

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

As the decision of the Watford appeal tribunal (held on 15 August 2008 under reference 052/08/00957) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the claimant's claim for tax credit that she made on 2 October 2007 has not been validly decided. I refer it back to the decision-maker for decision in accordance with the legislation as explained below.

REASONS FOR DECISION

1. This is an appeal by a refugee against the decision made on her claim for tax credit that she submitted when her claim for asylum was allowed. Both the decision-maker and the submission writer failed to apply the legislation correctly. It is, therefore, not surprising that the appeal tribunal, in dismissing the appeal, failed to do so as well.

A. The facts

2. These are not in dispute. The claimant is Russian. She came with her son to the United Kingdom on 2 August 2005 and claimed asylum on her arrival. Pending the decision on that claim, she received support from the National Asylum Support Services. (For convenience, I call this 'asylum support'.) She was accepted as a refugee on 14 August 2007 and her asylum support came to an end 28 days later, on 11 September 2007. She claimed tax credit on 2 October 2007. On 20 December 2007, she was awarded child tax credit for the inclusive period from 2 October 2007 to 5 April 2008. She did not qualify for working tax credit. The tribunal confirmed that this was her entitlement.

B. The tax credit legislation

3. I will focus on how the claim for tax credit should have been handled rather than on the mistakes that have been made. In order to do so, I need to set out the relevant legislation. It is contained in regulation 3 of the Tax Credits (Immigration) Regulations 2003 (SI No 653):

'3 Exclusion of persons subject to immigration control from entitlement to tax credits

...

(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-

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(a) is notified that he has been recorded by the Secretary of State as a refugee, and

(b) claims tax credit within 3 months 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).

(7) Regulations 7 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.

(9) The amount of support provided under-

(a) section 95 or 98 of the Immigration and Asylum Act 1999,

(b) regulations made under Schedule 9 to that Act, by the Secretary of State in respect of essential living needs of the claimant and his dependants (if any), or

(c) regulations made under paragraph 3 of Schedule 8 to that Act,

(after allowing for any deduction for that amount under regulation 21ZB(3) of the Income Support (General) Regulations 1987) shall be deducted from any award of tax credits due to the claimant by virtue of paragraphs (6) and (8).'

4. Regulation 3(4) is authorised by section 42 of the Tax Credits Act 2002. Regulation 3(5)-(9) is authorised by section 65(9) as incidental or supplementary provision.

C. How the legislation should have been applied

5. I am grateful to Paul Wade, who has represented the Commissioners for Her Majesty's Revenue and Customs on this appeal and whose submission dealt with this matter in detail.

6. While her claim for asylum was pending, the claimant was subject to immigration control and was not entitled to tax credit: regulation 3(4).

7. When she was given asylum, she claimed a tax credit within the three months allowed by regulation 3(5). That gave her the benefit of the following provisions of regulation 3.

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8. Her claim should have been treated as made on the date she claimed asylum (2 August 2005) and at the start of every tax year thereafter: regulation 3(6).
9. Her entitlement to tax credit should have been determined on that basis: regulation 3(8). That should have led to a series of decisions for each tax year of the claim.
10. Her asylum support should have been deducted before the award is paid: regulation 3(9).
11. The normal rules about the time for claiming and the date of claim in regulations 7 and 8 of the Tax Credits (Claims and Notifications) Regulations 2002 should not have been applied: regulation 3(7).
12. The normal adjudication of tax credits is based on provisional assessments before a final decision is made. I explained this system in *CTC/2662/2005*:

‘10. Let me start with the most straightforward case possible. The claimant for a tax credit must make a claim (section 3(1)). The decision-maker then makes an initial decision under section 14. Payment is made in accordance with the award (section 24). As far as possible the claimant is paid by ‘regular payments of similar amounts over the entire period of award.’ (Regulation 12(2) of the Tax Credits (Payments by the Board) Regulations 2002). Neither the award nor the payment determine the claimant’s legal entitlement to a tax credit. This is done at the end of the tax year. The claimant is sent a notice under section 17 in order to identify the correct circumstances during the year. The decision-maker then makes a decision after final notice under section 18. It is this decision that decides the claimant’s entitlement.’

Provisional assessment is not appropriate when assessments are made in retrospect and regulation 4, therefore, modifies the adjudication provisions to provide for a straightforward decision on entitlement. Only the claim for the tax year in which the claim is actually submitted (2007/2008 in this case) is subject to the normal adjudication: regulation 4(2).

D. The claimant’s arguments

13. The claimant is no longer represented, but has had the benefit of two representatives in the course of this case. She was represented before the tribunal by the Mary Ward Legal Centre and her grounds of appeal to the Upper Tribunal were written by solicitors, Pierce Glynn. Between them, they have put every argument that might assist the claimant. In summary, there are four arguments. First, the claimant should be entitled to the benefit of the normal ‘time for claiming’ rules rather than regulation 3. Second, if regulation 3 applies, only the asylum support paid in respect of the claimant’s child should be taken in reduction of the child tax credit. Third, if the tribunal’s interpretation is correct, it is discriminatory. Fourth, the claimant’s entitlement to tax credit should reflect the fact that she had no income after 11 September 2007. I will take the claimant’s arguments in turn.

E. Argument 1 – do the normal ‘time for claiming’ rules apply?

14. The claimant’s solicitors have argued that the claimant’s entitlement before 2 October 2007 should be considered under the normal ‘time for claiming’ rules rather than under

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regulation 3. That would limit the period to which she would be entitled, but would avoid the need to take account of the asylum support that she received.

15. I reject this argument. It is impossible to sustain. Regulation 3(5) governs the application of regulation 3(7). It applies to a claimant who has been given asylum and then claims tax credit. Once those conditions are satisfied, the consequences specified in regulation 3(6)-(9) apply, including the exclusion of the normal 'time for claiming' rules. That exclusion is beneficial to claimants, as they are treated as claiming tax credit on the date of their claim for asylum. However, that exclusion is subject to the condition that asylum support is taken into account. It is not possible to avoid the operation of regulation 3(5) or to sever the conditions in that paragraph from the consequences that follow. There is no discretion, whether for Her Majesty's Revenue and Customs or a tribunal; regulation 3 repeatedly uses the word 'shall', not 'may'. Nor is there power for claimants to opt for the particular rules that are to their advantage.

F. Argument 2 – is only asylum support paid in respect of the claimant's child taken into account for tax credit?

16. The claimant's solicitors have argued that if regulation 3(9) applies, only the asylum support paid to the claimant in respect of her children should be taken into account. Their argument has four elements. I reject both the individual elements and the overall effect of this argument. I will explain why as I set out each element.

17. The first element is that, given the amounts of asylum support paid to an adult and each child, child tax credit can never be paid to any single-parent family with one child or any two-parent family with two children. Only larger families can benefit. This is based on these figures:

Asylum support payable in	for an adult	and for a child aged 16-18
2005/2006	£39.34	£33.85
2006/2007	£40.22	£34.60
2007/2008	£41.41	£35.65

18. I reject this element. It is clear from regulation 3(9) that its function is to prevent double payment of public funds in respect of the same period. However, there are three significant features of that provision. (a) It is mandatory. (b) It applies to all payments of asylum support, regardless of whether they are paid in respect of the adult or the child. The legislation listed in regulation 3(9) contains all the legislation under which it is payable. It does not distinguish between support paid in respect of a claimant and that paid in respect of other members of a claimant's family. (c) It applies to both working tax credit and child tax credit without distinction. There is no scope in the language or context of regulation 3(9) to interpret it as applying different components of the support payment to different tax credits. It provides for the asylum support to be deducted from 'any award of tax credits'. Nor is there any scope for a

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different, purposive interpretation. The function of the provision is to protect the public purse. It is a broad brush provision that recovers all payments of asylum support paid to a family from any tax credit entitlement. Interpreting it as such furthers that function.

19. The second element refers to the reduction for income support payable under regulation 21ZB(3) of the Income Support (General) Regulations 1987. This was repealed from 16 June 2007. The solicitors argued that this provision prevented the support payable for the adult being deducted twice, once for income support and then for tax credit. The claimant cannot rely on that provision, because she was only granted asylum after 16 July 2007. Her solicitors argued that any support payments that would have been taken into account in an income support claim should not be treated as income for the purposes of child tax credit.

20. I reject this element. The income support provision prevented double recovery from a claimant. Its removal does not provide any justification for preventing full recovery from the claimant. It supports the tribunal's interpretation of regulation 3(9). The income support provision prevented recovery that would otherwise be made under regulation 3(9). Once it is removed, the rational interpretation is that that recovery is now authorised.

21. The third element relies on a statement from Her Majesty's Revenue and Customs' website, which describes the purpose of regulation 3(9) as being 'to mitigate any double provision'. In the case of child tax credit, they argue that there is only double provision as regards the asylum support paid for the claimant's child.

22. I reject this element. I have to interpret and apply regulation 3, not the entry on the website. I have given my reasons for that interpretation in rejecting the first element.

23. The fourth element is that, if the tribunal was correct, asylum support paid to a claimant before a child was born would be taken into account in deciding the amount of child tax credit payable in respect of that child.

24. I reject this element for the reasons that I have given for rejecting the first element.

G. Argument 3 – is regulation 3(9) discriminatory?

25. The claimant's solicitor has argued that regulation 3(9) is discriminatory on the ground that the claimant could not claim tax credit in the same way as other claimants once she had been given asylum. I reject this argument.

26. In order to maintain a human rights discrimination argument, the claimant's case must come within the scope of one of the substantive articles in the European Convention on Human Rights. In view of the decision of the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, I accept that regulation 3(9) is within the scope of Article 1 of Protocol 1 to the European Convention on Human Rights:

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'THE FIRST PROTOCOL

ARTICLE 1

PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

27. That leaves the issue of whether there is discrimination under Article 14 of the Convention:

'ARTICLE 14

PROHIBITION OF DISCRIMINATION

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

28. The circumstances of the claimant's case are not within that provision. She can claim tax credit just like any other claimant. A refugee is treated differently from other claimants, but that difference is justified by their different circumstances and the fact that they have received asylum support is part and parcel of those circumstances. As a refugee, the claimant is at an advantage compared to others, because her claim is not subject to the normal 'time for claiming' rules. However, that favourable treatment justifies another difference: unlike other claimants, she has received asylum support from public funds that has to be recovered.

29. Moreover, on the solicitors' argument the impact of regulation 3(9) depends on the size of the claimant's family. The size of her family is not an 'other status' for the purposes of Article 14. Nor is it a personal characteristic, as those words are usually interpreted.

30. The claimant's solicitors have also referred to Article 24 of the United Nations Convention relating to the Status of Refugees of 1951:

'24 Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements,

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holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

- (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
- (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
 - (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non- contracting States.'

31. I can see nothing in regulation 3 that is contrary to those requirements. In particular, the provisions of that regulation are authorised by Article 24(1)(b)(ii).

H. Argument 4 – should the claimant's entitlement to tax credit should reflect the fact that she had no income after 11 September 2007?

32. Paul Wade's response to this argument is that the claimant's entitlement from 2 October 2007 has been determined on that basis. I think that this may misunderstand the solicitors' argument. Or, perhaps, I have misunderstood it. My interpretation of the argument is that the claimant should not have her asylum support taken into account in respect of any period after it ceased to be paid. If that is the argument, I reject it. Entitlement to tax credit is based on annual income, not on weekly income. It is impossible to isolate the asylum support payments to the particular weeks in respect of which they were paid and to deduct it from tax credit entitlement for those weeks only. That is not possible under the structure of tax credit entitlement. As I read regulation 3, all asylum support payments are deducted from any award on the claim that was made within three months of attaining refugee status, regardless of

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when they were paid. The proper approach is to decide the claim without reference to the payments of asylum support and then to deduct those payments from the award that would be made on that basis.

I. Disposal

33. Paul Wade has invited me to remit the case to Her Majesty's Revenue and Customs for proper determination in accordance with regulations 3 and 4. I accept that submission. In *R(IB) 2/04*, the Tribunal of Commissioners said:

'72. ... there may be some decisions made by the Secretary of State which have so little coherence or connection to legal powers that they do not amount to decisions under section 10 [of the Social Security Act 1998] at all.'

That remark applies equally to Her Majesty's Revenue and Customs and to decisions under the tax credit legislation. In this case, the decision-maker decided the claim without reference to the provisions of regulations 3 and 4. The result was that (a) the wrong regulations were applied and (b) a decision was given only from 2 October 2007, which cannot properly be isolated from the earlier part of the 2007/2008 tax year. Given my analysis of the legislation, it is unlikely that the decisions that are made will be more favourable to the claimant than the one originally given.

**Signed on original
on 28 April 2009**

**Edward Jacobs
Upper Tribunal Judge**