Neutral Citation Number: [2022] EWCA Civ 120

Case No: C1/2021/1289

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Bourne
[2021] EWHC 1845 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE SINGH
and
LADY JUSTICE ANDREWS

- -

Between :

THE QUEEN (on the Application of DK)	**Respondent**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Interested Party**

- -
- -

Galina Ward (instructed by the **Solicitor's Office and Legal Services, HMRC**) for the **Appellants** and the **Interested Party**
Simon Cox and Michael Spencer (instructed by the **Child Poverty Action Group**) for the **Respondent**

Hearing date: 25 January 2022

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10 a.m. on Tuesday, 8 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Singh :

Introduction

1. This appeal arises from Bourne J's order (sealed on 5 July 2021), granting the claim for judicial review of a decision by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to refuse the Respondent's claim for backdated child tax credit: *R (DK) v HMRC* [2021] EWHC 1845 (Admin); [2021] 4 WLR 122. The Judge granted permission to appeal to this Court.

2. The issue is whether a claim for the backdated tax credit, under the system of the Tax Credits Act 2002 ("the 2002 Act"), is valid for the period of time before a person is recognised as a refugee, as provided for by regulations made under the 2002 Act; or whether article 7 of the Welfare Reform Act 2012 (Commencement No. 23 and Transitional and Transitory Provisions) Order 2015 ("the 2015 Order") prevents such a claim being made.

3. The Appellants are HMRC and the Interested Party is the Secretary of State for Work and Pensions. The Appellants' case is that, under article 7 of the 2015 Order, a claim for tax credits is made on the date on which any action is taken which results in a decision on the claim being required. In this case that date was 28 January 2020, after asylum was granted to the Respondent; but by that date no further child tax credit claims were possible owing to the introduction of Universal Credit in the area where the Respondent was resident.

4. The Respondent maintains that the Judge was correct to hold that he should be treated as having claimed tax credits on the date when he claimed asylum, and on 6 April (the first day of the tax year) in subsequent years. If the earlier date is the relevant date, then the Respondent will be entitled to tax credits for the period from the date of his asylum claim until 2 July 2016, when his son left full-time education.

5. In essence the Respondent's case is that regulations 3(5)-(8) of the Tax Credits (Immigration) Regulations 2003 (SI 2003 No. 653) ("the 2003 Regulations"), made pursuant to section 42 of the 2002 Act, provide for a refugee, once recorded as such, to claim tax credits for the period from the date when their claim for asylum was made. The Appellants rely on the Tax Credits (Claims and Notifications) Regulations 2002 (SI 2002 No. 2014) ("the 2002 Regulations"), made pursuant to section 4(1) of the 2002 Act, which make provisions for the making of claims as referred to in article 7 of the 2015 Order.

6. In granting the Respondent's claim for judicial review on this ground, Bourne J followed the decision of the Outer House of the Court of Session in *Adnan v HMRC* 2021 CSOH 63; 2021 SLT 883 (Lord Tyre) in the interests of comity, although he expressed his doubts about that decision. The appeal in *Adnan* was dismissed by the Inner House shortly before the hearing of the appeal before this Court: 2022 CSIH 2 (Lord Woolman, giving the Opinion of the Court, which included the Lord President, Lord Carloway, and Lord Pentland).

Factual Background

7. On 21 December 2009 the Respondent arrived in the United Kingdom from Sri Lanka with his wife and son (then aged 11) and on the next day submitted a claim for asylum. The Respondent had three asylum claims refused and in August 2012 his receipt of asylum support payments ended.

8. On 5 April 2016 the Respondent made his final claim for asylum. On 2 July 2016 the Respondent's son left full-time education aged 18: on that date any entitlement to child tax credit ended. However, as the Respondent was for all of this time a person "subject to immigration control", he could not claim any "legacy" benefits before receiving a positive decision on his claim for asylum.

9. On 25 October 2017 the Respondent's area became a "full service area" for the purposes of Universal Credit.

10. On 1 February 2019 section 33(1)(f) of the Welfare Reform Act 2012, abolishing tax credits, came into force, subject to certain saving provisions made under article 3(1) of the Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order (SI 2019 No. 167), which are not material for present purposes.

11. On 19 December 2019 the Secretary of State for the Home Department granted the Respondent's claim for asylum and on 3 January 2020 the Respondent's solicitor received a letter confirming this.

12. On 21 January 2020 the Respondent made a claim for Universal Credit. The Respondent was not able to claim for the child element of Universal Credit at this time, as his son had already left full-time education and Universal Credit did not permit any backdated element.

13. On 28 January 2020 the Respondent posted a completed tax credit claim form to HMRC along with a written request for a backdated award.

14. On 17 February 2020 the Appellants sent a letter to the Respondent's advisor, Refugee Action, stating that they were no longer accepting any new claims for tax credits. On 25 February 2020 the Respondent sought a mandatory reconsideration of this decision from the Appellants.

15. In May 2020 the Respondent received a letter from the Appellants dated 8 April 2020 stating that he was not allowed to make a new claim for tax credits. On 19 May 2020 the Respondent replied to the Appellants seeking a mandatory reconsideration of that decision in his case. On 7 July 2020 the Appellants issued a reconsideration notice and refused to change their decision.

Material legislation

Tax credits

16. Section 3(1) of the Tax Credits Act 2002 states:

> "Entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it."

17. Section 4(1) of the 2002 Act provides:

> "Regulations may –
>
> (a) require a claim for a tax credit to be made in a prescribed manner and within a prescribed time,
>
> (b) provide for a claim for a tax credit made in prescribed circumstances to be treated as having been made on a prescribed date earlier or later than that on which it is made, …"

18. Section 42(1) of the 2002 Act provides that regulations may make provision in relation to persons "subject to immigration control" (a) for excluding entitlement to, or to a prescribed element of, child tax credit, or (b) for this part of the Act to apply subject to other prescribed modifications.

19. Section 42(2) of the 2002 Act provides that the phrase "a person subject to immigration control" has the same meaning as in section 115 of the Immigration and Asylum Act 1999 ("the 1999 Act"). According to section 115(9) of the 1999 Act "a person subject to immigration control" means a person who (a) requires leave to enter or remain in the United Kingdom but does not have it; (b) has leave to enter or remain in the UK which is subject to a condition that he does not have recourse to public funds; and there are two other situations described in subparagraphs (c) and (d). It is common ground that the Respondent fell within this definition at all material times.

The 2002 Regulations

20. Regulation 5 of the 2002 Regulations provides:

> "(1) This regulation prescribes the manner in which a claim for a tax credit it to be made.
>
> (2) A claim must be made to a relevant authority at an appropriate office –
>
> > (a) in writing on a form approved or authorised by the Board for the purpose of the claim.
> >
> > or
> >
> > (b) in such other manner as the Board may decide having regard to all the circumstances."

The 2003 Regulations

21. Regulation 3 of the 2003 Regulations provides:

> "(1) No person is entitled to child tax credit … while he is a person subject to immigration control, except in the following Cases, and subject to paragraphs (2) to (9)."

22. Of particular relevance are paragraphs (4) to (8):

> "(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) and regulation 4 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 sub-paragraph (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).
>
> …
>
> (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."

Universal Credit

23. The concept of Universal Credit was created by section 1 of the Welfare Reform Act 2012 ("the 2012 Act") but its introduction has occurred in stages and in different geographical areas at different times.

24. Section 33(1) abolished certain benefits, including child tax credit: see para. (f). However, as section 150 of the 2012 Act made clear, in particular at subsections (3) and (4), the different provisions of the Act could be brought into force by the Secretary of State on different days for different purposes.

25. Article 7(1) of the 2015 Order provides as follows:

> "Except as provided by paragraphs (2) to (6), 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 (in the capacity, whether as a single person or as part of a couple, in which he or she is permitted to claim universal credit under the Universal Credit Regulations 2013), the provision 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."

26. Article 7(8) provides as follows:

> "Subject to paragraph (9), 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 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."

27. Article 7(11)(g) provides as follows:

> "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;
>
> …
>
> (j) 'tax credit' (including 'child tax credit' and 'working tax credit') and 'tax year' have the same meanings as in the Tax Credits Act 2002; …"

The decision of the High Court

28. In the claim for judicial review the Respondent's three grounds of challenge were as follows:

    (1) Article 7 of the 2015 Order 23 properly construed did not bar a claim for child tax credit for a period of entitlement occurring before an applicant could apply for Universal Credit.

    (2) Alternatively, barring the claim by applying article 7 of the 2015 Order would be incompatible with the Respondent's rights under article 14 of the European Convention on Human Rights, read with article 8 or article 1 of Protocol No. 1.

    (3) In making article 7, the Interested Party failed to comply with her public sector equality duty under section 149 of the Equality Act 2010.

29. It is only the first issue which is the subject of this appeal. There has been no cross-appeal on the other two grounds, which were rejected by the Judge.

30. The issue which arose under the first ground had been decided by Lord Tyre in *Adnan* on 15 June 2021, the day before the hearing in the High Court. While not binding, that judgment was entitled to considerable respect. At para. 45 Bourne J held that he would follow that decision as it was extremely undesirable to have conflicting court decisions on exactly the same legislation in Scotland and in England and Wales. He considered that there were "no compelling reasons to the contrary". Nonetheless, Bourne J went on to express some doubt about the conclusion of the Outer House.

31. It followed that article 7(1) did not bar the Respondent from claiming child tax credit under regulation 3(5)(b) of the 2003 Regulations; and that regulation 3(6) (the deeming provision) entitled him to be treated as having made valid claims on the date of his asylum claim and on the first day of the subsequent tax years while his son was in full-time education. In the result Bourne J made a quashing order in respect of HMRC's decision of 8 April 2020.

The appeal to this Court

32. The sole ground of appeal is that the Judge erred in interpreting article 7 of the 2015 Order as meaning that a person to whom regulation 3(5) of the 2003 Regulations applies is to be treated as having claimed tax credits on the date or dates provided for by regulation 3(6) of those Regulations.

33. On behalf of the Appellants and the Interested Party Ms Ward submits that regulation 3(5) of the 2003 Regulations requires that a claim is made for a tax credit before regulation 3(6), the critical deeming provision, has any effect: until that date there is nothing on which the deeming provision can "bite". Ms Ward submits that a claim is made when it is received by HMRC (subject to certain exceptions not relevant to this appeal); article 7(1) prevents any such claim being made. The 2003 Regulations are premised on there being a claim being made under the 2002 Regulations.

34. Secondly, article 7(1) of the 2015 Order could have provided, but does not, that a claim could be made in a full service Universal Credit area for the purposes of regulation 3(5). Article 7 establishes clear rules about when a claim is made. Ms Ward submits that it is only the date on which the claim is physically made that is relevant for the purposes of article 7(1) unless paras. (9) or (10) apply. There is no need for provision or further exceptions in relation to the 2003 Regulations because they only have application if a claim is made in accordance with the 2002 Regulations.

The decision of the Inner House in *HMRC v Adnan*

35. On 18 January 2022, a week before the hearing in this Court, the Inner House of the Court of Session gave judgment in *HMRC v Adnan*, dismissing the appeal.

36. At para. 12 of his judgment, Lord Woolman pithily identified the problem at the heart of both *Adnan* and the present appeal:

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

37. Lord Woolman identified three major difficulties with the unambiguous construction of article 7 for which HMRC contended, at paras. 13 to 16:

    (1) It treats regulation 3 of the 2003 Regulations as having no force or effect. The 2015 Order amended the 2002 Regulations but did not revoke or repeal the 2003 Regulations. The clear language required to remove the "contingent right" which regulation 3 confers on asylum seekers is absent.

    (2) Since the 2015 Order came into force, regulation 3 of the 2003 Regulations has been amended on three occasions, including once (on 1 January 2021) after tax credits were abolished on 1 February 2019, yet the relevant provision remains in force.

    (3) It would yield an arbitrary result as the refugee's entitlement would turn on the random event of whether Universal Credit had been rolled out in a particular area. This is said to be truly a "postcode lottery".

38. Lord Woolman went on to hold, at para. 17, that the court preferred the alternative interpretation and that the words "that date" in article 7(1) refer to the deemed date of the asylum claim under regulation 3(6) of the 2003 Regulations. Neither provision takes primacy; instead they "mesh" and this avoids an absurd result.

39. Finally, in dismissing HMRC's broader legislative purpose argument, that Parliament could not have intended to allow refugees to continue to benefit from backdated claims while excluding such claims from the majority, Lord Woolman said, at para. 19, that no material was cited to support the argument; and it was "difficult" to

explain why article 7(8)(b) expressly excluded backdating under the 2002 Regulations but only did so implicitly for regulation 3(6) of the 2003 Regulations.

40. The doubts expressed by Bourne J in the present case about the Outer House's decision in *Adnan* were acknowledged by Lord Woolman but were considered not to affect the soundness of the reasons already given for dismissing the appeal.

41. Before this Court Ms Ward criticised the reasoning of the Inner House in *Adnan* and invited this Court not to follow it; or, at least, to express its doubts about it in order to assist the Supreme Court should either case go further. In particular, Ms Ward submits that:

(1) There is no "contingent right" which Regulation 3 confers on asylum seekers. Regulation 3, on her interpretation, does have force and effect but there is simply no claim for tax credits on which it can "bite" in the present context.

(2) The amendment that was made to Regulation 3 in January 2021 was to deal with a specific aspect of the UK's departure from the European Union at that time: see regulation 4(2) of the Social Security, Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations (SI 2020 No. 1505). It should not be regarded as having any broader significance for the interpretation of the legislation.

(3) The so called "arbitrary result" depending on geography is simply a consequence of the fact that Universal Credit has inevitably had to be rolled out on a gradual basis in different parts of the UK. This is explained in evidence which was before the High Court in the present case: I will return to that evidence later, as it is the subject of an application to adduce unagreed material before this Court.

42. Mr Cox, who appeared with Mr Spencer for the Respondent, accepted the second of those criticisms but submitted that this point had not been necessary for the decision of the Inner House. Mr Cox submits that this Court should follow the decision of the Inner House and commends its essential reasoning to us as being correct.

Application to adduce unagreed material

43. On behalf of the Appellants there is an application under para. 27(12) of Practice Direction 52C, to adduce the witness statement of Yasir Naim, an official in the Department for Work and Pensions, which was before the Judge but which the Respondent does not agree should be before this Court. The Appellant submits that the statement provides helpful background in relation to the policy background, legislative history and the way in which Universal Credit provisions were implemented by way of transitional provisions. On behalf of the Appellants Ms Ward disavows any intention to rely upon the statement of Mr Naim insofar as it expresses opinions.

44. She observes that the modern approach to statutory interpretation is to give the words used in legislation their true meaning in the light of their context and their purpose: see e.g. *R (Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ

1875, at para. 119 (Singh LJ). As I explained there, by reference to authority from the House of Lords and Supreme Court, the purpose of legislation is nevertheless objective and not subjective. Evidence by the maker of the legislation or anyone else is therefore irrelevant. Nevertheless, I agree with the fundamental submission on behalf of the Appellants that it is often useful for the court to be assisted by a witness statement on behalf of the Government, which sets out the legislative background and history. This helps the court to ascertain the context and purpose of legislation. This is not the same thing as the subjective policy intentions of any individual minister or Government department. In the end, I did not understand Mr Cox to take any issue with this approach as a matter of principle. Accordingly, I would grant the application to adduce the witness statement of Mr Naim but only insofar as it contains objective matters and not subjective expressions of opinion. Ultimately, however, there is nothing in that statement which materially affects the conclusion which I would have reached in any event on the merits of this appeal.

Analysis

45. There is a well-established practice that the courts in this jurisdiction will follow the decisions of courts in Scotland on the same point of interpretation in revenue matters, since the legislation is of application in both jurisdictions and it would be highly undesirable if there were inconsistent decisions. This is particularly so at the appellate level, since any decision of ours will be binding on this Court and lower courts and tribunals in England and Wales, while the decision of the Inner House will be binding on all courts and tribunals in Scotland. This is subject to there being a "compelling reason" not to follow a Scottish decision on the same point: see e.g. *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd* [1971] 1 WLR 1094, at 1102 (Widgery LJ); and *Deane v Secretary of State for Work and Pensions* [2010] EWCA Civ 699; [2011] 1 WLR 743, at para. 26 (Ward LJ), citing *Abbott v Philbin (Inspector of Taxes)* [1960] Ch 27, at 49 (Lord Evershed MR); and [1961] AC 352, at 373 (Lord Reid).

46. In my view, this Court should accord the greatest respect to the decision of the Inner House in *Adnan*. I can see no compelling reason to depart from the decision of the Inner House. Although I see some force in the submissions advanced on behalf of the Appellants, I also see force in the contrary submissions made on behalf of the Respondent, which in substance found favour in the Inner House.

47. In particular, as it seems to me, an important feature of the present context is that, inevitably, it takes time for a claim for asylum to be determined. When a decision is taken granting that claim, the consequence is that it is recognised that the claimant has been a refugee throughout the relevant period, at least since the most recent claim for asylum. The decision acts as an official recognition of a state of affairs which has existed earlier. The decision does not create that state of affairs.

48. Against that background, it seems to me that the purpose of the 2003 Regulations was a benevolent one, to recognise that, in the meantime, a person had not received payments of child tax credits to which they were otherwise entitled. Although that might not be regarded as being strictly a "vested right", I can understand why Lord Woolman described it as a "contingent right" in his judgment for the Inner House.

For that reason, I can understand the reasoning that, if the intention of legislation is to remove that entitlement for the past and not merely to set out the legal position for the future, that could and should be made clear.

Conclusion

49. For the reasons I have given I would dismiss this appeal.

Lady Justice Andrews:

50. I agree.

Lord Justice Bean:

51. I also agree.