Bulletin 191

CSHC,RT

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSTC/326/2005

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of the tribunal sitting in Dumfries on 29 November 2004 (the tribunal) is not erroneous in law. Accordingly, the tribunal's decision stands.

The issues

2. By regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002 SI No. 2014 (the notifications regulations), a tax credit claim which, under s.1(1) of the Tax Credits Act 2002 (the Act) (see Appendix A to this decision), includes child tax credit (CTC), is treated as having been made up to 3 months earlier than its real date, provided the claimant would have been entitled to tax credit during that period had an earlier claim been made.

3. Regulation 7 has been subject to two excepting transitional provisions to date, which preclude its automatic backdating for most claimants of income support (IS) or income-based jobseeker's allowance (IBJSA) who are entitled to amounts in respect of children; the first is set out in Article 5(4) of the Tax Credits Act 2002 (Commencement No. 4, Transitional Provisions and Savings) Order 2000 (the commencement no. 4 order) (see Appendix (B)) and, secondly, in two overlapping measures, Article 7 of the Tax Credits Act 2002 (Transitional Provisions) Order 2005 (the transitional provisions order 2005) (see Appendix (C)) and Article 2 of the Tax Credits Act 2002 (Transitional Provisions) (No.2) Order 2005 (the second transitional provisions order) (see Appendix (D)).

4. The reason for the above exceptions to backdating of CTC is that s.1(3)(d) of the Act abolishes provision for children in those benefits, because, as the Act expressly puts it, such IS and IBJSA amounts "are superseded by tax credit". Although CTC has a wider ambit than IS and IBJSA, it is still a means-tested social security benefit for all those responsible for children, and the statutory objective is that it entirely subsumes hitherto equivalent support through IS and IBJSA. However, although the Act received Royal Assent on 8 July 2002, s.1(3)(d) of the Act is not yet in force, which has resulted in various measures, such as the above, to prevent duplication of child support through both IS/IBJSA and CTC until the "migration" process (as it has become known) is completed.

5. Is Article 5(4) of the commencement no. 4 order (otherwise applicable to this appellant's case) either *ultra vires* or not to be applied under the Human Rights Act 1998 because it discriminates against him in breach of Article 14 of the European Convention on Human Rights (ECHR), in conjunction with Article 8 or Article 1 of the First Protocol?

Background

6. The facts are not in dispute. The claimant is a married man, living with his wife and children, and both spouses are under 60 years of age. At the date of his CTC claim on 18 March 2004 (the relevant date), the claimant's wife was in receipt of IS, which included personal allowances for their children. The IS in payment was low because the claimant was paid incapacity benefit and an occupational pension. The equivalent award of CTC when made was considerably larger in amount than the total weekly IS received; a combination, therefore, of the claimant's resources and the application of the Social Security (Working Tax Credit and Child Tax Credit) (Consequential Amendments) Regulations 2003 SI No. 455 (the consequential amendments regulations) removed the entitlement of the claimant's wife to IS from her first benefit week after 6 April 2004. (The consequential amendments regulations is one of the measures referred to above which gradually transfers provision for children from the IS and IBJSA schemes to CTC; they prevent most new IS/IBJSA claimants including children in their claim from 6 April 2004; they also remove allowances for children from existing IS claimants from the same date once CTC has been awarded.)

7. Because of the effect of Article 5(4) of the commencement no. 4 order, CTC was awarded to the appellant from the relevant date only. Although the appellant maintains he is the sole CTC claimant, s.3(3) of the Act ensures that he and his wife *must* make a joint CTC claim. In contrast, although the IS claimant has to include in their claim a spouse with whom he or she lives, the partners may choose which of them is to be the claimant.

The tribunal process

8. The claimant appealed to a tribunal, where he was represented, as he has been throughout these proceedings, by Mr McCormack, a local welfare rights officer. Neither the appellant nor his wife attended the tribunal hearing. No representative appeared on behalf of what are now the Commissioners for Her Majesty's Revenue and Customs (HMRC). Mr McCormack argued that Article 5(4) should not be applied to his case, either because it was *ultra vires* as "oppressive" or should be read as applying to CTC claims made only on or after 6 April 2004. It was submitted that it was unfair that the claimant, who offered to refund the difference, should be penalised by a limitation on CTC backdating solely because his wife had received IS in that period.

9. The tribunal, however, confirmed the adverse decision under appeal to it. The second argument was rejected on the basis of the wording of Article 5(4); on the first, the tribunal said:

> "I suspect that what Mr McCormick *[sic]* may have been driving at was some human rights or equitable type argument whereby the statutory instrument should be annulled because of its unfairness. I did not think that there could be any argument based on ultra vires. Mr McCormack referred me to the Enabling Act and maintained that the transitional provision contained in Regulation 5(4) was not within the Ministers *[sic]* power to promulgate. The human rights argument against the regulation would be a difficult one to formulate let alone argue with any degree of confidence but if it was to be argued then it would be for the appellant or his representative to state precisely how the Human Rights Act would apply so as to negate the effect of the transitional provision. No such argument was produced and I could not myself find any to assist the appellant."

10. I regret to say that the appeal papers for the tribunal were poorly prepared by HMRC. No copy of any relevant legislation was produced. Even at the stage of appeal to the Commissioner, it was Mr McCormack who first alerted me to the second set of excepting transitional provisions.

Appeal to the Commissioner

11. The claimant appealed, with my leave, to the Commissioner. It was submitted that there was a breach of Article 8 because the claimant was denied the choice between IS and CTC; *ultra vires* on the basis of unfairness was reiterated.

12. I directed an oral hearing which took place on 1 September 2005. Mr McCormack appeared on behalf of the appellant. The appeal is not supported by the HMRC for whom Mr Mowat, Solicitor, appeared. Following the hearing, Mr Mowat was directed to make a further written submission and did so in a response received in the Office on 11 October 2005. The claimant, through his representative, was given the opportunity to reply but has made no further submission.

13. The parties gave me rather limited specificity with respect to their arguments. However, insofar as points were raised, I deal with them in my conclusion and reasons. Mr McCormack mainly founded on the inequity of his client being refused backdated CTC when other IS claimants, to the representative's knowledge, had received it. He could not, however, be sure of dates when this had occurred. Initially, Mr Mowat maintained that if any such payments were made, that must have been an error. However, I pointed out that both the transitional provisions order 2005 and the second transitional provisions order (curiously, in identical terms, so far as preventing backdating is concerned, but the second additionally defines "the child premia"), are only made 17 March 2005.

The commencement number 4 order, excepting CTC backdating for most IS claimants, including those in the circumstances of the claimant, for any day before 6 April 2004, was made 31 March 2003, which covered the immediate introduction of tax credit claims; but where was the preclusion of backdating for the period 6 April 2004 to 16 March 2005?

14. After a short adjournment, Mr Mowat produced a 2004 draft order ("the Tax Credits Act 2002 (Transitional Provisions) Order 2004") which was, he suggested, by oversight, never laid. However, this did not extend to a prevention of backdating but only purported to introduce the mechanism of a notional claim for CTC by IS claimants, which was in fact subsequently introduced by the transitional provisions order 2005. By a direction after the hearing, I gave Mr Mowat another opportunity to investigate. I also wanted to know why the transitional provisions order 2005 and the second transitional provisions order prohibited CTC backdating for any day before *31 December 2006* even though, by Article 2(5) of the commencement number 4 order, section 1(3)(d) of the Act, which abolished personal allowances and premiums for children (Article 2(5) uses the inaccurate term of 'child premia'), came into force on *6 April 2005*.

15. In his written submission in response, Mr Mowat was unable to produce any further legislation referable to backdating. He concedes that, through an unintended omission, there is a gap in cover. He has, however, referred me to the Tax Credits Act 2002 (Commencement No. 4, Transitional Provisions and Savings) (Amendment) Order 2005 SI No. 1106 (Appendix (E)) (the amendment order) which, made on 5 April 2005 and thus at the eleventh hour, substituted 31 December 2006 as the new date for the abolition of the various prescribed entitlements applicable to children referred to in s.1(3)(d) of the Act.

16. I feel bound to comment that the last minute nature of the amendment order, the curiosity of two substantially overlapping measures produced on the same day (the transitional provisions order 2005 and the second transitional provisions order), a draft order which was never laid, and the failure to enact a consistent statutory scheme of backdating to prevent double recovery, indicate a history of some haste and confusion by the legislators. There has been a complex web of measures, not always successful, necessitated because the prospects for the completion of intended "migration" seem ever to recede. The issue before me is how, if at all, does this affect the refusal to backdate this appellant's CTC claim?

My conclusion and reasons

Ultra vires

17. Mr McCormack conceded at the hearing before the Commissioner that Article 5(4) of the commencement no. 4 order (Article 5(4)) is not outwith the enabling powers of ss.61 and 62(2) of the Act; nor does he any longer suggest that its plain wording allows backdating of the CTC award prior to the relevant date. He submitted, however, although without citing authority, that the provision is not "reasonable" because of its inequitable effect, whether in comparing him with one not in receipt of IS or IBJSA at the relevant date, or, alternatively, with any other IS claimant who benefited from the legislative failure to continue the prevention of backdating.

18. In *O'Connor v Chief Adjudication Officer* (reported as a part of R(IS)7/99), the Court of Appeal held that statutory instruments of any type could be held to be *ultra vires* on grounds of irrationality as well as of illegality. However, the test to demonstrate such irrationality is a very high one: it must be shown by the one who suggests it that, in making the regulation, the Secretary of State has done something which *no* reasonable person would do.

19. It is insufficient to found *ultra vires* on the grounds of irrationality simply that the provision in question has had a harsh or discriminatory impact on the claimant concerned. The regulation in issue in *O'Connor* is often regarded as an exceptionally severe one, i.e. the rule excluding a student

who has not abandoned his course from any entitlement to means tested benefits, even if he has no other form of financial support. The justification put forward by the Secretary of State was that it encouraged a student to concentrate on his studies to know that if he failed his end of year exams (as Mr O'Connor had done), he would either have to abandon the course or support himself until he could re-sit them. The court was nevertheless satisfied that this met the test of rationality; moreover, once the basic rationality of the provision was established, the circumstances of the individual case were irrelevant. Auld LJ commented that "[t]he fact that the general policy may produce hardship in individual cases does not make it or the subsidiary legislation implementing it irrational". It was for the Secretary of State "... to decide who should qualify for income support and who should not. Simply because his policy may have operated harshly in individual circumstances did not make it irrational".

20. There appears to be no case in which a Commissioner has held secondary legislation to be *ultra vires* on the grounds of irrationality. In all instances where the argument has been raised it has failed, because the Commissioner has not been satisfied that no reasonable Secretary of State could have made a regulation with that effect. I consider that no such argument succeeds here either. The approach and principles on which Article 5(4) is based are entirely rational. The claimant has already received support from the State for his children during the relevant period. The prevention of double recovery arises from the legitimate interest of protecting the public purse. Allowing a claimant to refund what has been received in order to take advantage of a more beneficial benefit, would cause difficult and expensive administrative burdens.

21. The appellant may be unlucky in that, for him, the now introduced CTC entitlement is much more generous than IS was, but that does not make the provision irrational. As Mr Commissioner Mesher said, at paragraph 18 of R(IS)5/01, about the rule which prevents, with certain exceptions, those on income support from increasing their housing costs:

> "... I am unable to accept that the result of interpreting [the statutory rule in issue before him] as I have done ... is irrational, in the sense that no reasonable Secretary of State could have made a regulation with that effect. The result might produce hardship in individual cases or cause differences in treatment between claimants who seem equally meritorious, but that does not make it irrational."

Nor, in my view, can the categorisation of what is or is not irrational change because, with respect to a *later* period, the Secretary of State, through oversight, omitted to extend the exclusion.

The Human Rights Arguments

22. Mr McCormack did not strenuously argue any breach of Article 8 or of Article 1 of the First Protocol, except when linked with Article 14 of the ECHR, nor did he cite any relevant judicial authority. On discrimination, he continued to rely on the inherent unfairness of the claimant's situation.

Article 8

23. Article 8 of the ECHR affords respect for private and family life, the home and correspondence. Mr Mowat accepted that Article 8 is capable of imposing on a state a positive obligation to provide support, having regard to paragraph 43 of the unanimous judgement of the Court of Appeal in *Anufrijeva v Southwark LBC* (*Anufrijeva*) (2004) QB 1124, (2004) 1 All ER 833.

24. However, as Mr Mowat points out, Lord Woolf CJ, giving the judgement of the court, continued at paragraph 43:

> "... We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that Article 8 requires him to be provided with welfare support, where

> his predicament is not sufficiently severe to engage Article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, Article 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in R (*J*) *v Enfield London Borough Council* [2002] EWHC 735 (Admin), where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, Article 8(1) would be infringed ..."

I agree that, in the present circumstances, the state has provided welfare support and there is no arguable infringement of Article 8. Although Mr McCormack did not articulate any argument specifically directed to Article 1 of the First Protocol, it seems nevertheless appropriate to address the point.

Article 1 of the First Protocol

25. Article 1 of the First Protocol to the European Convention on Human Rights provides as follows:

> "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 ...."

26. In *Stec and others v The United Kingdom* (dec.) [GC], (Nos. 65731/01 and 65900/01, ECHR 65731/01) (*Stec*), the Grand Chamber of the European Court of Human Rights on 6 July 2005 declared admissible a complaint that the scheme for reduced earnings allowance and retirement allowance was discriminatory, in breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1. One of the arguments raised by the United Kingdom was that non-contributory benefits do not fall within the scope of Article 1 of the First Protocol.

27. However, at paragraph 53 the Court said:

> "... if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction."

28. There is no breach of Article 1 of the First Protocol taken on its own in the present case, because there has been no "deprivation" of a possession; the claimant is not entitled to CTC for the relevant dates because he does not satisfy the appropriate conditions under domestic law. However, because the tax credit legislation generates proprietary interests which *may* now be seen as falling within the ambit of Article 1 of Protocol No. 1, the focus moves to whether there has been discrimination in the enjoyment of such rights for the purposes of Article 14.

29. Although presented as a tax credit, in substance CTC is a means-tested social security benefit which replaces IS support for children and some young people and extends such support to a wider group of those responsible for them. Laws LJ, in the Court of Appeal in *R (on the application of Carson) v Secretary of State for Work and Pensions* and *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Gv 797, [2003] 3 All ER 577 (*Carson and Reynolds*), said that income support did not come within the ambit of Article 8 because the scheme was not made out of compliance with any actual or perceived positive obligation to secure respect for family life. It was also held that non-contributory benefits are not "possessions", a point which the House of Lords then left open pending *Stec*. However, standing Mr Mowat's concession on the basis of *Anufrijeva,* set out above, and because I have had no argument on whether I should follow *Stec* or *Carson and Reynolds* and am reluctant to delay matters even further, I am content to assume that Article 8 and Article 1 of the First Protocol are engaged, so that Article 14 is applicable; therefore, the sole issue remaining is whether the claimant was subject to relevant discrimination.

Discrimination

30. As noted by Mr Commissioner Mesher in paragraph 10 of CIS/1616/2004:

> "...I shall also, taking into account what the House of Lords said about it not being necessary in every case to go through all the points identified in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, focus on one particular element of discrimination. That is whether the claimant was treated differently from some other person whose circumstances were not relevantly different or who was in an analogous situation."

31. The two comparators suggested in this case are firstly, one who claimed CTC on the same date as the claimant but who was able to backdate because not in receipt of either IS or income-based job seeker's allowance; the second comparator is a claimant who was entitled to one of those benefits but was fortunate enough to claim a CTC in the period between 6 April 2004 and 16 March 2005 and for days within that period.

32. In my judgement, the circumstances of the claimant were not relevantly similar to either case. So far as the first comparator is concerned, such a person was not receiving state support for children of a kind sufficiently similar to income support in the way that CTC is; in effect, CTC subsumes IS with respect to children. While it is true that state support is given in other ways, and even by other non-contributory and non-means tested benefits such as child benefit, CTC is predicated on the premise that personal allowances and premiums for children would be wholly removed from IS and IBJSA once CTC became available in its stead, although other benefits, such as child benefit and child dependency increases, would continue. That the abolition of the relevant support for children in IS claims has not, as was the original policy intention, been fully synchronised with the advent of CTC entitlement, does not negate the difference between, on the one hand, claimants formerly in receipt of support for children in IS or IBJSA and, on the other hand, those who receive different support for children in the tax and social security systems but to which IS claimants may be likewise entitled; the same rules, about which benefits are taken into account and which are disregarded for the purposes of entitlement to CTC, apply to IS/IBJSA claimants as to others.

33. As said by Mr Commissioner Mesher in paragraph 15 of CIS/1616/2004:

> "...I do not have to think that there are good reasons behind either or both of the rules to conclude that the government was entitled to make whatever rule it thought fit for the different circumstances. If I need to go beyond that and ask a question like that posed by Lord Hoffmann in *Carson and Reynolds* (at [31]), there was enough of a relevant difference between the circumstances to justify a difference in the rules applied. I also bear in mind the factor mentioned at several points in the speeches in *Carson and Reynolds*, that the line sought to be drawn in the present case between sets of circumstances does not raise questions of suspect grounds of discrimination offending our notions of the respect due to the individual, but rather the kind of line that does not attract intense scrutiny and is within the broad political judgment to be exercised by government and Parliament."

34. So far as the IS claimant is concerned who achieves CTC backdating in the period when the power to disallow normal backdating was permitted to lapse, there is no question of discrimination within Article 14. Article 14 relates to a difference of treatment between two analogous groups at the same time and in relevantly similar circumstances. But had the appellant claimed CTC in the period 6 April 2004 to 16 March 2005, he too would have been given backdating along with his peers. The result of the claimant's argument would be that benefit rules could never be altered for the future without inevitable discrimination.

Summary

35. The tribunal addressed the arguments put to it both adequately and correctly. Even had the human rights questions been sufficiently focused, either at the tribunal or before the Commissioner, I discern no wrong approach. Accordingly, as no error of law has been demonstrated, there is no ground for me to interfere.

(signed)
L T PARKER
Commissioner
Date: 22 November 2005

APPENDIX TO CSTC/326/2005

The following is relevant legislation in the case:

(A) Tax Credit Act 2002

"**1.**—(1) This Act makes provision for-
(a) a tax credit to be known as child tax credit,
...
(3) The following (which are superseded by tax credits) are abolished-
...
(d) the amounts which, in relation to income support and income-based jobseeker's allowance, are prescribed as part of the applicable amount in respect of a child or young person, the family premium, the enhanced disability premium in respect of a child or young person and the disabled child premium,

...
2.—(1) Tax credits are to be under the care and management of the Board.
...
[From April 6 2005, all of s.2 is replaced by the following: "The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the payment and management of tax credits", by paragraph 88 of Schedule 4 to the Commissioners for Revenue and Customs Act 2005.]

3.—
...
(3) A claim for a tax credit may be made-
(a) jointly by the members of a married couple or unmarried couple both of whom are aged at least sixteen and are in the United Kingdom ... ; or
...
(b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).
...
(5) In this Part "married couple" means a man and woman who are married to each other ...
...
(8) In this Part-
"joint claim" means a claim under paragraph (a) ... of subsection (3), and
"single claim" means a claim under paragraph (b) of that subsection.

...
4.—(1) Regulations may-
(a) require a claim for a tax credit to be made in a prescribed manner and within a prescribed time,
(b) provide for a claim for a tax credit made in prescribed circumstances to be treated as having been made on a prescribed date earlier or later than that on which it is made,
...

61.— ... the preceding provisions of this Act come into force in accordance with orders made by the Treasury.

62.— ...

(2) ... the Treasury may by order make any transitional provisions ... which appear appropriate in connection with the commencement of any provision of this Act.

..."

(B) **Tax Credits Act 2002 (Commencement No.4, Transitional Provisions and Savings) Order 2003 SI No. 962**
Made 31st March 2003

"**2.**—

...

(5) Section 1(3)(d) of the Act (child premia in respect of income support and income-based jobseeker's allowance) shall come into force on 6 April 2005.

...

5.—

...

(4) Notwithstanding regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002, a person shall not be entitled to a tax credit in respect of any day prior to the day on which he makes a claim for it ("the earlier day") if-

(a) the earlier day falls-

(i) before 23rd October 2003 in a case where the claimant, or in the case of a joint claim, either of the claimants is not less than 60,

or

(ii) before 6th April 2004 in any other case; and

(b) on the earlier day the claimant is entitled, or in the case of a joint claim, either of the claimants is entitled, to an income-based job-seeker's allowance or income support other than by virtue of regulation 6(2) of the Income Support (General) Regulations 1987 ..."

(Regulation 6(2) of the last cited regulations was revoked on October 25 2004, but was applicable only to lone parents and permitted such a parent who began work to continue to receive IS for the first two weeks of such work).

(C) **Tax Credits Act 2002 (Transitional Provisions) Order 2005 SI No. 773**
Made 17th March 2005

"**7.** Notwithstanding regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002, a person shall not be entitled to a tax credit in respect of any day prior to the day on which he makes a claim for it ("the earlier day") if-

(a) the earlier day falls before 31st December 2006, and

on the earlier day the claimant is entitled, or in the case of a joint claim, either of the claimants is entitled, to the child premia in respect of income support or income based jobseeker's allowance."

(D) **Tax Credits Act 2002 (Transitional Provisions) (No. 2) 2005 SI No. 776**
Made 17th March 2005

"**2.**—(1) Notwithstanding regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002, a person shall not be entitled to a tax credit in respect of any day prior to the day on which he makes a claim for it ("the earlier day") if-

(a) the earlier day falls before 31st December 2006, and

(b) on the earlier day the claimant is entitled, or in the case of a joint claim, either of the claimants is entitled, to the child premia in respect of income support or income based jobseeker's allowance.

(2) For the purposes of article 2 "the child premia in respect of income support or income based jobseeker's allowance" means the amounts referred to in section 1(3)(d) of the Tax Credit Act 2002."

(E) Tax Credits Act 2002 (Commencement No.4, Transitional Provisions and Savings) (Amendment) Order SI No. 1106
Made 5th April 2005

"**2**.—(1) Amend the Tax Credits Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003 as follows.

(2) In article 2(5) for '6th April 2005' substitute '31st December 2006'".