

DECISION OF THE SOCIAL SECURITY COMMISSIONER

The Commissioner's decision in summary

1. This appeal by the claimant to the Commissioner succeeds. The decision of the appeal tribunal sitting at Newcastle-upon-Tyne on 30 October 2002 is wrong in law and must be set aside. The claimant's appeal against the refusal to backdate entitlement to benefit will have to be reheard by a new tribunal. The fact that this appeal to the Commissioner has succeeded does not necessarily mean that the claimant will succeed before the new tribunal. That depends on the view that the new tribunal takes of the relevant facts, when applying the law in accordance with my directions at paragraph 24 below.

The central issue in this appeal

2. The issue in this appeal is whether the claimant, an Iranian national, was entitled to backdate a claim for income support following the grant of his application for asylum.

The background to this appeal

3. The claimant applied for asylum on 1 December 2000. The delays in dealing with such applications are a matter of public record. The Home Office wrote a formal letter to the claimant dated 27 September 2001 (but date-stamped 28 September on its reverse) granting him indefinite leave to remain in the United Kingdom as a refugee. The letter contained a considerable amount of information, which may well be difficult for a non-native speaker of English to take on board fully. This information included the statements "You will be able to get Social Security Benefit (including Income Support) if you meet the conditions" and also that his entitlement to assistance from the National Asylum Support Service (NASS) would stop 14 days after the notification of the decision. The letter makes no mention of a 28 day time limit on claiming arrears of income support, which is discussed further below. It is not clear precisely when the claimant received the letter, although the letter itself states that "you are deemed to have been notified of it two days after it was sent". There is no suggestion that receipt of that letter was unduly delayed, as was an issue before the House of Lords in *R v Secretary of State for the Home Department ex parte Anufrijeva* [2003] UKHL 36.
4. As it happened the claimant did not make an application for benefit (income-based jobseeker's allowance) until late January 2002, nearly four months later. The Secretary of State treated the claimant's claim for jobseeker's allowance as made on 21 January 2002. Allowing for the three "waiting days", that benefit was paid as from 24 January 2002. Assisted by one of his college tutors, the claimant then wrote in a letter, apparently received on 11 March 2002, asking for his benefit to be backdated to when he was granted indefinite leave to remain in September 2001. This was treated as a claim to backdate income support. That letter set out the sequence of events leading to the claim for backdating of benefit.

5. On 18 March 2002 the Benefits Agency wrote the claimant a short letter stating that they were unable to backdate entitlement to benefit because any such request had to be received within 28 days of the notification of the Home Office's decision. Although no formal authority was referred to in the letter, this was clearly a reference to regulation 21ZB of the Income Support (General) Regulations 1987. The claimant lodged an appeal, stating that he had not claimed benefit earlier because he had been issued with NASS vouchers until 24 January 2002. Moreover, he wrote, "the council asylum worker said to me when you get the NASS 35 you can go to the benefit and JobCentre and apply to backdate benefits. If you have no NASS 35 you can't apply to backdate". In short, this letter of appeal summarised the account given in his March letter requesting backdating.

The tribunal's decision on the appeal

6. The first hearing of the claimant's appeal on 22 August 2002 was adjourned as the Appeals Service had failed to provide a Farsi interpreter as had been previously requested. The appeal was then heard at Newcastle-upon-Tyne on 30 October 2002. The appeal tribunal dismissed the claimant's appeal and so confirmed the refusal by the Secretary of State to backdate benefit entitlement. The tribunal later issued a Statement of Reasons for its decision. That Statement sets out the background to the claim to backdate entitlement to benefit. In its reasons, the tribunal states that "The Claimant does not meet the specified conditions for backdating which is that any request for backdating must be made within 28 days of the Notification from the Home Office but the backdating request was not received until the 18th March 2002" (the correct date in fact appears to be 11 March 2002).
7. The tribunal also made findings about the letter which the claimant had received from the Home Office and the advice that he had received as to its contents. The tribunal evidently found the claimant's evidence unimpressive, concluding that he had contradicted himself in his oral evidence. The tribunal accepted that the claimant had language problems but found that the letter had been read to him by a fluent English speaker. The tribunal also referred to the nature of the advice that the claimant had received from the council's asylum support worker, finding that it was confined to employment issues only. The tribunal concluded that "None of the heads of appeal satisfy the law in this matter and in view of this the Appellant's claim cannot succeed as he does not fit within any of the relevant legal criteria."

The appeal to the Commissioner

8. Almost a year to the day from the date of the hearing, and so well beyond the normal time limit of one month for appeals, the claimant applied for leave to appeal to the Commissioner. In this application reference was made to an earlier application for leave to appeal made in May 2003. A tribunal chairman refused to allow the late application for leave, stating that the "alleged application" of May 2003 (a copy of which is actually in the papers) was already out of time and it was unreasonable to wait five months to enquire as to the outcome of the May 2003 application.

9. The claimant, through his solicitors, then made a further application for leave to appeal direct to the Commissioner on the same grounds as that made in May 2003. These were essentially two-fold: (1) that the tribunal had failed to give adequate reasons for finding that the support worker's advice had been solely confined to the claimant's employment status; and (2) that there was a breach of natural justice in that the claimant's language problems had not been properly taken into account (although this appears to be more a complaint about the Benefits Agency's treatment of the claimant than the tribunal's findings). The application for leave to appeal was granted by Mr Commissioner Henty.
10. The Secretary of State does not support this appeal. His representative argues that the tribunal reached the only decision that was open to it. In summary, he states that the claimant's position is governed solely by the 28 day time limit in regulation 21ZB of the Income Support (General) Regulations 1987. This, he argues, is an absolute time limit and the claimant cannot avail himself of the general rule relating to backdating benefit claims under regulation 19 of the Social Security (Claims and Payments) Regulations 1987. The mitigating factors put forward by the claimant are, he argues, "irrelevant to the outcome of his claim".
11. In response, the claimant's solicitors assert that regulation 21ZB "discriminates against our client as it only affects a certain class of people in this case refugees of which our client is a member". They invite me to allow the claimant's appeal.

The significance of regulation 21ZB

12. I do not accept the main point in the submission by the Secretary of State's representative. He argues that the claimant's entitlement to income support is governed solely by regulation 21ZB (which was inserted by regulation 3(5) of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (S.I. 2000 No. 636)), and that regulation 19 of the Social Security (Claims and Payments) Regulations 1987 is of no relevance. Regulation 21ZB(1) itself certainly provides that it covers anyone who, like the claimant, submits a claim for asylum on or after 3 April 2000 and who is notified that he has been accepted as having refugee status.

13. Regulation 21ZB(2) then states:

“(2) Subject to paragraph (3), a person to whom paragraph (1) applies, who claims income support within 28 days of receiving the notification referred to in paragraph (1), shall have his claim for income support determined as if he had been recorded as a refugee on the date when he submitted his claim for asylum.”

Regulation 21ZB(3) then provides that the amount of income support is to be reduced by the amount of NASS payments received in the meantime.

14. The effect of regulation 21ZB is that a claimant who successfully applies for asylum has 28 days from receiving the notification of that status in which to claim arrears of income support. Regulation 21ZB lays down an absolute 28 day time limit for making

such a claim for arrears of benefit (which can in fact go right back to the date of the asylum application). There is no provision in this regulation for this period of 28 days to be extended, e.g. where the claimant might have “good cause” for a late claim.

15. Independently of this, the normal rule for income support is that entitlement can be backdated for a period of up to a maximum of three months where (1) the claimant could not reasonably have been expected to claim earlier and (2) the reason for the late claim falls within one or more of a number of specified exceptional circumstances (regulation 19(4) and (5) of the Social Security (Claims and Payments) Regulations 1987). These are essentially various limited categories of “good cause” as defined by legislation. However, the Secretary of State relies upon regulation 19(8) of those Regulations, as amended by the Social Security (Miscellaneous Amendments) (No.2) Regulations 1997 (S.I. 1997 No. 793) and the 2000 Regulations, to argue that “good cause” is irrelevant in this case. Regulation 19(8) states that:

“(8) This regulation shall not have effect with respect to a claim to which regulation 21ZB(2) of the Income Support (General) Regulations 1987 (treatment of refugees) applies.”

16. Based on this, the Secretary of State’s representative submits that regulation 21ZB of the Income Support Regulations and regulation 19 of the Claims and Payments Regulations are mutually exclusive. In his view it is not possible to use any of the limited backdating powers under regulation 19 to “get round” the effect of the absolute 28 day time limit in regulation 21ZB.
17. In my view this is to misunderstand the legislative framework. The starting point is section 1 of the Social Security Administration Act 1992, which (in virtually all cases) requires a claim to be made as a precondition of entitlement to benefit. Section 5 of the 1992 Act then grants the Secretary of State various regulation-making powers in relation to claims. In the exercise of these powers, the Social Security (Claims and Payments) Regulations 1987 have been made. Regulation 19(1) of, and Schedule 4 to, those Regulations sets out the basic rules for claiming various benefits and the time limits that apply. Thus the general rule is that claims for income support or jobseeker’s allowance must be made on ‘the first day of the period in respect of which the claim is made’. Regulation 19(4) and (5) then provide, by way of exception to this general principle, that the prescribed period for claiming these benefits can be extended for up to three months if “good cause”, as defined by the Regulations, can be established.
18. However, regulation 19(4) is expressly stated to be subject to regulation 19(8). The purpose of regulation 19(8) is to provide that those claimants who can avail themselves of regulation 21ZB are not to be caught by the standard limit of three months on backdating entitlement to income support. A successful applicant for asylum, who claims arrears of income support within 28 days of receiving the Home Office’s notification, is a person who makes “a claim to which regulation 21ZB(2) of the Income Support (General) Regulations 1987 (treatment of refugees) applies”. In that situation regulation 19(8) then provides that “this regulation” (i.e. the normal three month rule) “shall not have effect”. In other words, the claim for arrears of benefit, if made within the 28 day time limit, may be backdated by many more than three months

and indeed right back to the date of the asylum application. This is supported by regulation 6(4D) of the 1987 Regulations, which deems the claim so made to have been made actually at the much earlier date when asylum was applied for – see the obiter opinion of Mrs Deputy Commissioner Rowley in *CIS/579/2004* (at paragraph. 43.4).

19. In my view, therefore, there are not two entirely separate and mutually exclusive regimes, which appears to be the Secretary of State's contention. The correct position in law is that a person in the claimant's situation may be able to make a claim for backdated benefit in accordance with regulation 19(4) and (5). Just because he is a successful applicant for asylum does not take him out of that regime. However, if he had made his claim within 28 days of the Home Office letter, he might have his entitlement to benefit backdated to the date of his original application for asylum, by virtue of regulation 21ZB, regardless of the normal three month rule in regulation 19(4).
20. But how does this affect this claimant? In this case the claimant was undoubtedly a person to whom regulation 21ZB(1) applied, as he had claimed asylum after 3 April 2000 and had subsequently been notified that he had refugee status. This claimant, however, was **not** a person who fell within regulation 21ZB(2), as plainly he did not make a claim for arrears of income support within 28 days of receiving the Home Office letter. The claim which he was subsequently treated as making on 11 March 2002 was thus not "a claim to which regulation 21ZB(2) of the Income Support (General) Regulations 1987 (treatment of refugees) applies", because it was outside the 28 day time limit. It follows that regulation 19(8) cannot operate to exclude the effect of the normal three month rule in regulation 19(4) on the claimant's March claim to backdate income support.

The effect on the tribunal's decision

21. How does this affect the tribunal's decision as a matter of law? The tribunal was clearly right to find that the claimant's application to backdate benefit was not within 28 days of the notification of the Home Office's decision. There has been no challenge to that finding of fact which appears to me to be inevitable. It follows, on the facts of this case, that regulation 21ZB cannot assist the claimant. The reasons for the delay in this case are understandable but, as I have already observed, regulation 21ZB contains no "good cause" route to accommodate such late claims.
22. If the sole issue in this case was the applicability of regulation 21ZB, I would have had no doubt in upholding the tribunal's decision and dismissing the appeal. But what of the potential application of the three month rule in regulation 19(4)? The tribunal correctly identified that the application to backdate income support was made in March 2002. The tribunal found this application to have been made on 18 March 2002. In this respect I think that it was misled by the decision maker's submission, which refers to 18 March being the date of the receipt of the letter, when in fact it appears to have been the date of the decision maker's decision. The departmental minute at page 57 show that the letter was in fact received no later than 11 March. But in the event nothing very much may turn on the difference of seven days.

23. The tribunal also made findings on various matters which were relevant to the issue of “good cause” under regulation 19 (see paragraph 7 above). The final paragraph of the tribunal’s reasons, which concludes “None of the heads of appeal satisfy the law in this matter and in view of this the Appellant’s claim cannot succeed as he does not fit within any of the relevant legal criteria”, may also be directed to regulation 19 considerations. However, I am not satisfied that the tribunal applied the proper legal tests in this case. Reading the reasons as whole, one is left with the distinct impression that the tribunal elided the two issues of the 28-day rule under regulation 21ZB and the separate “three month rule if good cause shown” in regulation 19. Indeed, the final two paragraphs of the Statement of Reasons suggest that the tribunal considered that the “good cause” provisions in regulation 19(5) acted as a qualification to the 28 day rule, which is not the case. In fairness to the tribunal, its consideration of the issues was not helped by an initial decision which made no reference to the legal source used (regulation 21ZB) and a submission to the tribunal which referred exclusively to the regulation 19 issue, without mentioning regulation 21ZB at all. For these reasons I conclude that the tribunal’s decision is wrong in law. I must therefore set the tribunal’s decision aside under section 14(8) of the Social Security Act 1998. There is insufficient evidence and not enough findings of fact for me to substitute my own decision. I therefore refer the case back under section 14(8)(b) for rehearing by a new tribunal to be heard in accordance with the following directions.

24. My directions are as follows:

- (1) The new tribunal should consider first whether the claimant can claim the benefit of regulation 21ZB. This is entirely a matter for the new tribunal, but unless some new facts emerge it is difficult to see how the tribunal will reach a conclusion other than that the 28 day time limit has not been satisfied.
- (2) The new tribunal should then consider the claim for benefit made on 11 March 2002. This has been treated as a claim to backdate entitlement to income support to September 2001. It is not possible to backdate a claim that far given the three month time limit in regulation 19(4). But the tribunal needs to consider whether the claimant is able to show “good cause” to extend the period for claiming income support from 11 December 2001 to 11 March 2002.
- (3) The tribunal will therefore need to examine the potential application of any of the “good cause” criteria in regulation 19(5) during the period from 11 December 2001 to 11 March 2002. In particular the tribunal should consider whether regulation 19(5)(a) or (5)(e) apply in the claimant’s case. In assessing whether the former is applicable, the tribunal will doubtless bear in mind that it must focus on the claimant’s language skills in English at the material time, and not as they may be at the date of the hearing.
- (4) If the tribunal finds that the claimant has shown “good cause” under regulation 19(4) and (5), the tribunal must then consider whether the claimant was eligible for income support during this period. Clearly any income received during this period would be a factor. But the tribunal must also determine whether or not the claimant falls within any of the categories of prescribed persons for the purposes of entitlement to income support (see Schedule 1B to the Income Support (General) Regulations 1987).

- (5) In this context the tribunal will need to make findings as to whether paragraphs 18 or 18A of Schedule 1B apply. It is difficult to see how paragraph 18A can apply, as that depends on a successful regulation 21ZB claim. But the tribunal will need to make findings of fact about the college course undertaken by the claimant to see whether or not paragraph 18 may apply in his case. If not, the tribunal should also consider whether there are any other provisions in Schedule 1B that may apply.

Two further points

25. There are two further points which should be made. The first concerns the assertion by the claimant's representative that regulation 21ZB is discriminatory. I use the word "assertion" advisedly, as this is not a reasoned submission by the claimant's solicitor. There is not even an explicit reference to the Human Rights Act 1998 or the European Convention on Human Rights. But, in any event, I think that this argument is misplaced. As indicated above, the normal rule is that income support can be backdated for a maximum of three months. One of the very few exceptions to that principle applies to refugees. The actual effect of regulation 21ZB(2) is that a refugee's claim for income support can be backdated to the date on which the claim for asylum was made (regulations 4(3)(c) and 6(4D) of the Claims and Payments Regulations) – albeit that the arrears are subject to deduction for (the less generous) NASS payments received in the interim period. It follows that a refugee's entitlement to income support may be backdated well beyond the usual maximum of three months, given the delays which are prevalent in that system. This is more generous than the treatment accorded to the "ordinary" income support claimant, wherever he or she hails from. It is also more generous than the rule which applied to refugees under the now repealed regulation 21ZA, which limited their entitlement to the (lower) urgent cases rate of income support. This generosity on claiming arrears is subject to a 28 day time limit. This may be different treatment but it is a long way from being discriminatory treatment.
26. The second point is that it hardly seems appropriate for the claimant's solicitors to blame the Benefits Agency for not advising the claimant correctly when he first made contact with the Agency in late January 2002, as he was already well outside the 28 day time limit. The claimant may possibly have a legitimate complaint in respect of the quality of the advice he received from other sources in the period immediately after he received the Home Office's letter, but that it a matter that lies outside my jurisdiction. He may also feel aggrieved that the 28 day time limit was not drawn to his attention by the Home Office letter, but again that is not a matter for me.

Conclusion

27. My decision to allow the claimant's appeal is thus as set out at paragraph 23 above.

**(Signed) N J Wikeley
Deputy Commissioner**

(Date) 22 July 2004