



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 2
P880/20

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Reclaiming Motion by

HER MAJESTY'S REVENUE AND CUSTOMS

Respondents and Reclaimers

against

MR ALI ADNAN AND MRS SAIMA ADNAN

Petitioners and Respondents

in the petition for

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

**Respondents and Reclaimers: Maciver; Office of the Solicitor to the Advocate General for Scotland
Petitioners and Respondents: M Dailly (sol adv); Drummond Miller LLP**

18 January 2022

Introduction

[1] Welfare benefits have come and gone in different forms over the years. The main current benefit for those unable to work is universal credit. It was introduced by the

Welfare Reform Act 2012. It replaced the working tax credit and child tax credit regime ushered in by the Tax Credits Act 2002.

[2] Universal credit did not come into force on a single date. Instead it was progressively rolled out by postcode area. It did not cover the whole of the United Kingdom until 1 February 2019. Subject to a few exceptions, tax credits were abolished on the same date.

[3] The petitioners are a married couple who applied for asylum in 2013. They did not attain refugee status until six years later. Their immigration history is as follows:

2013 – 2018

14 February 2013	application for asylum (subsequently refused and unsuccessfully appealed to the First-tier Tribunal)
17 August 2015	appeal rights exhausted
20 January 2018	submitted further representations (subsequently accepted by the Home Secretary as a fresh claim)

2019

4 October	granted refugee status
17 & 18 December	received formal confirmation of new status
23 December	successful claim for universal credit

2020

14 January	made claim for child tax credit backdated to 2013
27 March	HMRC refused to accept the claim
21 May	requested reconsideration of decision
18 September	HMRC confirmed its March decision

Present proceedings

[4] In these proceedings for judicial review the petitioners contend that HMRC's decisions refusing to accept their claim for child tax credit and confirming the refusal were

unlawful. They invite the court to reduce the two decisions. HMRC adopt the contrary stance. They submit that the decisions correctly implemented the relevant legislation.

[5] At an early stage, the parties reached agreement on two procedural issues. First, HMRC (quite properly) declined to rely on the fact that the petitioners raised these proceedings well outside the time limit for judicial review. It did so because the parties had engaged in extensive correspondence about the correct mode of challenge for over a year. Subsequently, the court extended the three month period. Second, if the petitioners' arguments prevailed, HMRC would determine whether they would be entitled to receive child tax credits from either: (a) the date of the original asylum claim - 14 February 2013; or (b) the date of making fresh representations - 20 January 2018.

[6] After a substantive hearing, the Lord Ordinary sustained the petitioners' first and second pleas in law, repelled HMRC's pleas, and granted the orders sought.

Legislative framework

[7] A thicket of subordinate legislation governs the 2002 and 2012 benefit regimes. The dispute between the parties centres on four statutory instruments.

The 2002 Regulations

[8] The Tax Credits (Claims and Notifications) Regulations 2002 specify that a tax credit claim must be (i) made in writing, (ii) on an approved form, and (iii) contain information about the applicant's national insurance number: regulation 5. Awards can be backdated by up to 31 days (originally 3 months) from the date of claim: regulation 7.

The 2003 Regulations

[9] The Tax Credits (Immigration) Regulations 2003 state that, in the first instance,

asylum seekers are not entitled to tax credit: regulation 3 (4). But if the Home Secretary notifies a person that he has been recorded as a refugee, and that person makes a claim within one month, he is eligible for tax credit: regulation 3 (5). Further, in terms of regulation 3 (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 [that] date ... 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).”

The 2015 Order

[10] Article 7 of the Welfare Reform Act 2012 (Commencement No. 23 and Transitional and Transitory Provisions) Order 2015 Order provides that:

“(1) ... a person may not make a claim for ... 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) ... for the purposes of this article—

(a) a claim for ... 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 [2002] Regulations; and

(b) it is irrelevant that the effect of any provision of the [2002] 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. ...”

The 2019 Order

[11] The Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019 abolished tax credits on 1 February 2019: article 2. That was, however, again subject to certain savings (article 3), which - as HMRC accept - apply to the petitioners.

Are the petitioners entitled to claim backdated child tax credit?

[12] The 2003 Regulations and the 2015 Order each appears to supply a different answer to the central issue. Regulation 3 allows the petitioners to claim child tax credit. Article 7 does not.

[13] HMRC submit that article 7 excludes the claim. They argue that its terms are unambiguous. Once individuals are entitled to claim universal credit, they cannot claim backdated child tax credit. The attractive simplicity of that construction runs into three major difficulties.

[14] First, it treats regulation 3 as being of no force or effect. The 2015 Order, however, did not (as HMRC accept) expressly revoke or repeal it. Indeed it did not refer to the 2003 Regulations at all. In sharp contrast it materially amended the 2002 Regulations. As to implied revocation or repeal, regulation 3 conferred a contingent right on asylum seekers. Clear language is required to remove such a right: section 16 of the Interpretation Act 1978; *Bennion on Statutory Interpretation* 8th ed. section 27.9. That language is absent here.

[15] Second, since the 2015 Order came into force, regulation 3 has been amended on three occasions: 10 March 2015, 20 July 2018, and 1 January 2021. HMRC submits that there remained a small pool of individuals who were entitled to claim tax credits until they were abolished on 1 February 2019. This only provides an explanation for amendments made before this date. They fail to explain why amendments were being made after this date to a redundant regulation.

[16] Third, it yields an arbitrary result. A refugee's ability to claim backdated child tax credit would turn on a random event - whether universal credit has been rolled out in a particular area. In other words, it would truly be a "postcode lottery".

[17] We prefer the alternative interpretation. The words “that date” in article 7(1) refer to the deemed date of the asylum claim in terms of regulation 3(6). That construction reconciles the two provisions. Neither takes primacy over the other. Instead they mesh. It also avoids an absurd result.

[18] Article 7(8)(a) does not assist HMRC. The petitioners have complied with regulation 5 of the 2002 Regulations. There is nothing to prevent them from making a claim under regulation 3(6). Article 7 itself contains a list of other exceptions where claims for tax credit may be made. A mechanism must exist for such claims.

[19] HMRC also advance a broader contention. They submit that Parliament could not have intended to allow refugees to continue to benefit from backdated claims, while excluding such claims for the majority. No material, whether in the nature of a policy statement, ministerial statement to Parliament or any *travaux préparatoires*, was cited in support of this contention. It is difficult to explain why article 7(8)(b) expressly excluded the backdating of other tax credit claims under the 2002 Regulations, but only did so implicitly in relation to regulation 3(6) claims.

[20] The Lord Ordinary’s decision was followed in *R (on the application of DK) v HM Revenue and Customs* [2021] EWHC 1845 (Admin). Bourne J did so on the broad ground of comity. He expressed some doubt about the conclusion. He queried why there had been no express exception for refugees’ tax credit claims in the 2015 Order. We understand the basis for his doubt, but for the reasons given above hold that the result is sound.

Conclusion

[21] We refuse the reclaiming motion. All questions of expenses are reserved.