Act 1992") and the Child Benefit (General) Regulations 2006 ("the Child Benefit Regulations 2006"). In August 2011 the Carrington family moved and went to live permanently in Spain. They described themselves as having retired and they were funded by their occupational pensions.

7. Mr and Mrs Carrington notified the Department for Work and Pensions ("DWP"), which was paying Disability Living Allowance ("DLA") in respect of the child, of their move to Spain. However child benefit is administered by HMRC. There was no communication between DWP and HMRC, and Mrs Carrington did not separately notify HMRC of the move.

8. When HMRC became aware of the move they decided that there had been an overpayment of child benefit and they stopped payment of the child benefit in May 2013. By a decision dated 24 January 2014 HMRC decided that Mrs Carrington had been overpaid child benefit from 5 September 2011 to 5 May 2013 in the sum of £1,766.10. This was because child benefit is a non-contributory, non means-tested benefit provided for by the Benefits Act 1992. Section 146(1) of the Benefits Act 1992 provides that 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. Section 146(2) provides that no person shall be entitled to child benefit unless he is in Great Britain in that week. The Child Benefit Regulations 2006 at regulation 24 provide that a person is not to be treated as being in Great Britain unless he is ordinarily resident here or if he has no right to reside here.

9. Mrs Carrington appealed against the decision by HMRC that she had been overpaid child benefit to the First-tier Tribunal (Social Entitlement Chamber) ("FTT (SEC)").

Proceedings in the First-tier Tribunal and Upper Tribunal

10. Mrs Carrington's appeal against HMRC's decision that benefits had been overpaid was dealt with by a non-oral disposal by the FTT(SEC). By a decision dated 10 July 2014 by First-tier Tribunal Judge ("FTTJ") Jacques Mrs Carrington's appeal was dismissed.

11. In a statement of Reasons for Decision FTTJ Jacques set out the relevant background. Mrs Carrington's absence from the UK for more than 52 weeks was noted and it was held that as Mrs Carrington was no longer ordinarily resident in the UK child benefit should not have been paid. FTTJ Jacques held that European Union law did not assist Mrs Carrington. An order for repayment of the sum was made.

12. Mrs Carrington appealed against the decision made by the FTT(SEC) to the Upper Tribunal (Administrative Appeals Chamber) pursuant to permission granted by FTTJ Jacques. The appeal was stayed in the Upper Tribunal pending the determination of *Bogatu v Minister for Social Care Protection* (Case C-322/17) in the Court of Justice of the European Union ("CJEU"). That case concerned article 67 of the 2004 Regulations and it was, in the event, found by the Upper Tribunal not to be relevant.

13. In the submissions to the Upper Tribunal the legal representatives then acting for HMRC submitted that article 7 of the 2004 Regulation, which provides that benefits shall not be withdrawn on the basis that the beneficiary lives in a member state other than that in which the institution responsible for paying is based, applied. However HMRC relied on article 68 of the 2004 Regulation, which provides for a rule of priority where benefit is payable in two different member states, and article 59 of Regulation (EC) 987/2009 ("the 2009 Regulation"), which provides that where the applicable legislation and/or the competence to grant family benefits change between member states during a calendar month, benefits should continue to the end of the month and the other institution of the other member state should be informed, to submit that HMRC had no obligation to pay Mrs Carrington after she had moved to Spain.

14. The appeal in the Upper Tribunal was determined on the papers by Upper Tribunal Judge ("UTJ") Jacobs in a decision dated 19 September 2019 [2019] UKUT 289 (AAC). UTJ Jacobs recorded the common ground that article 7 of the 2004 Regulation applied, and noted that this was consistent with the approach that he had taken in *KR v*

Secretary of State for Work and Pensions [2019] UKUT 85 (AAC). He held that article 68 of the 2004 Regulation did not apply because there was no evidence of an overlapping child benefit claim. He held that article 59 of the 2009 Regulation did not apply because it would otherwise override article 7 and it only applied when the legislation changed, which was not this case.

DLA

15. There were separate proceedings in the Tribunals in relation to DLA paid to the Mrs Carrington. It became common ground between the DWP and Mrs Carrington that the UK remained, for the purposes of DLA, the competent state and the DLA continued to be paid.

The amended grounds of appeal to the Court of Appeal

16. The first ground of appeal is that the Upper Tribunal erred in deciding that article 7 of the 2004 Regulation required the UK to continue paying child benefit after the move to Spain, or that the effect of article 7 was that the applicable legislation did not change. This was because child benefit, as a family benefit, only needed to be paid by the UK to persons resident in Spain, if either the UK's legislation applied or there was some specific provision in the 2004 Regulation requiring payment. The second ground of appeal is that the Upper Tribunal wrongly decided that article 68 of the 2004 Regulation did not apply. Finally in the third ground of appeal HMRC contend that the Upper Tribunal ought to have decided that article 10 of the 2004 Regulation applied.

17. Mrs Carrington in a letter dated 8 November 2020 contended that the UK remained the competent state to pay child benefit. Mrs Carrington asked for payment of the arrears of child benefit up until 2018 which was when her child left approved secondary education. In a further written submission dated 23 December 2020 Mrs Carrington stated that the argument remained the same and recorded that the DWP had accepted the position following the Upper Tribunal decision when continuing to pay DLA. In a final written submission Mrs Carrington confirmed that there was no outstanding DLA claim and that her son had transitioned to a Personal Independent Payment. Mrs Carrington confirmed that she wished to rely on the judgment of UTJ Jacobs in this case.

Mrs Carrington's position (issue one)

18. Mrs Carrington made various inquiries with the court in relation to the hearing of the appeal as she was acting in person about whether she could be represented by her husband or a family friend acting as a McKenzie friend. The Court, in a reply copied to both parties, dealt with the issue of a McKenzie friend and also suggested that Mrs Carrington might consider applying to Advocate, the Bar Council's pro bono unit, which does excellent work in providing pro bono representation in certain circumstances. In further emails Mrs Carrington expressed concern about representation, and about her exposure to costs if she should lose.

19. In response to these concerns HMRC wrote a letter to Mrs Carrington, copied to the Court, in which they made it clear that they would not seek costs from Mrs Carrington in the event that they succeeded on the appeal. HMRC also confirmed that they would not seek repayment of any benefits and would make payments of benefits to Mrs

Carrington, regardless of the outcome of the appeal. HMRC noted that their principal and principled interest was in the proper analysis of article 7 of the 2004 Regulation.

20. We are satisfied that HMRC have ensured that Mrs Carrington's position is not unfairly prejudiced by granting permission to HMRC to raise the new points of law. This means that Mrs Carrington remains able to appear and take a full part in the appeal, but is not under any obligation to do so.

The 2004 Regulation is still relevant (issue two)

21. The 2004 Regulation had direct effect in the UK pursuant to the European Communities Act 1972 when the UK was a member of the European Union. The UK has left the European Union, and the transitional arrangements under which European law continued to apply ceased to have effect on 31 December 2020. It appears, however, that special arrangements were made in Part Two, Title III of the Withdrawal Agreement, to which effect was given in section 7A of the European Union (Withdrawal) Act 2018 in respect of citizen's rights. In general terms it appears that articles 30 and 31 of the Agreement provide for the continued application of the 2004 Regulation in particular circumstances. This means that the points of law raised by HMRC are still relevant and important to future cases.

Sufficient findings of fact (issue three)

22. The essence of HMRC's submission is that Mrs Carrington moved permanently to Spain, in August 2011. This fact was found by the FTT and indeed appears to have been common ground throughout the proceedings below. If HMRC is right that child benefit is governed only by the Benefit Act 1992 and the Child Benefit Regulations 2006, and that article 7 of the 2004 Regulation does not affect this conclusion, I accept that there are sufficient findings of fact made by the FTT to permit the point to be argued. This would also mean that no new facts would need to be found.

Points of law might be decisive (issue four)

23. In granting permission to appeal Lewison LJ identified that the point about the exportability of child benefit was an important point of principle. At the hearing on 11 February the Court asked whether child benefit would have been affected by the provisions set out in article 24 of Directive 2004/38/EC known as the Citizens' Rights Directive. Ms Smyth submitted that the exportability of child benefit was not affected by the Citizens' Rights Directive, because it was submitted that the host member state was Spain.

24. The Court also asked how, if it was common ground that the UK was the competent state for the purposes of payment of DLA, Spanish law could apply to child benefit in circumstances where HMRC submitted in paragraph 9 of its Skeleton Argument that there is a "Basic rule: only one state's law applies at any one time". Ms Smyth submitted that DLA belonged to a class of benefits known as "sickness benefits" and that child benefit was "a family benefit". These were different types of benefits for the purposes of European Union law, and that it was possible to have different states dealing with different types of benefits. These are matters which can only be determined on appeal having heard full argument on the points.

25. There was also discussion at the hearing about whether DWP accepted the analysis of the benefits advanced by HMRC. The Court was told that DWP and HMRC have a common view of the proper workings of the 2004 Regulation. The Court was concerned that the view of DWP should be clear at the hearing of the appeal, and there was discussion about the possibility of DWP applying to intervene in the appeal.

Representation of opposing argument (issue five)

26. In circumstances where Mrs Carrington's position has, very properly, been protected by HMRC and Mrs Carrington was acting in person, it is obviously desirable to ensure that these new points of law should be the subject of other submissions. This is because the experience shows that a court is likely to come to a more accurate and reliable decision on the law having had the benefit of oral argument on both sides.

27. HMRC suggested that this was a case where the court was likely to be assisted by the appointment of an advocate to the court. I agree and the Court will take this matter forward through the appropriate channels. This will also ensure that the court will have the benefit of arguments that can be made in support of the judgment below.

Conclusion

28. In my judgment it is appropriate for this court to permit HMRC to raise the new points of law about articles 7 and 10 of the 2004 Regulation on appeal. Mrs Carrington's position has been protected, and there are sufficient findings of fact to enable the appeal to be effective. The points of law raised by the appeal were recognised to be important points of principle by Lewison LJ when granting permission to appeal, and it is apparent that the 2004 Regulation forms part of the EU law which continues to apply after the UK's departure from the European Union and the ending of transitional arrangements. It is apparent that these points of law have the potential to affect other cases and ought to be clarified. As was made clear in *Miskovic* at paragraph 124 the Court of Appeal exists, like every court, to do justice according to law. The new points of law can be entertained without unfairness and should be heard.

29. For the detailed reasons set out above, the Court granted permission to HMRC to raise the new points of law set out in their amended grounds of appeal at grounds one and three. The Court has adjourned the appeal to enable an advocate to the court to be appointed. The Court also made other directions in an attempt to ensure that the adjourned hearing of the appeal is effective.

Lady Justice Rose :

30. I agree.

Lord Justice David Richards :

31. I also agree.