DECISION OF THE SOCIAL SECURITY COMMISSIONER

1   I dismiss the appeal. For the reasons below, the decision of the tribunal is not wrong in law.

2   This is an appeal by joint claimants for tax credit, to whom I refer as Mr and Mrs B. Mr B took the appeal for both of them. He is appealing with permission of a chairman against the decision of the Peterborough tribunal on 26 10 2007 under reference 143 07 00618.

3   I held an oral hearing of this appeal on 31 07 2008 in the courts in Procession House, London. Mr B represented himself and his wife. Tim Buley of counsel, instructed by the Solicitor to Her Majesty's Revenue and Customs ("HMRC"), appeared for the Respondents.

REASONS FOR THE DECISION

4   Mr and Mrs B claimed tax credits on 7 02 2006 for themselves and their child born on 14 04 2005. They were given an award of child tax credits from 6 11 2005 to 5 04 2006. Following the usual end of year procedure, Mr and Mrs B were informed that they were entitled to both working tax credit and child tax credit for the period from 6 11 2005 to 5 04 2006. The entitlement notice (called a "finalised award notice") was issued on 4 09 2006. This appeal is against the decision notified in that notice. Mr B contends that they should be paid tax credits back to 14 04 2005 for child tax credit (when their child was born) and 6 04 2005 for working tax credit (on income grounds). Mr B objected because it discriminated against the self-employed and that it infringed human rights.

5   The appeal was heard at an oral hearing of a tribunal on 26 10 2007. The tribunal dismissed the appeal. It "was unable to see how any particular statutory right or protection had been contravened with regard to equal rights". It held that the points of law raised by Mr B at the hearing were outwith the jurisdiction of the tribunal.

6   Mr B was granted permission to appeal by the tribunal chairman. His grounds of appeal relied on what he contended to be unfairness between the treatment they were given and the treatment that would have been given to a refugee. This was racial discrimination under the Race Relations Act 1976 as compared with refugees. He argued that before me as his primary argument. His second argument was that they were being discriminated against because they were self-employed. HMRC did not accept either argument, and contended that the tribunal had taken the right decision. It is convenient to deal with the two issues separately.

The late claim caused by late accounts
7   Mr and Mrs B made their claim late because they considered that they were not in a position to make a claim on 6 04 2005, the start of the relevant tax year. Their accountant had not finalised their accounts. Until the accounts were finalised, they did not know their income for that year.

8   Unfortunately they were not aware of a practice, accepted by all sides including HMRC, that allows "protective claims" to be made at the beginning of any tax year. A protective claim can be made in a situation like this, either within three months of the beginning of the year or, for child tax credit, within three months of the child being born. This is so even if the claimants do not then know how much income they will earn in the year.

9   The HMRC leaflet *Protect your right to tax credits by claiming early,* on the Web at http://www.hmrc.gov.uk/taxcredits/claiming-early.htm., states:

"If you think your income will go down

If you're expecting your income to go down, you should make a tax credits claim at the start of the year just in case this happens. Any tax credit payments will then be backdated to the date you made your claim. You might want to do this if for example, you're self-employed or your work is seasonal, or you might be made redundant."

Backdating a late claim

10   That practice enables an early claim. The rules do not allow a late claim. See regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002. The title ("time-limit for claims (if otherwise entitled to tax credit up to three months earlier)") and drafting of that regulation are somewhat inelegant but the rule is clear. Tax credits claims made after the beginning of a tax year can be backdated up to three months to the beginning of the year (or other reason for claim). A claim cannot be backdated more than three months. HMRC interprets "month" as 31 days to avoid the time limit varying between months, to ensure fairness between claimants. So it treats three months numerically as 93 days. That was the rule applied to Mr and Mrs B.

11   That regulation applies to all claims, unless legislation provides an exception. There are two principal exceptions. The first, in regulation 8 of the Tax Credits (Claims and Notifications) Regulations 2002, applies to claims of working tax credit involving a disability element. It links the period for claiming tax credits to award of disability living allowance.

12   A second exception is in regulations 3(5) of the Tax Credits (Immigration) Regulations 2003. This applies to those granted refugee status. They are allowed to make backdated claims for tax credits within three months of being notified of being given refugee status. If a claim is made in that time limit, it is backdated by regulation 3(6) to the day on which he or she claimed asylum status (and each succeeding year until he or she was granted refugee status). Behind this is the more general rule in regulation 3(4) of those regulations preventing someone with an outstanding claim for asylum (or refugee status) from being entitled to tax credits. Regulation 3(5) is a limited exception to that more general ban. It is not, as Mr B assumed, a rule giving preference to refugees. It is a rule putting a refugee in the position he or she would have been in if, on arrival in the United Kingdom, he or she was given refugee status when claiming asylum. In those cases it gives a refugee the same rights, and no more, than those who are entitled to be in the United Kingdom have.

Arguments of the parties

13   Mr B's argument was that he was discriminated against because refugees were allowed to backdate their claims when he was not. In his view, that made the tax credits laws on backdating discriminatory. Mr B put his arguments specifically on breaches of the Race Relations Act 1976, not on human rights issues. He put his argument in measured tones, making it clear that he was not accusing any officials of racism or racially discriminatory behaviour. His criticism was, as he saw it, about the principle behind rules favouring refugees rather than others. When I asked him to identify the "others", his answer was, in effect, anyone entitled to be in the jurisdiction as of right. In his view, the rules required officials to act in breach of the prohibitions in the Race Relations Act and in particular section 20.

14   Mr Buley, for HMRC, answered that in three ways. First, the tribunal had no jurisdiction to deal with the matter. Second, if that was wrong, then the proper provisions to consider in the Race Relations Act 1976 are sections 19B and 41 and not 20. Third, even if Mr B was right that the provisions he raised were engaged, there was no arguable evidence of discrimination.

Jurisdiction over Race Relations Act proceedings

15   Section 53 of the Race Relations Act 1976, as amended and as it applies in England and Wales, provides:

53   Restrictions of proceedings for breach of Act

(1)   Except as provided by this Act or the Special Immigration Appeals Commission Act 1997 or Part 5 of the Nationality, Immigration and Asylum Act 2002, no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Act.

(2)   Subsection (1) does not preclude the making of an order of certiorari, mandamus, or prohibition.

Section 54 gives jurisdiction to deal with complaints under the Act to employment tribunals. Section 57 gives jurisdiction about complaints under Part III of the Act (including sections 19B and 20) to designated county courts. So, in England and Wales, issues relating to breaches of the Race Relations Act go to the high court (administrative court) on an application for judicial review or, on complaint, to the employment tribunal, or, in a civil action, to a designated county court. A social security tribunal cannot deal with an appeal that is based on a contention that a decision is "unlawful by reason of " the Race Relations Act.

16   The tribunal therefore did not have jurisdiction to deal with the complaint by Mr B. A Commissioner has jurisdiction only to the extent that the jurisdictional prohibition on a tribunal can be given effect. This was confirmed in passing by the Court of Appeal in *Couronne v Crawley Borough council and others* [2007] EWCA 1086, noting that "the social security appeal tribunal is not empowered to make a finding of unlawful racial discrimination" (paragraph 3).

17   If the tribunal erred in this case, it was in not dealing specifically with the reason why it considered that it did not have jurisdiction. In fairness to Mr B, he set out his argument clearly. He repeated it before me because he was not aware, from either the official submission to the tribunal or the decision of the tribunal, of this limitation on jurisdiction.

18   For that reason, I set out briefly Mr Buley's answer to his argument based on section 20 of the Race Relations Act. Mr Buley's first point was that section 20 does not apply to decisions such as that made by the HMRC officials about tax credits backdating. If there were any action that offended against the prohibitions about discrimination it was the action of making the regulations. Section 20 is about the provision of goods and services. It does not extend to making government regulations by Statutory Instrument. This was made clear by Auld J in *R v Secretary of State for Social Security ex parte Nessa*, (1994) 7 Admin Law Reports 402. Section 41 is also relevant. That provides that nothing is unlawful under the race Relations Act if done "in pursuance of" any statutory instrument. That prevented any complaint against an official merely carrying out the terms of these regulations. If anything in the Race Relations Act were relevant here, it would be by reason of section 19B (public authorities), added to the Act by the Race Relations (Amendment) Act 2000. That section is subject to section 19C. Section 19C states that section 19B does not apply to courts and tribunals. It also does not apply to making statutory instruments. So the combined effect of section 19C and section 41 was that there was no basis to argue discrimination under that Act in connection with these regulations. There was therefore no basis in the Act on which to consider if there was any discrimination as alleged by Mr B.

19   Mr B's argument did not deal with sections 19B and 19C or section 41 or the bar on jurisdiction. He did not press any specific argument under the Human Rights Act. Nor could I see any arguable point of engagement in Mr B's argument between his contention of discrimination and that Act. So I did not call on Mr Buley to deal with that.

Conclusion

20   It is arguable that the decision of the tribunal erred in law in not dealing with Mr B's argument as fully as it might, and in not dealing specifically with the bar on its jurisdiction imposed by the Race Relations Act 1976. But it arrived at precisely the decision that it should have reached, namely that it had no jurisdiction to deal with Mr B's complaints as put to it. I see no useful purpose being served at this stage in setting aside the tribunal decision only to reimpose the same decision for the same core reason. Any failure to deal with the matter has been remedied in the full arguments heard by me in this appeal. I therefore dismiss the appeal on those grounds.

21   There are no specific human rights issues outstanding, so the tribunal's decision not to consider any such argument is right on that basis.

22   There is no ground on which the tribunal could have found that HMRC was wrong in applying the time limit as it did on the facts before the tribunal. I dismiss the appeal.

David Williams
Commissioner
7 08 2008

[Signed on the original on the date shown]