

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

As the decision of the First-tier Tribunal (made on 25 July 2016 at Leicester under reference SC314/16/00858) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: regulation 13 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI No 2005) must be read so as not to deprive the claimant of the social advantage of her husband's Dutch entitlement to invalidity benefit.

REASONS FOR DECISION

A. What this appeal is about

1. This appeal concerns the Commissioners' decision under section 18 of the Tax Credits Act 2002 governing the claimant's entitlement to tax credits for the tax year 2014/2015. The issue is whether the award of working tax credit should have included a child care element pursuant to section 12 of the Act and regulation 13 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI No 2005). One condition for the inclusion of that element in an award is that the claimant's partner must be incapacitated (regulation 13(1)(c)(i)). Regulation 13(4)-(12) contains numerous circumstances in which a person may be shown to be incapacitated by reference to awards of benefit relating to incapacity. None of those conditions is satisfied. The claimant's partner does, however, receive a Dutch invalidity benefit. If he were receiving the British equivalent, it would fall within regulation 13(6)(b).

B. The oral hearing

2. Having received the parties' written submissions, I decided that an oral hearing would assist me to answer the questions I had set for myself. It was held on 15 June 2017. Manisha Ghelani of Leicester Welfare Rights represented the claimant. Tom Rainsbury of counsel represented the Commissioners. By the end of the hearing, further issues had been identified, which were the subject of written submissions. I am grateful to Mrs Ghelani and to Mr Rainsbury for their assistance in this appeal both at the hearing and in their subsequent submissions.

C. The specific issues

3. The issues I identified in my grant of permission were:

- Is regulation 13(4)-(12) exhaustive of the incapacity conditions that may be satisfied?
 - Should the Dutch benefit payable to the appellant's partner be treated as sufficient evidence of incapacity?
 - Is the appellant being deprived of a social advantage contrary to Article 7(2) of Regulation (EU) 492/2011?
4. The other issues identified at the hearing were:
- Is Article 5 of Regulation (EC) 883/2004 relevant?
 - Could the claimant's partner have made a claim for employment and support allowance credits?
 - Does regulation 13 affect the general freedom of workers and discourage people from coming to the United Kingdom?

D. The tax credit legislation

5. Section 12 of the Tax Credits Act 2002 provides for a child care element in the calculation of entitlement to working tax credit:

12 Child care element

(1) The prescribed manner of determination of the maximum rate at which a person or persons may be entitled to working tax credit may involve the inclusion, in prescribed circumstances, of a child care element.

(2) A child care element is an element in respect of a prescribed proportion of so much of any relevant child care charges as does not exceed a prescribed amount.

6. Detailed provision for the child care element is made in the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002:

13 Entitlement to child care element of working tax credit

(1) The determination of the maximum rate must include a child care element where that person, or in the case of a joint claim at least one of those persons, is incurring relevant child care charges and—

- (a) is a person, not being a member of a couple, engaged in qualifying remunerative work;
- (b) is a member or are members of a couple where both are engaged in qualifying remunerative work for not less than 16 hours per week; or
- (c) is a member or are members of a couple where one is engaged in qualifying remunerative work for not less than 16 hours per week and the other—
 - (i) is incapacitated;
 - (ii) is an in-patient in hospital; or
 - (iii) is in prison (whether serving a custodial sentence or remanded in custody awaiting trial or sentence); or

(iv) is entitled to carer's allowance under section 70 of the Social Security Contributions and Benefits Act 1992.

(2) For the purposes of paragraph (1) a person is not treated as incurring relevant child care charges where the average weekly charge calculated in accordance with regulation 15 is nil or where an agreement within regulation 15(4) has not yet commenced.

(4) For the purposes of paragraph (1)(c)(i) the other member of a couple is incapacitated in any of the circumstances specified in paragraphs (5) to (12).

(5) The circumstances specified in this paragraph are where housing benefit is payable under Part 7 of the Contributions and Benefits Act to the other member or the other member's partner and the applicable amount of the person entitled to the benefit includes a disability premium on account of the other member's incapacity or regulation 28(1)(c) of the Housing Benefit Regulations 2006 (treatment of child care charges) applies in that person's case.

(6) The circumstances specified in this paragraph are where there is payable or - in the case of a credit - an entitlement in respect of him one or more of the following—

- (a) short-term incapacity benefit payable at the higher rate under section 30A of the Contributions and Benefits Act;
- (b) long term incapacity benefit under section 40 or 41 of the Contributions and Benefits Act;
- (c) attendance allowance under section 64 of that Act;
- (d) severe disablement allowance under section 68 of that Act;
- (e) disability living allowance under section 71 of that Act;
- (f) increase of disablement pension under section 104 of that Act;
- (g) a pension increase under a war pension scheme or an industrial injuries scheme which is analogous to an allowance or increase of disablement pension under sub-paragraph (b), (d) or (e) above;
- (h) contributory employment and support allowance or a limited capability for work credit, where entitlement to that allowance or statutory sick pay or a benefit or allowance mentioned in sub-paragraph (a) or (b) or (d), has existed for a period of 28 weeks comprising one continuous period or two or more periods which are linked together provided that, if the person received statutory sick pay, the person satisfied the first and second contribution conditions set out in paragraphs 1 and 2 of Schedule 1 to the Welfare Reform Act;
- (i) personal independence payment;
- (j) armed forces independence payment.

(6A) In paragraph (6)(h), the reference to contributory employment and support allowance is a reference to an allowance under Part 1 of the Welfare Reform Act 2007 ("the 2007 Act") as amended by the provisions of

Schedule 3 , and Part 1 of Schedule 14, to the Welfare Reform Act 2012 that remove references to an income-related allowance, and a contributory allowance under Part 1 of the 2007 Act as that Part has effect apart from those provisions.

(7) The circumstances specified in this paragraph are where a pension or allowance to which sub-paragraph (c), (d), (e) or (f) of paragraph (6) refers, was payable on account of his incapacity but has ceased to be payable only in consequence of his becoming a patient.

(8) The circumstances specified in this paragraph are where he has an invalid carriage or other vehicle provided to him under section 5(2)(a) of and Schedule 2 to the National Health Service Act 1977, section 46 of the National Health Service (Scotland) Act 1978; or Article 30(1) of the Health and Personal Social Services (Northern Ireland) Order 1972.

(9) The circumstances specified in this paragraph are where, on 31st March 2013, council tax benefit was payable under Part 7 of the Contributions and Benefits Act (as then in force) to the other member or the other member's partner and the applicable amount of the person entitled to the benefit included a disability premium on account of the other member's incapacity.

(10) Paragraph (9) is subject to paragraphs (11) and (12).

(11) Paragraph (9) does not apply unless the other member of the couple was incapacitated (for the purposes of paragraph (1)(c)(i) and regulation 4(1) Second condition, Third variation (c)(i)) solely by virtue of that person or their partner having been in receipt, on 31st March 2013, of council tax benefit which included a disability premium on account of the other member's incapacity, and none of the other circumstances specified in paragraphs (5) to (8) applied on that date.

(12) If—

(a) the other member of the couple is incapacitated in the circumstances specified in paragraph (9), and

(b) the couple ceases to be entitled to working tax credit (for any reason) on or after 1st April 2013,

that member of the couple shall not be treated as incapacitated in the circumstances specified in paragraph (9) in relation to any subsequent claim.

7. Part of regulation 4 is relevant to the interpretation of regulation 13:

4 Entitlement to basic element of Working Tax Credit: qualifying remunerative work

(1) Subject to the qualification in paragraph (2), a person shall be treated as engaged in qualifying remunerative work if, and only if, he satisfies all of the following conditions (and in the case of the Second condition, one of the variations in that condition).

First condition

...

Third variation: In the case of a joint claim where a person or any other member of the polygamous unit is responsible for a child or qualifying young person, the person—

...

- (c) is aged at least 16 and undertakes work for not less than 16 hours per week and that person's partner is—
 - (i) incapacitated and satisfies any of the circumstances in regulation 13(4) to (12); ...

E. The EU legislation

8. These are the relevant provisions Regulation (EC) 883/2004:

Article 1

Definitions

For the purposes of this Regulation:

- (l) 'legislation' means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1); ...

Article 3

Matters covered

- 1. This Regulation shall apply to all legislation concerning the following branches of social security:
 - (a) sickness benefits;
 - (b) maternity and equivalent paternity benefits;
 - (c) invalidity benefits;
 - (d) old-age benefits;
 - (e) survivors' benefits;
 - (f) benefits in respect of accidents at work and occupational diseases;
 - (g) death grants;
 - (h) unemployment benefits;
 - (i) pre-retirement benefits;
 - (j) family benefits.

Article 5

Equal treatment of benefits, income, facts or events

Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

- (a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;
- (b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

9. Regulation (EU) 492/2011 provides for equality of treatment in respect of social advantages:

Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers.

F. Is regulation 13(4)-(12) exhaustive of the incapacity conditions that may be satisfied?

10. Yes. Mr Rainsbury argued that this was the natural reading of regulation 13 taken on its own. I am not so sure about that. It may be that it could have been better worded to indicate that regulation 13(4) to (12) was not exhaustive of the meaning of 'incapacitated', but it could also have been better worded to indicate the opposite. However, regulation 13 has to be read in the context of the Regulations as a whole and I accept Mr Rainsbury's argument that the provision for the third variation in regulation 4(c)(i) can only be read as meaning that regulation 13(1)(c)(i) has no separate existence apart from regulation 13(4) to (12). In those circumstances, I do not need to deal with Mr Rainsbury's alternative argument based on purpose, policy and consequences.

G. Should the Dutch benefit payable to the appellant's partner be treated as sufficient evidence of incapacity?

11. No. This follows from my interpretation of regulation 13. If the claimant is to succeed, it must be on the grounds of EU law.

H. Can the claimant rely on Article 5 of Regulation 883/2004?

12. No. Mrs Ghelani's ingenious argument was that the claimant's husband could rely on Article 5. As I understood her argument, it was this. The husband is within the personal scope of the Regulation and the benefit that he was awarded in Holland is within its material scope. Therefore Article 5 ensured that that award had the same legal effect in this country as it did in Holland.

13. I accept Mr Rainsbury's argument that it is important to have regard to the definition of 'legislation' in Article 1 when applying Article 5. How does that affect the application of Article 5(a) and (b)? I take them in turn.

Article 5(a)

14. If this country is the competent State, we are concerned with our social security legislation, which does not include the tax credit legislation. Under the social security legislation, the receipt of (say) an employment and support allowance has the effect that the claimant is treated as having limited capability for work and, possibly, for work-related activity. The social security legislation does not have the effect that the claimant is treated as incapacitated for the purposes of entitlement to the child care element in working tax credit. That benefit only arises under tax credit legislation, which is outside the scope of Regulation 883/2004. It follows that the claimant cannot rely on her husband's receipt of an equivalent to employment and support allowance under Article 5(a).

15. If Holland is the competent State, the same result arises, because 'legislation' in both places means legislation relating to social security covered by Regulation 883/2004.

Article 5(b)

16. Again, if this country is the competent State, under our social security legislation, the fact that a claimant has limited capability for work and, possibly, for work-related activity has certain consequences. But it does not have the effect of satisfying a condition for the child care element. That is the effect of tax credit legislation, which is different legislation and not within the scope of Article 883/2004. It follows that Article 5(b) does not apply.

17. If Holland is seen as the competent State, the effect of its award is that the claimant's husband is incapacitated. But the effect of Article 5(b) is that Holland not this country - must take account of like facts or events in other States. That cannot help the claimant in this country.

I. Is the appellant being deprived of a social advantage contrary to Article 7(2) of Regulation (EU) 492/2011?

18. Yes.

19. I do not need to burden this decision with a detailed statement of the law on Article 7(2), as I can rely on the statement by Upper Tribunal Judge Turnbull in *MR v Commissioners for Her Majesty's Revenue and Customs* [2011] UKUT 40 (AAC). In short, the issue is whether regulation 13 is intrinsically liable to affect

migrant workers more than national workers and, if so, whether there is a risk that it places them at a particular disadvantage compared with national workers.

20. Mr Rainsbury argued that neither of these tests was satisfied. Regulation 13 was not likely to affect a substantially higher proportion of migrant workers than national workers and the claimant was able to make a claim for one of the benefits listed. If there was a difference between Dutch and British social security benefits, that is a consequence of there being no requirement for harmonisation under EU law. The claimant's husband could surrender his Dutch benefit and claim an employment and support allowance.

21. I do not accept these arguments. First, as Mrs Ghelani has pointed out, if the claimant's husband were to surrender his Dutch benefit and claim an employment and support allowance, the amount of his Dutch benefit would be treated as his notional income under regulation 106 of the Employment and Support Allowance Regulations 2008, as he would have deprived himself of it for the purpose of securing entitlement to employment and support allowance. It may be that this would not entirely wipe out his entitlement – that would only be known when the Secretary of State had decided any claim he might make for an employment and support allowance - but the position is not as simple as Mr Rainsbury suggested.

22. Second, it is intrinsically likely that regulation 13 will affect a substantially higher proportion of migrant workers than national workers. We are only concerned with those who are incapacitated. By definition, it is only migrant workers who will be affected by the exclusion from regulation 11 of equivalent benefits from other member States. Not all migrant workers will be affected, because some will not have benefits from other States. They can simply claim the relevant British benefit, so long as this country is the competent State. Otherwise, they are prevented or at least hampered if they surrender their benefit in order to claim the British equivalent. British workers simply not in that position.

23. Third, this surely puts them at a particular disadvantage as compared with British workers.

J. Does regulation 13 affect the general freedom of workers and discourage people from coming to the United Kingdom?

24. No. I cannot see any scope for applying the general principle of freedom of movement independently of the issue of social advantage.

25. It seems to me dangerous to approach freedom of movement as a general principle, as it can result in overwriting the EU legislation. It is true that the Court of Justice of the European Union regularly refers to freedom of movement, but that is always in a context. as I said recently in *IG v Secretary of State for Work and Pensions* [2016] UKUT 176 (AAC), reported as [2016] AACR 41:

36. In prohibiting exclusion of entitlement, the Court has, as Mr Mills pointed out, referred to the freedom of movement of workers. The flaw in his reliance on this general principle is that it proves too much by removing the statements that he cites from their context. It is beyond argument that

freedom of movement is a fundamental principle of EU law and that it must not be restricted unduly. But that does not mean that it can be applied in every context and without regard to its effect on EU legislation. Mr Mills did not limit or qualify his argument by reference to any conditions other than to rely on the claimant being resident in this country as the dependent of her son who was exercising his freedom of movement as a worker. I reject that argument as presented.

37. Unlimited resort to general principles of freedom of movement, non-discrimination and equal treatment would allow the Court of Justice of the European Union and any national court applying EU law to rewrite any EU subordinate legislation to the extent that it might hamper freedom of movement. Mr Mills argued that in this case it would be an impediment to the claimant's son exercising that freedom if the claimant could not, when she joined him in her retirement, obtain social security for her care needs at a rate appropriate to the living conditions in this country. But where would this argument end? Resort to this basic principle could rewrite vast tracts of Directive 2004/38 and undermine the principle of coordination that is the stated purpose of Regulation 883/2004. The ultimate logic of the argument is to lead to increasing harmonisation of social security benefits across the EU. That is not the purpose of the Regulation, as the Court has regularly stated. It would also allow, or even encourage, forum shopping when claimants or their families have connections with a number of States. That would be inconsistent with the coordination principle on which the Regulation is based.

26. The Court has acknowledged that a particular measure can provide a deterrent to freedom of movement without interfering: *Weigel and Weigel v Finanzlandesdirektion für Vorarlberg* (Case C-387/01) at [53]-[55]. That is especially so in the case of social security, as EU law provides only for coordination rather than harmonisation: *da Silva Martins v Bank Betriebskrankenkasse – Pflegekasse* (Case C-388/09), [2011] ECR I-5761 at [72].

K. The credits issue

27. Given my decision, it is not necessary to examine this issue, which was discussed in the written submissions after the hearing.

L. Outcome

28. The result is that regulation 13 must be read so as not to deprive the claimant of the social advantage of basing a claim for the child care element of working tax credit on her husband's incapacity as evidenced by his award of Dutch invalidity benefit.

**Signed on original
on 05 September 2017**

**Edward Jacobs
Upper Tribunal Judge**