CTC/0031/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision

1. This appeal by the claimant, brought by my leave granted on 21st March 2006, does not succeed. I confirm the decision of the Basildon tribunal of 14th September 2005, made under reference U/42/919/2005/00543, to the effect that the award of child tax credit made on or about 27th September 2004 cannot be further backdated beyond 9th December 2003.

Background and Procedure

2. I held an oral hearing of this appeal on 21st September 2006. The claimant attended in person but was not represented. The respondent, Her Majesty's Revenue & Customs ("HMRC", also referred to in some of the provisions as "the Board") was represented by Clive Sheldon of counsel, instructed by Esther Isaacs from the office of the Solicitor to HMRC. I am grateful to all of them for their assistance. Following the oral hearing there was a further round of written submissions in relation to Article 6 of the European Convention on Human Rights ("the Convention").

3. This appeal arises because of the replacement of Children's Tax Credit ("old CTC") by Child Tax Credit ("new CTC") with effect from 6th April 2003. Old CTC was a tax allowance against taxable income and was in effect claimed on the annual income tax return. New CTC is claimed on a claim form within specified time limits, as is the case with most tax credits and similar benefits.

4. The claimant was born on 12th February 1953. He was a bank official until retirement/redundancy in 2000. The claimant had been claiming old CTC through his income tax return for some time. He states that he was not advised that, and was unaware that, old CTC was to be replaced by new CTC with a different method of claiming the new CTC. There was in fact widespread publicity about new CTC and a helpline telephone number was publicised – although, in the result, whether or not the claimant realised or should have realised that the system was changing is not really relevant to my decision. On 11th March 2004 he claimed new CTC on the relevant form and on 27th September 2004 the Inland Revenue (which has subsequently been absorbed into HMRC) made an award of £257.15 in respect of the period 9th December 2003 (effectively 3 months before the date of claim) to 5th April 2004. On 21st October 2004 he appealed to the tribunal on the basis that the award should have been backdated to 6th April 2003 for the reasons indicated above.

5. The tribunal considered the matter on 14th September 2005 in the absence of the parties and confirmed the decision of the Inland Revenue. On 27th November 2005 the District Chairman of the tribunal refused leave to appeal to the Commissioner against the decision of the tribunal. He now appeals by my leave, granted on 21st September 2006 so that legal aspects of this matter could be more fully considered.

The Rules for Claiming New CTC

6. Section 3(1) of the Tax Credits Act 2002 provides that entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it. So far as is relevant, section 5 provides as follows:

> 5(1) Where a tax credit is claimed for a tax year by making a claim before the tax year begins, any award of the tax credit on the claim is for the whole of the tax year.
>
> 5(2) An award on any other claim for a tax credit is for the period beginning with the date on which the claim is made and ending at the end of the tax year in which that date falls.

7. The general rule, to be found in regulation 4 of the Tax Credits (Claims and Notifications) Regulations 2002, is that the relevant date (or date of claim) is the date on which the claim was received (usually in an office of HMRC). This is subject to regulation 7 below.

8. So far as is relevant, regulation 5 provides as follows:

> 5(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 purposes of the claim; or
> (b) in such other manner as the Board may accept as sufficient in the circumstances of any particular case.

9. Regulation 7 provides that:

> 7(1) In the circumstances prescribed by paragraph (2) a claim for a tax credit received by a relevant authority at an appropriate office shall be treated as having been made on the date prescribed by paragraph (3)
>
> 7(2) The circumstances prescribed by this paragraph are those where the person or persons by whom the claim is made would (if a claim had been made) have been entitled to a tax credit either –
>
> (a) on the date falling three months before the relevant date (or on 6th April 2003 if later); or
> (b) at any later time in the period beginning on the date in subparagraph (a) and ending on the relevant date.
>
> 7(3) The date prescribed by this paragraph is the earliest date falling within the terms of paragraphs 2(a) or (b) when the person or persons by whom the claim is made would (if a claim had been made) have become entitled to the tax credit.

10. If the only acceptable claim made by the claimant in this appeal was that made on 11th March 2004, then the effect of regulation 7 is to limit backdating to a maximum period of three months, and there is no way round that. Arguments by the claimant in relation to the documentation he supplied and to the limitation rules do not assist him. On the facts of this particular case he has to show that his 2002-2003 income tax return should be accepted as a claim under the provisions of regulation 5(2)(b) above, and that the tribunal (and, on appeal, the Commissioner) has jurisdiction to deal with this.

Appealing Tax Credit Decisions

11. Section 38 of the Tax Credits Act 2002 provides for the right of appeal (to the tribunal) in respect of a list of specific decisions by HMRC. These relate to decisions as to whether to make or revise an award and to the rate of the award, and to penalties and interest. There is no explicit provision for a right of appeal in relation to a determination under regulation 5(2)(a) or (b) whether to authorise or approve a particular form or to accept or not accept a claim made in any other manner.

12. Mr Sheldon argues that section 14(1) of the 2002 Act, which provides for the initial decision on a claim, only comes to into operation once a claim has been duly made. Accordingly, the right of appeal against a decision under section 14 does not incorporate a right of appeal against a determination under regulation 5(2)(a) or (b). On the face of it this is correct, subject to effect of the Human Rights Act 1998, considered below.

13. Section 14(1) of the 2002 Act provides that:

> 14(1) On a claim for a tax credit the Board must decide –
> (a) whether to make an award of the tax credit, and
> (b) if so, the rate at which to award it.

The Human Rights Act Argument

14. I must consider the position under the Human Rights Act 1998 and what is usually referred to as the European Convention on Human Rights ("the Convention"). The full legal reference given in section 21(1) of the 1998 Act is "the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950".

15. The Human Rights Act 1998 came fully into force on 2nd October 2000. Amongst other matters, it provides for direct application of the Convention in UK domestic law. Its main relevant provisions are as follows:

> 3(1) So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> 6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> 6(2) Subsection (1) does not apply to an act [of a public authority] if-

(a) as a result of one or more provisions of primary legislation the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights the authority was acting so as to give effect to or enforce those provisions.

6(3) In this section "public authority" includes –
(a) a court or tribunal

7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
(a) …
(b) rely on the Convention right or rights concerned in any legal proceedings

16. Articles 6(2) and 6(3) of the Convention deal with criminal proceedings. The relevant parts of article 6(1) read as follows:

> 6(1) In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

17. Assuming for the moment that there has been a breach of article 6, what remedy can I provide? If the primary legislation does not provide a right of appeal to the tribunal, then section 6(2)(a) of the 1898 Act applies and the tribunal is relieved of the duty to avoid acting in a way that is incompatible with the Convention, as is the Commissioner. This situation is avoided if it is possible to read the primary legislation in a way that is compatible with the Convention. In my view it would be possible to do that. If that were not the case, the only remedy available would be a declaration of incompatibility as provided in section 4 of the 1998 Act. However, the list of courts that can make such a declaration is limited. Although it includes the High Court and the Court of Appeal, it does not include the tribunal or the Commissioner.

Has There Been a Breach of Article 6?

18. In the House of Lords decision in Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5; [2003] 2 AC 430 Lord Hoffman (with the approval of the other Lords sitting) said at paragraphs [33] and [34]:

> "The Strasbourg court … has said, first that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing court) has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of Bryan v UK (19960 21 EHRR 342, "full jurisdiction" does not necessarily mean jurisdiction to re-examine

> the merits of the case but, as I said in the Alconbury Developments case [2001] 2 All ER 929 at [87], "jurisdiction to deal with the case as the nature of the decision requires". … an extension of the scope of article 6 into administrative decision making must be linked to a willingness to accept by way of compliance something less than a full review of the administrator's decision".

19. I observe that in the recent decision in Tsafayo v UK (application 608600/00) the European Court of Human Rights confirmed that disputes over entitlement to social security and welfare benefits generally fall within the scope of article 6 (paragraph 39). Mr Sheldon accepts that entitlement to tax credits is capable of amounting to civil rights within the meaning of article 6 but argues that the determination whether to accept a claim under regulation 5(2)(b) is not itself a determination of the claimant's civil rights. This is because at that stage there has not yet arisen any dispute which has been decided upon, because no claim has yet been made. However, it seems to me that if the refusal to accept a claim means in effect that there can be no entitlement to tax credits, or no entitlement for a particular period, then that is as much a determination of the claimant's civil rights as would be a refusal of a claim. I reject Mr Sheldon's argument on this point.

20. Mr Sheldon accepts that the decision of HMRC was not made in public (and I do not think that it can seriously be suggested that it was made by an independent and impartial tribunal) but argues that although there is no right of appeal to a tribunal, a decision of HMRC as to whether to accept a claim under the provisions of regulation 5(2)(b) is subject to supervision by the Administrative Court of the Queen's Bench Division of the High Court through the judicial review procedure and that this is adequate to bring the whole process into compliance with article 6.

Is Judicial Review Adequate?

21. There are differences in procedure and practice between judicial review and an appeal to a tribunal, but the key difference is that on judicial review the High Court will not consider the merits of an administrative or quasi-judicial decision, but will focus on any error of law, the procedure by which the decision was reached, natural justice, adequacy of reasons and similar matters. A tribunal considering an appeal will place itself in the shoes of the original decision maker and take a decision based on the merits. A Commissioner considering an appeal from a tribunal will take account of the same factors as would be taken account of by the High Court but, if the appeal from the tribunal is allowed, also has the power (frequently exercised) to stand in the shoes of the tribunal (section 14(8) of the Social Security Act 1998).

22. The factors to be taken into account in deciding that judicial review is an adequate remedy have been said to include:

- that the decision being made is essentially one of administrative policy (R(Alconbury Developments Ltd) v Secretary of State for the Environment etc [2001] UKHL 23, [2003] 2 AC 430; Lord Hoffman in Begum at paragraph [59])

- that the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion to wider policy aims (Bryan v United Kingdom 1995; Tsfayo at paragraph 45)

- that findings of fact on disputed factual issues were only "staging posts on the way to the much broader judgments" (Lord Bingham in Begum at paragraph 9(2)).

23. Mr Sheldon argues that the determination under regulation 5(2)(b) does not even involve any finding of fact. I am not sure that is always the case. It might involve taking a view on whether adequate or a specific item of information has been provided, whether the "claim" was actually received, and/or where the claim was received. On this point Mr Sheldon relies on R(Malik) v Waltham Forest PCT [2006] ICR 1111, but that case involved an interim suspension which would not necessarily affect the final outcome, whereas a refusal to accept that a claim for tax credit has been made deprives the "claimant" of any entitlement at all (subject to the three month backdating rule). Further, in Malik Mr Justice Collins was not setting out an invariable rule, but pointed out that judicial review may suffice, particularly where there is no requirement to make findings of fact (paragraph 33).

R(IS) 6/04

24. Mr Sheldon relies on this decision by Mr Commissioner Howell in which similar issues in relation to claims for income support were considered. The effect of his decision was to restore the generally understood position that had prevailed before the implementation of the Social Security Act 1998, the changes purportedly made by regulations made under that Act being in contravention of article 6. The position before the 1998 Act was that a dispute between a claimant and the Secretary of State (or the adjudication officer) over whether or when an effective claim had been made in compliance with the prescribed requirements was subject to a right of appeal to the tribunal. The prescribing of forms to be used and the exercise of administrative discretion to waive their use in individual cases, were questions expressly reserved to the Secretary of State (rather than the adjudication officer) and carried no right of appeal.

25. I am not necessarily bound to follow the same approach. The statutory context is different, Mr Howell was considering whether the 1998 Act had effectively removed (to the disadvantage of claimants) a distinction that had previously existed, and the question of whether there was a right of appeal against a determination under the equivalent of regulation 5(2)(b) was not an issue on the facts before him.

R(H) 3/04

26. This decision of a Tribunal of Commissioners is also relevant. As explained and approved in C(H) 4234/2004, (a decision of a differently constituted Tribunal of Commissioners), in relevant cases the legislation gave the local authority a large measure of discretion as to the person from whom it should seek recoverability of an overpayment of housing benefit. However the legislation gave no indication of the considerations to be taken into account in the exercise of this discretion. As the local authority would of necessity take into account non-legal judgments of local policy and

financial and social considerations, the decision was non-justiciable. Although there was an undisputed right of appeal to the tribunal, the tribunal could not consider the merits of the decision but was limited to considering the same matters as would be considered on an application for judicial review.

Conclusions

27. The acceptance of a "manner" of claiming is, on the face of it, an administrative act involving the exercise of discretion (even though it does not necessarily require "a measure of professional knowledge or experience"). If that discretion is exercised so unreasonably that no reasonable administrator could have exercised it in that way, judicial review is available and is an adequate remedy. As far as the merits of the way in which the exercise of discretion are concerned, there is no guidance in the legislation or regulations as to how the discretion is to be exercised. That seems to make it a non-justiciable determination in the sense of R(H) 3/04 and C(H) 4234/2004. On that basis the tribunal would in any event be limited to considering the equivalent of the grounds that are available for obtaining judicial review. Accordingly, judicial review is an adequate remedy and there is no basis for reading into Section 38 of the Tax Credits Act 2002 a right of appeal to the tribunal in respect of determination made under the provisions of regulation 5(2)(b).

28. It is worth recording that, even had I reached the opposite conclusion, I cannot see that the submission of the income tax return can properly be regarded as a claim for new CTC.

29. I emphasise that my decision is limited to matters arising under regulation 5(2)(b). I do not necessarily take the same view in respect of issues relating to whether a claim has been made to a relevant authority or at an appropriate office or in writing or on an approved or authorised form. All these seem to be questions of fact rather than of administrative discretion, but they do not arise in the present case.

30. For the above reasons, this appeal by the claimant fails.

H. Levenson
Commissioner

20th December 2006