



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 63

P880/20

OPINION OF LORD TYRE

In the petition of

ALI ADNAN AND MRS SAIMA ADNAN

Petitioners

for

Judicial Review of a decision of Her Majesty's Revenue and Customs in relation to the petitioners' entitlement to child tax credits.

Petitioners: M Dailly (sol adv); Drummond Miller, LLP

Respondents (HM Revenue and Customs): G MacIver, Office of the Solicitor to the Advocate General for Scotland

15 June 2021

Introduction

[1] The petitioners are husband and wife. On 14 February 2013 they applied for asylum in the United Kingdom. That application was refused and they became appeal rights exhausted on 17 August 2015. On 20 January 2018 they made further submissions which were accepted as a fresh claim, and on 4 October 2019 they were granted refugee status. They received letters on 17 and 18 December 2019 containing formal notification of their status. On 23 December 2019 they made a successful claim for Universal Credit.

[2] On 14 January 2020, the petitioners made a claim for child tax credit backdated to the date of their application for asylum in 2013. By decisions dated 27 March and 18 September 2020, the respondents (HMRC) refused to accept the petitioners' claim. It is common ground that no statutory appeal lies against a decision to refuse to accept a claim, as opposed to a decision to refuse to make an award. In these proceedings the petitioners seek reduction of those decisions and declarator that the decisions were ultra vires of HMRC and separatim unlawful and irrational. The petition came before me for a substantive hearing in the form of a debate.

Entitlement of refugees to tax credits

[3] Tax credits were abolished on 1 February 2019 and replaced by the Universal Credit system. The following is a summary of the application to asylum seekers of the tax credit system prior to its replacement by Universal Credit.

Statutory provisions of general application

[4] Entitlement to tax credits generally was conferred by the Tax Credits Act 2002 ("the 2002 Act"), section 8 of which contained the basic requirements for entitlement to child tax credit. Sections 14 to 23 contained provisions relating to the making of decisions by HMRC on claims for tax credits. All of these sections were repealed by article 2 of the Welfare Reform Act 2012 (Commencement No 32 and Savings and Transitional Provisions) Order 2019/167 ("the Commencement No 32 order"), with effect from 1 February 2019. By virtue of article 3(1) and (2) of that Order, however, the repeal does not apply to an award of a tax credit that has effect for a period that includes 31 January 2019.

[5] The Tax Credits (Claims and Notifications) Regulations 2002/2014 (“the 2002 Regulations”), made under the 2002 Act and amended from time to time, regulated the making of claims for tax credits generally. Regulation 5 prescribed the manner in which a claim was to be made, specifying inter alia that a claim had to be made in writing on a prescribed form and to include certain specified information. Regulation 7 set out circumstances in which a claim could be treated as having been made on a date up to three months (reduced in 2012 to 31 days) before the date on which the claim was actually received by HMRC: in other words, for the backdating of a claim for such a period.

Entitlement of asylum seekers to tax credits

[6] Regulation 3(1) of the Tax Credits (Immigration) Regulations 2003/653 (“the 2003 Regulations”) stated:

“No person is entitled to child tax credit or working tax credit while he is a person subject to immigration control, except in the following Cases, and subject to paragraphs (2) to (9).”

For present purposes it is necessary to set out the terms of paragraphs (4) to (8) of regulation 3, as amended up to date:

- “(4) Where a person has submitted a claim for asylum as a refugee and in consequence is a person subject to immigration control, in the first instance he is not entitled to tax credits, subject to paragraphs (5) to (9).
- (5) If that person—
 - (a) is notified that he has been recorded by the Secretary of State as a refugee or has been granted section 67 leave, and
 - (b) claims tax credit within one month of receiving that notification, paragraphs (6) to (9) ... shall apply to him.
- (6) He shall be treated as having claimed tax credits—
 - (a) on the date when he submitted his claim for asylum, and
 - (b) on every 6th April (if any) intervening between the date in subparagraph (a) and the date of the claim referred to in paragraph (5)(b), rather than on the date on which he makes the claim referred to in paragraph (5)(b).

(7) Regulations 7, 7A and 8 of the Tax Credits (Claims and Notifications) Regulations 2002 shall not apply to claims treated as made by virtue of paragraph (6).

(8) He shall have his claims for tax credits determined as if he had been recorded as a refugee on the date when he submitted his claim for asylum.”

[7] In summary, the effect of these provisions was to exclude an asylum seeker from entitlement to tax credits while his or her claim for asylum as a refugee was being determined, but then, if refugee status was granted, to treat him or her as having made a claim for tax credits at the time when the claim for asylum was submitted and every year thereafter; in other words, to allow the claim (if otherwise admissible) to be backdated to the application for asylum.

Replacement of tax credits by universal credit: transitional provisions

[8] For present purposes, the key transitional provisions are contained in the Welfare Reform Act 2012 (Commencement No 23 and Transitional and Transitory Provisions)

Order 2015/634 (“the Commencement No 23 Order”). Article 7, so far as material, states:

“(1) Except as provided by paragraphs (2) to (6), a person may not make a claim for housing benefit, income support or a tax credit... on any date where, if that person made a claim for universal credit on that date..., the provisions of the Act listed in Schedule 2 to the No 9 Order would come into force under article 3(1) and (2)(a) to (c) of this Order in relation to that claim for universal credit.

...

(8) Subject to paragraph (9), for the purposes of this article—

(a) a claim for housing benefit, income support or a tax credit is made by a person on the date on which he or she takes any action which results in a decision on a claim being required under the relevant Regulations; and

(b) it is irrelevant that the effect of any provision of the relevant Regulations is that, for the purpose of those Regulations, the claim is made or treated as made on a date that is earlier than the date on which that action is taken.

...

(11) For the purposes of this article—

...

(g) ‘the relevant Regulations’ means—

...

(iii) in the case of a claim for a tax credit, the Tax Credits (Claims and Notifications) Regulations 2002”.

The issue

[9] The issue for determination is whether the effect of article 7 of the Commencement No 23 Order is to disentitle the petitioners from claiming any tax credits referable to the period beginning with the date of one or other of their claims for asylum and ending with the replacement of tax credits by Universal Credit on 1 February 2019.

Argument for the petitioners

[10] On behalf of the petitioners it was submitted that their entitlement to claim tax credits under regulation 3 of the 2003 Regulations had been preserved by article 3 of the Commencement No 32 Order. Article 7 of the Commencement No 23 Order did not operate to disentitle them. It was a transitional provision applicable to “ordinary” tax credit claimants, ie not to asylum seekers to whom the 2003 Regulations applied. Article 7(8)(a) of the Commencement No 23 Order, which provided that a claim was made on the date when the claimant took action resulting in a decision being required under “the relevant Regulations”, remained subject to Regulation 3(6) of the 2003 Regulations which treated the claim as having been made on the date when a claim for asylum was submitted.

Article 7(8)(b) had no application to the petitioners because “the relevant Regulations” referred to therein were the 2002 Regulations, article 7 of which was disapplied by article 3(7) of the 2003 Regulations in relation to claimants such as the petitioners. The

words "that date" in article 7(1) of the Commencement No 23 Order had to be read subject to the mandatory direction in regulation 3(6) of the 2003 Regulations. As at the dates of their original and fresh claims for asylum, the petitioners could not have applied for Universal Credit and so article 7 of the Commencement No 23 Order did not exclude entitlement to child tax credits.

[11] There was a presumption under section 16 of the Interpretation Act 1978 against repeal of the petitioners' right to claim child tax credits without express statutory provision. The petitioners had a standalone right to backdated tax credits from the 2003 Regulations and 2019 Order, whose terms were precise and clear. They preserved the right of refugees to make such a claim. Parliament had not intended to remove that right; had it so intended, it would not have amended the 2003 Regulations after enacting the Commencement No 23 Order. Reference was made to Bennion, *Statutory Interpretation* (7th ed, 2019) at section 27.10), recently approved and applied by the Inner House in *SW v Chesnutt Skeoch Ltd* [2021] CSIH 11 at paragraph 30.

Argument for HMRC

[12] On behalf of HMRC, it was submitted that article 7 of the Commencement No 23 Order was determinative of the issue. Its effect was that where the Universal Credit provisions applied to a person because they had the ability to make such a claim in an area where those provisions had been rolled out, they were prevented from making a claim for legacy benefits, including child tax credit. The petitioners were entitled to – and did – claim Universal Credit. No claim could be made for tax credit. Regulation 3 of the 2003 Regulations did not assist them: a recognised refugee's entitlement to tax credits depended upon their making a claim under regulation 3(5)(b). That possibility was excluded by

article 7(1) of the Commencement No 23 Order. The petitioners' argument elided two separate issues by arguing that regulation 3(6) deemed their tax credit claim to have been made at the time of their claim for asylum. That was so only within the scheme set out by the 2003 Regulations themselves, where the deeming in regulation 3(6) could occur only if an actual claim had been made on time in accordance with regulation 3(5)(b), ie within one month of the grant of asylum. The deeming could not disapply regulation 3(5)(b) itself.

There was no basis for interpreting the words "that date" in article 7(1) of the Commencement No 23 Order as meaning the date deemed by regulation 3(6) to apply for the purposes of those Regulations.

[13] It was accepted that the petitioners fell within the saving provision in article 3 of the Commencement No 32 Order, but that did not assist them. Regardless of that saving, article 7(1) of the Commencement No 23 Order excluded any claim for tax credits at the date when it had been made. Article 7 did not bear upon entitlement to tax credits but on ability to make a claim, regardless of whether the claim would be ongoing or in respect of a historical period. Article 7(8) was express in defining, for its own purposes, when a claim was made, namely the date on which the claimant took any action which resulted in a decision on a claim being required under the relevant Regulations, ie the 2002 Regulations. Although certain of the 2002 Regulations were disapplied to asylum seekers by regulation 3(7) of the 2003 Regulations, others were not, including regulation 5 which specified the requirements for making a claim. Although there was no provision equivalent to article 7(8)(b) in respect of the 2003 Regulations, this was of no significance because article 7(8)(b) merely served as a clarification. Article 7(8)(a) had the same effect without it. No rational legislative purpose would be served by applying a deeming provision to

successful asylum seekers where deeming was disapplied for the majority of claimants.

Such an interpretation would be absurd.

[14] There was nothing arbitrary or odd about this result. Universal Credit was a new benefit and was intended to be a self-contained scheme. The removal of the petitioners' ability to make a backdated claim for child tax credit was a consequence of the replacement of the legacy benefits system, including tax credits, by Universal Credit, provided for in the 2002 Act. Any transition to a new system would entail some individuals having different entitlements from those that they might previously have had.

[15] The petitioners' reliance on section 16 of the Interpretation Act 1978 was unfounded because at the time of enactment of the Commencement No 23 Order they had had no "right" that could have been removed. By the time they were granted refugee status, any right to claim tax credits had been repealed. The passage from Bennion had been approved in *SW v Chestnutt Skeoch Ltd* in a different context.

Decision

[16] In my opinion the petitioners' argument is to be preferred. The critical point of dispute is whether the terms of article 7(1) and (8) of the Commencement No 23 Order entirely exclude the possibility of a claim being made under regulation 3(5)(a) of the 2003 Regulations to which the backdating in regulation 3(6) is capable of applying. They do not do so expressly, and the argument presented on behalf of HMRC depends upon a distinction being drawn between entitlement to tax credit on the one hand and the possibility of "making a claim" for tax credit on the other, with the latter having been cut off by the prohibition in the opening words of article 7(1) read together with article 7(8)(a).

[17] At first sight, the wording of article 7(8)(a) is puzzling in that it refers to the date on which a claimant takes any action which “results in a decision on a claim being required under the [2002] Regulations”. The statutory provisions regarding the making of decisions are not contained in the 2002 Regulations; as I have noted, they are in the Tax Credits Act 2002 itself. It seems, however, that on a proper reading article 7(8)(a) is referring to action consisting of the making of a claim that meets the conditions in the 2002 Regulations, with the consequence that a decision on it has to be made. Those conditions will include the formalities specified in regulation 5 of the 2002 Regulations which, as HMRC point out, is not disapplied to claims for tax credits by persons relying upon the 2003 Regulations. The starting point, in practical terms, in the present case is therefore that the petitioners’ claim for child tax credit was made on 14 January 2020.

[18] Turning then to the provisions of the 2003 Regulations (which have not been repealed), it is common ground that the petitioners’ claim for tax credit was submitted within one month of receiving notification of their recording as refugees. That means, in terms of regulation 3(5), that regulation 3(6) applies to them. I reject the contention by HMRC that regulation 3(5) itself constitutes a barrier which must be overcome before the deeming provision in regulation 3(6) is reached: regulation 3(5) does no more than state that if particular conditions are met (as they are in this case), the deeming provision takes effect. The argument that the reference to a claim in regulation 3(5) can be read in isolation is circular and, in my view, unsustainable.

[19] Regulation 3(6) then treats the petitioners as having claimed tax credits on the date of their claim for asylum and on every subsequent 6 April. I find no reason to treat that deeming provision as overridden by article 7 of the Commencement No 23 Order. In my opinion the opposite interpretation is preferable: because the petitioners’ claim is treated as

having been made on the dates specified in regulation 3(6), they simply fall outside the prohibition in article 7(1). Such an interpretation is confirmed by the closing words of regulation 3(6), which make clear that the dates in that sub-paragraph are to be substituted for “the date on which he makes the claim”. This is the same phraseology as that used in article 7(1) and in my view affords a clear indication that the distinction relied upon by HMRC is not to be drawn. The terms of regulation 3(8) are also consistent with the petitioners’ interpretation.

[20] Again contrary to the submission on behalf of HMRC, I regard it as significant that Parliament has seen fit, in article 7(8)(b) of the Commencement No 23 Order, expressly to exclude the backdating provision in regulation 7 of the 2002 Regulations (applicable to tax credit claimants generally) but has made no mention of regulation 3(6) of the 2003 Regulations. In technical provisions of such complexity, this cannot in my view be dismissed as a “lacuna”. It is rather an indication that Parliament has not sought, in the transitional provisions for the introduction of Universal Credit, to amend the special rules relating to claims for tax credits by asylum seekers, and in particular has not sought to interfere with the scheme in the 2003 Regulations whereby persons seeking asylum as refugees were excluded from entitlement to certain credits unless and until their refugee status was confirmed, at which time a backdated claim could be made.

[21] On the interpretation that I prefer, it does not seem to me that the petitioners’ argument based on section 16 of the Interpretation Act 1978 adds much. I have held that there is no statutory provision removing the entitlement to backdated tax credits that accrued to them when they obtained refugee status and made a timeous claim. HMRC’s argument was founded upon an alternative interpretation of the relevant statutory

provisions, rather than on a proposition that the entitlement could be removed without express provision.

[22] For these reasons I hold that the petitioners are entitled to the orders for reduction and declarator that they seek. It was conceded on their behalf that the court could not at this stage go further and hold them entitled to receive child tax credits from 14 February 2013 when they first claimed asylum. That claim was unsuccessful and I am advised that HMRC will wish to consider whether any entitlement to tax credits that the petitioners may have goes no further back than 20 January 2018 when they made the fresh claim that was accepted. The petitioners' claim will therefore now have to be determined afresh by HMRC, with regard being had to my decision in these proceedings.

Disposal

[23] I shall sustain the petitioners' first and second pleas in law and grant the orders sought in sub-paragraphs 4(i) and (ii) of the petition, and repel the respondents' pleas.