

CIS/1107/2008

DECISION OF THE SOCIAL SECURITY COMMISSIONERDecision

1. This appeal by the claimant succeeds. In accordance with the provisions of section 14(8)(a) of the Social Security Act 1998 I set aside the decision of the Wolverhampton Appeal Tribunal of 12th September 2007 made under reference 024/07/05372. I substitute my own decision. This is to the effect that the prescribed time for claiming income support ("IS") from 8th November 2006 is extended from that date to 8th February 2007. I refer to the Secretary of State questions relating to the satisfaction of the other conditions of entitlement to IS and to calculation and payment of any arrears of benefit on this basis.

Background and Procedure

2. The facts in this case appear not to be in dispute. The claimant is a man who was born on 21st October 1962 and (at least at the relevant times) had Somali nationality. His wife was settled in the United Kingdom and the claimant applied to the British Embassy in Addis Ababa for entry clearance to come to the United Kingdom to join her. After some dispute the Embassy issued him with a visa valid for two years, which was appropriate for a person who was applying to join his partner and which contained a restriction on having recourse to public funds. In fact this turned out to have been issued by mistake and he should have been given indefinite leave to remain as on the basis of family reunion, with no restriction on recourse to public funds.

3. The claimant entered the United Kingdom on 25th September 2006. He sought legal advice from the Trafford Law Centre, which confirmed instructions in writing on 11th October 2006. The Law Centre advised him that (in its opinion) an incorrect visa had been issued and that it would take this up with the Home Office and the Embassy, but the letter said nothing about entitlement to benefit. After they threatened judicial review proceedings the Foreign and Commonwealth Office ("FCO") agreed that the incorrect visa had been issued. However, the FCO letter of 18th December 2006 (pages 95 to 96 of the file) did not explicitly state what visa should have been issued but stated that the error could only be corrected by the Home Office. On 10th January 2007 the Law Centre sent a copy of the FCO letter to the claimant. The correct visa was not issued until 1st February 2007 (page 64). The Law Centre informed the claimant of this in a letter of 5th February 2007.

4. The claimant was incapable of work and on 8th February 2007 he made a claim for income support, asking that it be backdated to the date of his entry into the United Kingdom. On 11th March 2007 the Secretary of State refused to backdate the claim

(with no apparent consideration being given to the specific circumstances), and that is the only matter that is before me for decision.

5. On 3rd April 2007 the claimant appealed to the tribunal against that decision of the Secretary of State. The tribunal considered the matter on 12th September 2007 in the absence of the parties and confirmed the decision of the Secretary of State. No reasons were given on the Record of Proceedings or on the Decision Notice (pages 106 to 107).

6. In November 2007 the claimant instructed the Birmingham Tribunal Unit ("BTU") to act for him and I accept the BTU submissions that the claimant "has experienced great upheaval in recent times and his English is poor. He is undoubtedly confused by the benefit rules and systems".

7. On 13th December 2007 the BTU requested a full statement of reasons for the decision made by the tribunal. This request was made outside the normal one month time limit for making such a request and the chairman of the tribunal refused to issue reasons. The chairman also refused to accept a late application to set aside the decision. On 20th March 2008 the BTU applied to the Commissioner for leave to appeal against the decision of the tribunal. The claimant now appeals by my leave granted on 24th June 2008. In accordance with regulation 27 of the Social Security Commissioners (Procedure) Regulations 1999 I waive any irregularity involved in the failure to obtain a statement of reasons or to apply to the chairman of the tribunal for leave to appeal. This is because the claimant was unrepresented at the relevant times and had been placed at a disadvantage through no fault of his own but arising from an error made by the FCO. The Secretary of State opposes the appeal and supports the decision of the tribunal.

The Backdating Rules

8. Regulation 19(1) of and Schedule 4 to the Social Security (Claims and Payments) Regulations 1987 provide that the prescribed time for claiming IS is the first day of the period in respect of which the claim was made. However, so far as is relevant, regulation 19(4) provides:

19(4) ... in the case of a claim for [IS], ... where the claim is not made within the time specified for that benefit in Schedule 4, the prescribed time for claiming the benefit shall be extended, subject to a maximum extension of three months, to the date on which the claim is made, where -

- (a) any of the circumstances specified in paragraph (5) applies or has applied to the claimant; and
- (b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

9. Regulation 19(5) sets out a number of situations but for the present case the relevant circumstances are:

(e) the claimant was given written advice by a solicitor or other professional adviser, a medical practitioner, a local authority or a person working for a Citizens Advice Bureau or similar advice agency, which led the claimant to believe that a claim for benefit would not succeed;

10. It seems to me that this list is wide enough to include the officials in the visa section of the British Embassy in Addis Ababa, who are professionals and give advice to applicants as well as processing decisions. The visa documentation included a written restriction on recourse to public funds. This would lead any claimant to believe that a claim for benefit would not succeed and amounts to advice that such a claim would not succeed.

Conclusions

11. The Secretary of State accepts that it was reasonable for the claimant not to make a claim for benefit before receiving notification that the correct visa had been issued (and, by implication, for not claiming before 8th February 2007) but does not accept that the case comes within paragraph 19(5)(e). The main reason for this is because the Law Centre letter of 11th October 2006 containing its opinion on the visa position gave advice that was correct and paragraph 19(5)(e) applies only to incorrect advice. The problems with this argument are that the letter gave no advice about the benefit position, it stated an opinion on the visa situation but that in itself did not remedy the error, and there is nothing in the wording or structure of regulation 19 to limit the applicability of 19(5)(e) to cases of incorrect advice.

12. Although there is no statement of the tribunal's reasons for its decision, if it is correct that the visa officials come within the list in 19(5)(e), and if it is correct that 19(5)(e) applies to advice whether it is accurate or inaccurate (and these are matters of law) then no reasonable tribunal could have failed to reach the conclusion on the facts that I have reached.

13. The maximum period of backdating allowed under the regulations is three months, which is why the claim cannot be backdated to the date of the claimant's arrival in the United Kingdom. However, for the above reasons this appeal by the claimant succeeds to the extent indicated.

H. Levenson
Commissioner

14th August 2008