Claiming Child Benefit Without Breaching the Public Funds Condition

The exemption for those otherwise excluded as persons subject to immigration control based on being a member of a family of an EEA national

Note prepared for the Housing and Immigration Group (HIG) by Desmond Rutledge, Garden Court Chambers

Preface

This article discusses the provision whereby non-EEA nationals who would otherwise be excluded from claiming welfare benefits as persons subject to immigration control ('PSIC') may, nevertheless, be treated as not so excluded for certain benefits if they are a family member of an EEA national (which includes UK nationals).

For the avoidance of doubt, the exemption does not apply to non-EEA nationals who do not have leave to remain in the UK. Moreover, the exemption does not appear to benefit 'Zambrano carers' who have a right to reside in the UK under the EEA Regulations 2006 as their right to reside is deemed to be an excluded right for benefit purposes following the amendment to the habitual residence test within the benefit regulations in November 2012.

The general exclusion under section 115

It is well known that those who have been granted leave to remain in the United Kingdom but who have a 'no recourse to public funds' condition attached to their leave (including those who have been granted leave under Appendix FM of the Immigration Rules), would be in breach of that condition if they claim or receive additional 'welfare benefits', which are defined as 'public funds' in paragraph 6 of the Immigration Rules (the interpretation section). Moreover, a person in that position would come within the general exclusion to most welfare benefits and to tax credits as someone who is a 'person subject to immigration control' pursuant to section 115 of the Immigration and Asylum Act 1999 (and the equivalent provision in section 42 of the Tax Credits Act 2002).

The exemptions under the 2000 Regulations

What is less well known is that while the primary legislation does not contain any exceptions to the PSIC rule, it does contain a power to create regulations which exempt persons of specified categories or descriptions from the general exclusion in section 115(3)-(4). This is acknowledged in the Immigration Rules, which at paragraphs 6A and 6B reads (emphasis added):

> *"6A For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds merely because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).*
>
> *"6B. **....** a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits Act 2002."*

The relevant regulations are the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, as amended by SI 2013/1474.

Regulation 2 makes provision for certain people not to be excluded from entitlement to certain benefits under section 115 of the Immigration and Asylum Act who would otherwise be excluded under that section. Regulation 2(2) provides an exemption to certain non-means-tested benefits and reads: (emphasised added)

> ***"**For the purposes of entitlement to attendance allowance, severe disablement allowance, carer's allowance, disability living allowance, personal independence payment a social fund payment or child benefit under the Contributions and Benefits Act, as the case may be, a person falling within a category or description of persons specified in Part II of the Schedule is a person to whom section 115 of the Act does not apply."*

In other words, a PSIC is eligible to claim the non-means-tested benefits listed above, including child benefit, if they come within one of the categories contained in the four paragraphs. The relevant provision is in paragraph 1 of Part II of the Schedule and provides (emphasis added):

> *"A member of a family of a national of a State contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993 as modified or supplemented from time to time."*

The exemption therefore covers a claimant who is a PSIC who claims an entitlement to child benefit on the basis that they are a member of a family of an EEA national. The UK is a contracting party to the EEA agreement. This means the provision includes cases where the claimant is a member of a UK family. The guidance for decision makers issued by HM Revenue & Customs states that the claimant is covered if their family member is an EEA or Swiss national or a UK national: Child Benefit Technical Manual CBTM10140 - Residence and immigration: immigration - exceptions to the general exclusion:

> "People who are subject to immigration control are not excluded from entitlement to child benefit if they are a family member (spouse or partner) of a person who is a UK, EEA or Swiss national.
>
> If the child being claimed for is an EEA national, this would also allow for this exception to apply."

It follows that a non-EU national who is a PSIC who comes within this exception under the 2000 Regulations is exempt from both section 115, and for child benefits purposes, section 42, of the Tax Credit Act 2002, such that they should not be treated as 'not present in Great Britain' under the habitual residence test in regulation 23 of the Child Benefit (General) Regulations 2006 (SI 2006/223).

Case law on the exemption

The proper interpretation of this provision has been the subject of litigation before the Social Security Commissioners in Great Britain and Northern Ireland. The provision was initially considered by Deputy Commissioner Poynter in CDLA/708/2007, a case which involved a claim for Disability Living Allowance made by a sibling of a child with Irish nationality. The claimant was an Indian national aged 13, who suffered from a severe learning disability. He came to the United Kingdom to join his mother and lived with both his parents (who were also Indian) and with his younger sister, then aged 8 years old, who was a citizen of the Republic of Ireland. The claimant's leave to enter was subject to the condition that he should not have recourse to public funds, and this remained the case upon subsequent grants of leave to remain.

It was argued on behalf of the claimant that: (i) the Republic of Ireland is a contracting party to the EEA Agreement; (ii) therefore his sister is 'a national of a State contracting party to the Agreement on the European Economic Area' within paragraph 1 of Part II; (iii) that the claimant was a 'member of her family; (iv) therefore, s 115 did not apply to him and he was not excluded from entitlement to DLA either under that section or under regulation 2 of the

Social Security (DLA) Regulations 1991 (SI 1991/2890) (which contains a cross reference to section 115).

After acknowledging that "at first sight this submission seems unanswerable" the Deputy Commissioner nevertheless held that the provision should not be interpreted as "bearing its ordinary English meaning". Instead, the Deputy Commissioner held that: (i) paragraph 1 was intended to comply with the UK's international obligations under the EEA agreement; (ii) this meant the provision should both be interpreted in accordance with the EEA agreement; (iii) an individual cannot have greater rights under the EEA agreement than those conferred on them as a citizen of the Union under EU law; (iv) it followed that as the claimant's sister was not exercising any rights under EU law, the claimant could not derive any additional rights from his relationship with his sister under the EEA agreement which he did not have as a citizen under EU law. The Deputy Commissioner therefore dismissed the appeal.

In JFP-v-Department for Social Development (DLA) [2012] NICom 267 the Chief Commissioner of Northern Ireland declined to follow the approach of Deputy Commissioner Poynter of Great Britain in CDLA/708/2007. The claimant in JFP was a citizen of the United States of America. She is married to a citizen of the UK who was born in England. The claimant came to Northern Ireland with her husband in October 2007. Her passport contained a UK entry clearance visa, valid for the period from October 2007 to October 2009, which was endorsed with a 'no recourse to public funds' condition. JFP, who was represented by the Law Centre (Northern Ireland), submitted that the decision in CDLA/708/2007 was wrong. Those submissions appear at paragraph 26 of the decision and the relevant parts are reproduced below:

> " … Deputy Commissioner Poynter crucially fails to set out what international obligation under the EEA agreement the UK was intending to comply with by the introduction of the provisions of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000. EU Regulations are directly applicable in the UK. He fails to identify any obligation under the EEA agreement which would require the introduction of domestic provisions in relation to attendance allowance, severe disablement allowance, invalid care allowance, disability living allowance, a social fund payment or child benefit such as those in regulation 2 and Part II to the Schedule of the 2000 Regulations. If the reasoning of Deputy Commissioner Poynter is adopted, then it is submitted that the drawing up of these exceptions was a pointless exercise as all EEA nationals who are exercising rights and freedoms under the EEA Agreement, and their family members, would be entitled to claim the stated benefits without seeking to rely on the exception. It is submitted that in singling out these six benefits the legislature decided to go beyond the rights afforded to such claimants under EU law.
>
> Deputy Commissioner Poynter does not take into consideration the fact that the immigration rules do not regard DLA as public funds in a case such as this.

> The legislature has made clear provision in other benefits such as IB, JSA, IS and HB for entitlement to benefit to rely upon compliance with detailed residence rules. It cannot be presumed that the legislature has simply made a mistake in the wording of this provision and has omitted in error that only family members of those exercising rights or freedoms under the EEA agreement can benefit from the provision.
>
> In his decision Deputy Commissioner Poynter failed to address the issue that the relevant provision refers to six specific benefits, namely: disability living allowance, attendance allowance, severe disablement allowance, invalid care allowance, social fund and child benefit. He does not offer any explanation for why the provision deals specifically with these benefits. He does not consider the issue of how applications are treated for other benefits."

The Chief Commissioner plainly found these arguments persuasive and at paragraph 43 concludes that the claimant does fall within the category provided for in paragraph 1 to Part II of the Schedule, saying:

> "I have arrived at this conclusion by applying what are, in my view, the clear and unambiguous legislative provisions set out above. Those provisions are straightforward, are logical in sequence and application, and are not capable of ambiguity or uncertainty. There is no requirement, in my opinion, to look behind or further analyse the wording of those legislative provisions to attempt to identify a purpose or construction which was clearly not intended." (At para [44]).

The Chief Commissioner said in addition that if an interpretation based on the purpose of the provision was required, then in his view the correct starting point should be the purpose of the legislative provisions in the 2000 Regulations themselves rather than any intention to give effect to the EEA agreement (paras [46], [52]). The Chief Commissioner also notes that, unlike the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003), the 2000 Regulations do not expressly exclude the UK from its definition of an "EEA State". Consequently, JFP's appeal was allowed and she was held to be entitled to claim DLA under the exemption.

Whilst a decision of a Commissioner in Northern Ireland is not formally binding in Great Britain case law has established that identically worded provisions operating in Northern Ireland and Great Britain should be interpreted uniformly: see R(SB)1/90 at para [15]. CCS/4994/2002, para [30] and *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699, para [26].

Conclusion

Given the above, if a non-EEA national is part of a family unit which contains an EEA national (which includes a UK national), they should be able to claim child benefit under this exemption. This includes those who have been granted leave on the basis of their family life with a person who is a British Citizen under the Appendix FM to the Immigration Rules

where this is subject to a no recourse to public funds condition. Hence, the Home Office should not consider a claim for child benefit in these circumstances as a breach of the 'no recourse to public funds' condition for the reasons given in paragraph 6B of the Immigration rules.

Postscript on Zambrano carers

If someone has been recognised as a *Zambrano* carer under Regulation 15A of the Immigration (EEA) Regulations 2006 (SI 2006/1003), they will have a derived right to reside in the UK within the terms of reg 15A. However, a Zambrano carer's right to reside is deemed to be a non-qualifying right for benefit purposes and Zambrano carers have been excluded from claiming child benefit since 8 November 2012 by virtue of the Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612). Consequently, whilst the question has not been tested in the Upper Tribunal (AAC), it would appear that Zambrano carers do not benefit from the exemption in paragraph 1 of Part 2 of the Schedule to the 2000 Regulations discussed above.

Further information

For further details of the exemptions to the PSIC rule in Section 15 see Chapter 14 of *Macdonald's Immigration and Practice* (9th edn January 2015) on 'Welfare Provision for Migrants and Asylum Seekers' at paras 14.10-14.19.

Desmond Rutledge
March 2015