

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

TAX CREDITS

Application by HMRC for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 24 January 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an application by HMRC for leave to appeal from the decision of a tribunal with reference CN/11211/18/53/I.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal.
3. I set aside the decision of the appeal tribunal under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 without making fresh findings of fact. I give the decision that I consider the tribunal should have given, namely that:
 - (a) the respondent has made a valid single claim to WTC for the tax year 2018/19.
 - (b) the respondent has made a valid joint claim to CTC along with his wife for the tax year 2018/19.
4. I direct HMRC to assess his entitlement to WTC and CTC for the 2018/19 tax year on this basis.

REASONS

Background

5. The respondent, a Polish national exercising European Union (EU) free movement rights as a worker in the United Kingdom (UK), made a claim to HMRC for tax credits (TC) for the tax year 2018/19 on 15 June 2018. In

the claim, he stated that he was responsible for three children. However, in his claim he did not refer to his wife, with the consequence that his claim was processed as a “single claim” under section 3(8) of the Tax Credits Act 2002. On 9 August 2018 HMRC decided that he was not entitled to TC. The respondent requested a reconsideration and on 5 November 2018 HMRC notified him that the decision had been reconsidered but not revised. He appealed.

6. The appeal was considered on 24 January 2022 by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal allowed the appeal, holding that he was entitled to TC on a joint basis from 15 June 2018. Both the respondent and HMRC requested a statement of reasons for the tribunal’s decision and this was issued on 23 August 2022. On 6 December 2022 HMRC applied to the LQM of tribunal for leave to appeal to the Social Security Commissioner. The LQM extended the time limit for admitting the application, which was late, but refused the application by a determination issued on 9 March 2023. On 25 May 2023 HMRC applied to a Social Security Commissioner for leave to appeal. This application was also late.
7. HMRC stated that the reason for lateness was that the determination notifying the refusal of leave to appeal by the LQM was sent to the wrong HMRC office on 9 March 2023. It was re-routed within HMRC, arriving at the desk of the responsible person only on 23 May 2023. He made the submission of the renewed application for leave to appeal on 25 May 2023.
8. Although it was not made within the statutory time limit, I admit the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

9. HMRC, represented by Mr Greenall, submitted that the tribunal had erred in law on the basis that, whereas the tribunal allowed the respondent’s appeal by holding that he was entitled to receive TC in a joint capacity, he had never submitted a joint claim and there was no statutory mechanism by which his claim as a single person could be treated as a joint claim.
10. The respondent was invited to make observations on the appellant’s grounds. He duly responded and indicated that he did not support the application.

The tribunal’s decision

11. The LQM has provided a statement of reasons for her decision. From this I can see that she had a set of appeal papers relating to the case including the original response papers prepared by HMRC, together with a supplementary response, evidence provided by the Migrant Centre NI on behalf of the respondent and a second supplementary response from

HMRC. The respondent attended and gave oral evidence by way of a Polish interpreter. HMRC was represented by Ms Rodgers.

12. The tribunal found that a TC claim was made by the respondent for the tax year 2018/19 in his sole name. He referred in the claim to being responsible for his three children, but did not mention his wife or the fact that all four were living in Poland. However, the tribunal accepted that documents submitted to HMRC by the applicant on 24 July 2018 made it clear that the children were at school in Poland and being cared for by their mother. The tribunal decided that the decision of 9 August 2018 disallowing TC - on the basis that information requested by HMRC had not been provided by the respondent - was flawed. It observed that no further attempt to obtain information had been made and found that it had been sent to the wrong section within HMRC. It found that all relevant information was with HMRC and that the claim should have been treated as a joint claim. It allowed the appeal on this basis.

Relevant legislation

13. By section 3 of the Tax Credits Act 2002 (the 2002 Act):
 - (1) Entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it.
 - (2)
 - (3) A claim for a tax credit may be made—
 - (a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom, or
 - (b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).
 - (4) Entitlement to a tax credit pursuant to a claim ceases—
 - (a) in the case of a joint claim, if the persons by whom it was made could no longer jointly make a joint claim, and
 - (b) in the case of a single claim, if the person by whom it was made could no longer make a single claim.
 - (5A) In this Part “couple” means—
 - (a) two people who are married to, or civil partners of, each other and are neither—
 - (i) separated under a court order, nor

(ii) separated in circumstances in which the separation is likely to be permanent, or

(b) two people who are not married to, or civil partners of, each other but are living together as if they were a married couple or civil partners.

(7) Circumstances may be prescribed in which a person is to be treated for the purposes of this Part as being, or as not being, in the United Kingdom.

(8) In this Part—

“joint claim” means a claim under paragraph (a) of subsection (3), and

“single claim” means a claim under paragraph (b) of that subsection.

14. By section 14 of the 2002 Act:

(1) On a claim for a tax credit the Board must decide—

(a) whether to make an award of the tax credit, and

(b) if so, the rate at which to award it.

(2) Before making their decision the Board may by notice—

(a) require the person, or either or both of the persons, by whom the claim is made to provide any information or evidence which the Board consider they may need for making their decision, or

(b) require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need for that purpose,

by the date specified in the notice.

(3) The Board’s power to decide the rate at which to award a tax credit includes power to decide to award it at a nil rate.

15. Some European legislation has been referred to in the course of the submissions. This is Article 1(z) and Article 67 of Regulation (EC) 883/2004. These provide:

“Article 1

(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 67

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...”

Submissions

16. In this case I have the benefit of written submissions HMRC and from an unnamed specialist adviser on behalf of the respondent. I am grateful to the authors of those submissions.
17. The factual circumstances are not disputed. These are that the applicant had made a claim for TC but had not made reference to his wife on the claim form, whereas he had referred to his three children. Although the respondent was living and working in the United Kingdom, his wife and children were living in Poland. He was not separated from his wife. The respondent signed the Declaration at page 11 of the form in his sole name, and there was no declaration made by his wife.
18. The original decision to disallow the claim was based on a failure to provide information to the HMRC on request. It stated:

“Your tax credits claim

I wrote to you on 11 July 2018 because I needed to check the information in your tax credits claim.

You’ve not sent me the information I asked for, so I’ve made a decision not to award your claim.

What this means

From the information you’ve given me I can’t confirm that:

- you’re entitled to claim tax credits as a single person, so I’m unable to award you any tax credits
- you’re responsible for qualifying children, so I’m unable to award you any Child Tax Credit”

19. In the reconsideration decision of 5 November 2018 it was stated:

“We’ve not changed our decision.

We received your claim on 15 June 2018.

On 9 August 2018 your claim was rejected as we had not received a reply to our letter.

...

Generally, where one member of the couple is in the UK and one member is living and working outside the UK, the person living in the UK should make a single claim for tax credits. There are three exceptions to this when a joint claim can be made:

- Where either customer or both customers are living in the European Economic Area (EEA) and are responsible for any children.
- Where they are Crown Servants posted abroad.
- Where their absence from the UK is temporary.

We have made our decision based on the following legislation, The Tax Credits (Claims and Notifications) Regulations 2002, Regulations 2 and 5 and Tax Credits Act 2002, section 3 and section 14 and Regulations EC No.883/04, Article 1(z)".

20. In its decision to allow the appeal, it can be seen that the tribunal reasoned that it was factually incorrect that the respondent had not replied to the HMRC request for information. Contrary to the assertion in the decision notice, it decided that the respondent had notified HMRC about his wife and children being in Poland and that he should therefore be entitled to TC on the basis of a joint claim from 15 June 2018.

The applicant's submissions

21. Mr Greenall for HMRC submitted that the tribunal had erred in law on the basis that the respondent had made the TC claim in a single capacity and that – since the factual circumstances indicated that he should properly have claimed in a joint capacity – the correct decision was to disallow the appeal.
22. He noted that the circumstances of this case occurred when the UK was still a Member State of the EU. Mr Greenall referred to the principle of European law, derived from Article 67 of Regulation (EC) 883/2004, that a person may be entitled to family benefits in accordance with the legislation of the competent Member State including for family members residing in another Member State. This was on the premise that CTC was a family benefit as defined in Article 1(z) of Regulation 883/2004.

23. He observed that, whereas UK domestic law precluded a joint claim with a person outside the UK, EU law overrode the relevant statutory provision. He submitted that the respondent should have ensured that his wife made a joint claim with him, accepting joint and severable liability for any overpaid TC. However, he submitted that no statutory process existed whereby a single claim could be amended to add or remove another claimant. He relied upon *R(TC)1/07* – a decision of former Great Britain Commissioner May QC to the effect that joint and single claims are mutually exclusive.

The respondent's submissions

24. The respondent duly replied with observations. He firstly pointed out that he had intended making a claim for both working tax credit (WTC) and child tax credit (CTC). He observed that WTC was not a family benefit for the purposes of Article 67 of Regulation (EC) 883/2004. He submitted that section 3 of the 2002 Act envisages a unitary claim for WTC and CTC and that the approach advocated by HMRC could not permit such a claim, as EEA nationals could not validly claim both WTC and CTC.
25. The respondent referred to the TC600 claim form and submitted that nowhere on it was an express request to state whether a claim was made singly or jointly. The practice of HMRC was to assume a joint claim where a partner's details were included on the form. However, the "Your partner" section clearly supposes that the partner is UK resident as it asks for the partner's postcode and a national insurance number.
26. It was submitted that no guidance was provided by HMRC to advise on its approach that the EU domiciled partner's details would be ignored for WTC purposes but taken into account for CTC purposes. It was submitted that it was not clear what would amount to a valid claim in these circumstances. In any event, it was submitted that the respondent had complied with the requirements of regulation 5 of the Tax Credits (Claims and Notifications) Regulations 2002 (the 2002 Regulations).
27. Reference was further made to guidance in the HMRC Tax Credits Manual to the effect that "A claim form that is completed in accordance with the instructions on the claim form notes and includes all the information requested is a valid claim". It was submitted that the claim form notes at the time did not deal with the scenario in this case, and if anything suggested a single claim. There was no request to provide information about his partner. Reference was made to the HMRC approach in a case referred to as *CTC/2599/2019*.
28. Reliance was further placed on recital 13 and recital 45 in the Preamble to Regulation 883/2004 and it was submitted that they set out principles that were infringed by the approach of HMRC in this case. Further reliance was placed on recital 9 in the Preamble to Regulation (EC) 987/2009 which laid down the procedure for implementing Regulation (EC) 883/2004. This reads:

“(9) The inherent complexity of the field of social security requires all institutions of the Member States to make a particular effort to support insured persons in order to avoid penalising those who have not submitted their claim or certain information to the institution responsible for processing this application in accordance with the rules and procedures set out in Regulation 883/2004(EC) and in this Regulation”.

29. Turning to the 2002 Regulations, it was submitted that regulation 13(3) permitted a claim made by one member of a couple to be treated as made by the other member (and so be a couple claim). As this was within the powers of HMRC, it was submitted that it was also within the powers of the tribunal. It was further submitted that *R(TC)1/07* should be distinguished from the present case on its facts.
30. HMRC duly responded. It was submitted that *CTC/2599/2019* did not establish any precedent, as it was an appeal withdrawn by HMRC, and that it dealt with a converse situation to the present case. HMRC reiterated the submission that no claim on a joint basis could be made in the circumstances.

Assessment

31. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
32. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
33. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
34. It appears to me that an arguable case has been made out by HMRC and therefore I grant leave to appeal.
35. The basic issue in the case is whether the tribunal was correct to hold that a claim made on a basis that suggested that it was a single claim under section 3(3)(b) of the 2002 Act could instead be progressed as a joint claim. However, a complicating factor in the present appeal is the EU law dimension, which has an impact on the application of section 3(3)(a) of the 2002 to the facts of the particular case.

36. Before proceeding, it is worth recalling the adjudication processes relevant to TC. In brief, section 3 of the 2002 Act makes entitlement to TC dependent upon making a claim for it. A claim may be made either as a joint claim or a single claim and relates to the whole of a particular tax year. Further practical provisions relating to claims are laid down in the 2002 Regulations. HMRC must then decide whether to make an award of TC under section 14. The award is not formally a decision on entitlement and it may be revised under section 15 or section 16 on the basis that the award differs from the rate to which the claimant is entitled. Section 17 provides to the making of a final notice for the tax year and a declaration by the claimant that the relevant circumstances were as specified. Section 18 provides for a decision on entitlement for the tax year in light of the final notice. The decision on entitlement is itself subject to a power to enquire into and to revise entitlement under sections 19, 20 and 21. Decisions under sections 14, 15, 16, 18, 19, 20 and 21 may be appealed.
37. In addressing the issues arising in this appeal, I consider that the starting point must be section 3(3) of the 2002 Act. This states, at section 3(3)(a), that a claim may be made jointly by a couple both of whom are aged at least sixteen and are in the United Kingdom; or, at section 3(3)(b), by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another). By section 3(8) a section 3(3)(a) claim is referred to as a "joint claim", and a section 3(3)(b) claim as a "single claim".
38. On the face of the primary legislation governing claims to TC, therefore, it is a condition of a joint claim that both claimants are in the United Kingdom. It is a condition of a single claim that the claimant is not entitled to make a joint claim. The respondent's wife was not in the United Kingdom. Whereas the Tax Credits (Residence) Regulations 2003 (the Residence Regulations) provide for treating some claimants as being in the UK when they are not, I do not understand them to alter the position of the respondent and his wife. Primary legislation precluded a joint claim by the respondent and his wife and plainly suggested that making a single claim would be the only way to proceed.
39. However, in its submissions to me, instead of placing reliance on the wording of the UK primary legislation, HMRC accepts that a principle of European Union law overrides it. HMRC submits that by Article 1(z) and Article 67 of Regulation 883/2004, an EU national exercising free movement rights is entitled to family benefits for family members even if they are living in another EU Member State. It is accepted that CTC is a family benefit. It is therefore submitted on behalf of HMRC that a joint claim can be made by the respondent on the premise that EU law qualifies the effect of section 3(3)(a) of the 2002 Act, which would otherwise require both joint claimants to be in the UK.
40. Stepping back from this, however, a difficulty can be observed. Section 1 of the 2002 Act reads:

“(1) This Act makes provision for—

(a) a tax credit to be known as child tax credit, and

(b) a tax credit to be known as working tax credit.

(2) In this Act references to a tax credit are to either of those tax credits and references to tax credits are to both of them...”.

41. As we have seen above, entitlement to a tax credit is dependent upon a claim for it. The respondent in the present case had sought to claim both CTC and WTC.
42. By section 8(1) of the 2002 Act, the entitlement of the person or persons by whom a claim for CTC has been made is dependent on him, or either or both of them, being responsible for one or more children or qualifying young persons. This indicates to me, as accepted by HMRC, that CTC is a family benefit for the purposes of Regulation 883/2004.
43. By section 10(1) of the 2002 Act, the entitlement of the person or persons by whom a claim for WTC has been made is dependent on him, or either or both of them, being engaged in qualifying remunerative work. This indicates to me that WTC is not a family benefit, but rather is dependent upon the nature of the claimant’s employment. Whereas there is also provision within WTC for a child care element, there was no claim for childcare costs at Part 3 of the TC600 claim form and no subsequent entitlement to childcare costs has been claimed. This tends to reinforce the position that WTC is not a family benefit in the particular case.
44. An anomaly results from this. It arises directly from the fact that the respondent was invited to complete a TC600, which is a claim for “tax credits”, rather than a single form for each tax credit he wished to claim. Moreover, the TC600 for the particular tax year did not invite the respondent to indicate expressly if he wished to make a single or a joint claim. Rather, HMRC relied upon the fact of whether or not he completed the section of the form headed “Your Partner” and the section headed “Declaration” to determine whether he had made a single or a joint claim. A claimant who provided no details for a partner will have been treated by HMRC as having made a single claim, and a claimant who included details for a partner will have been treated as having made a joint claim.
45. Returning to section 3(3)(a) of the 2002 Act, as observed previously, a claim for TC cannot be made jointly where one member of a couple is outside the UK. HMRC submits, however, that a joint claim can be made for CTC on the basis that Article 67 of Regulation 883/2004 requires it. I agree that the Regulation has direct effect and requires the UK presence condition in section 3(3)(a) to be disapplied in the specific context of CTC being a family benefit.

46. More generally, however, it seems to me that regardless of the possibility of disapplying section 3(3)(a) for the purposes of CTC, the same possibility cannot extend to WTC. A joint claim for WTC could not be made by the respondent under section 3(3)(a) as his wife was not present in the UK. As WTC is not a family benefit, there would be no requirement under EU law for that position to be altered and the domestic primary legislation could not be disapplied.
47. The resulting anomaly is that a joint claim could be made for CTC, while a single claim would have to be made for WTC. Any disapplication of primary UK legislation by reason of EU law would have to be applied in the most minimal way possible. I see no basis for treating both CTC and WTC as family benefits for the purpose of EU law, and therefore claimed jointly, even though were claimed in the same TC600 form.
48. Before addressing that matter further, I will return to the decision of the tribunal. As will be recalled, it was dealing with a situation where a decision had been made to refuse TC on the grounds that the respondent had not supplied sufficient information to determine his claim. In fact, the tribunal found, he had provided information about the factual circumstances of his children and his wife in correspondence. It accepted that he had also communicated the circumstances in the context of a telephone call to "Clare from Tax Credits" and that HMRC was certainly aware that he was one of a couple. It observed that the reasons given for refusing his claim were that he had not replied to a request for information. It found that the understanding of the facts of the HMRC decision maker was flawed. It found that there was no further attempt by HMRC to elicit information from the respondent. It found that, had the respondent's claim been sent to the appropriate section in a timely manner, it is likely that the claim would have been resolved in a manner favourable to him. In the context, it decided that the respondent was entitled to TC on a joint basis from 15 June 2018.
49. In the present challenge to that approach, HMRC submits generally that there is no statutory mechanism to amend a single claim so as to add or remove another adult claimant. Reliance is placed on *R(TC)1/07*. That case dealt with a situation where a single claimant was found to be living as part of an unmarried couple. It was found by HMRC and upheld by the tribunal that she was not entitled to make a single claim and had incurred an overpayment of TC. The tribunal had referred the case back to HMRC for recalculation as a joint claim on the basis that throughout the relevant period she had been living as part of an unmarried couple. HMRC submitted that as the claim had been made as a single person, this could not be done.
50. HMRC further points out that there are different legal consequences involved in making a single claim and a joint claim. By section 28 of the 2002 Act any payment of TC that is made in excess of entitlement is recoverable. In a single claim that excess is recoverable from the single claimant, whereas in a joint claim that excess is jointly and severally recoverable from both members of a couple. A consequence of making a

declaration jointly in the TC600 claim form is that each member of a couple is placed on notice that they share responsibility for the information given, is put on notice of financial penalties and liability to prosecution as a result of false information, and that each shares liability to repay any TC overpaid.

51. HMRC submitted that the language of the legislation made a deliberate distinction between joint and single claims. If entitlement in the present case was on a joint basis then both the respondent and his wife would not only have joint entitlement but they would also have joint and several liability for any overpayment. It was submitted that the tribunal was effectively imposing a legal liability on the respondent's wife, notwithstanding that she had never been a party to the claim. However, it appears to me that any liability regarding overpayment arises from section 28 of the 2002 Act rather than from the declaration made in a TC600 claim form.
52. In *R(TC)1/07* Commissioner May QC followed the earlier decision of the Deputy Commissioner in *CTC/3864/2004* when holding that claims made under section 3(3)(a) and 3(3)(b) were mutually exclusive. In the context, he noted the difference between entitlement decisions made under section 19(3) and award decisions which could be amended or terminated under section 16.
53. I consider that I should approach *R(TC)1/07* with caution in relation to the circumstances of the present case. This is because it was addressed to a situation where an entitlement decision had been given under section 18 of the 2002 Act and a review had commenced under section 19(3) into retrospective entitlement for two previous tax years. In the present case, the relevant decision was a decision not to make an award under section 14. There was no section 18 entitlement decision involved. I consider that the circumstances in *R(TC)1/07* are not equivalent to those in the present case.
54. In the present case a claim had been submitted. An enquiry had been made by HMRC and the respondent had replied. I understand that his reply was overlooked and that in turn led to the rejection of his claim on the basis that "we had not received a reply to our letter". This was found by the tribunal to be factually wrong. Regulation 5(7) of the 2002 Regulations expressly permits claims to be amended before a section 14 decision has been notified. In these circumstances, as submitted by the respondent, it appears to me that the tribunal was entitled to consider new matters in the same way as HMRC was entitled to. This situation is not on all fours with *R(TC)1/07*.
55. I am also conscious of evolving jurisprudence in social security law over the past 20 years. This has tended to emphasise that benefits adjudication is inquisitorial rather than adversarial. For example, in the case of *ML-v-Department for Communities* [2021] NI Com 47, I commented at

paragraphs 78-80, regarding the adjudication processes of the Department for Communities in Northern Ireland that:

“78. In *Kerr v. Department for Social Development* Baroness Hale stated, at paragraph 61-62, that the process of benefits adjudication is inquisitorial rather than adversarial. In determining entitlement to benefit, both the claimant and the Department must play their part. The Department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. Lord Hope had said at paragraph 15:

“in this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the Department must contribute”.

79. In the context of claims, facts which may reasonably be supposed to within the claimant’s own knowledge are for the claimant to supply at each stage of the appeal. However, the claimant must be given a reasonable opportunity to supply them.

80. Benefit rules are complex and sometimes counterintuitive and cases such as *Hinchy* and *Kerr* are founded on the premise that claimants cannot be expected to know them. That is why the duty on the claimant is to respond to the instructions given by the Department and to complete forms in the manner required by the Department. However, as in *Kerr v Department for Social Development*, the claimant is entitled to expect the Department to play its part, particularly where those instructions have been complied with”.

56. It seems to me that deciding whether a single or joint claim may be made for TC in the present case is relatively complex. I consider that the TC600 form does not place the onus of that decision on the respondent, or claimants generally. Rather, it seeks to elicit information that should allow HMRC to make that determination. Whereas the respondent had not mentioned his wife in Poland in the initial claim, he had furnished information about her subsequently and before a section 14 award decision had been made. In principle, I consider that it was open to the tribunal to find that a joint claim was made, even in the context where the TC600 otherwise pointed to a single claim, where subsequent information had come to light that pointed towards a joint claim.

57. I also observe that by the Tax Credits (Claims and Notifications) Regulations 2002, regulation 13(3), “a claim for a tax credit made by one member of a couple is to be treated as also made by the other member of the couple in such manner and in such circumstances as the Board may decide”. Whereas I understand that this may refer in particular to telephone claims as a category, this provision would generally appear to give flexibility and discretion to permit interchangeability between single and joint claims.
58. It also seems to me that the approach adopted in *Kerr* is a good fit with the principles of EU social security law relied upon by the respondent who, as observed above, relied upon recital 9 in the Preamble to Regulation (EC) 987/2009 which laid down the procedure for implementing Regulation 883/2004. Although it was not referred to in argument before me, a more directly relevant provision would appear to be Article 60 of Regulation (EC) 987/2009 on the procedure for applying Articles 67 and 68 of the basic Regulation. Article 60(1)-(2) reads:

“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. [my emphasis]

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.

...”

59. It follows that I do not fault the tribunal for applying the principle that it can treat a claim initially made on its face as a single claim as in fact a joint claim. However, I next need to consider whether by treating the ostensibly single claim as a joint claim in the circumstances of the case it has applied the law correctly.
60. As seen above, by section 3(1) of the 2002 Act, entitlement to TC is dependent upon making a claim. It is also the case that by section 3(3)(a) a joint claim could only be made by a couple who were actually present in the UK or deemed to be present under the Residence Regulations. The respondent's wife was not present and, as I understand it, could not be deemed present under the Residence Regulations. Therefore, the respondent was not entitled to make a joint claim under section 3(3)(b).
61. Against this background, HMRC points out that section 3(3)(a) was not compatible with EU law as it stood at the material time. I consider that this submission was correct as far as CTC was concerned. However, it also appears to me that it was not correct as far as WTC is concerned. Whereas Article 67 of Regulation 883/2004 gave a right to CTC in the UK while a member of a couple was outside the UK in another Member State, it did not confer the same right to WTC as it was not a family benefit. Therefore, this approach produces an inconsistency.
62. The situation is more complex than the tribunal had observed. As far as WTC is concerned, the respondent was required by section 3(3)(b) to make a single claim and HMRC to process the claim as a single claim. To the extent that the tribunal decided otherwise, that amounts to an error of law. I consider that I must allow the appeal and set aside the decision of the appeal tribunal to that extent.
63. As far as CTC is concerned, the respondent was also required by domestic legislation to make a single claim. However, I consider that HMRC was obliged under EU law to disapply the requirement that both members of a couple should be in the UK. This would have the implication that the CTC claim should be determined as a joint claim.

Disposal

64. I set aside the decision of the appeal tribunal and I make the decision the tribunal should have made.
65. I conclude that the respondent has made a valid single claim to WTC for the tax year 2018/19.
66. I conclude that the respondent has made a valid joint claim to CTC along with his wife for the tax year 2018/19.

67. I direct HMRC to assess his entitlement for the 2018/19 tax year on this basis.

(signed): O Stockman

Commissioner

24 June 2024