[2010] AACR 6

(*Novitskaya v London Borough of Brent and another* [2009] EWCA Civ 1260)

CA (Mummery, Arden, Elias LJJ)
1 December 2009 **CH/3530/2007**

Claim – whether request for benefits in general terms can constitute claim for housing benefit

The claimant arrived in the United Kingdom from Uzbekistan on 29 July 1999. She claimed asylum on the day of her arrival and was notified that she had been granted refugee status on 12 May 2004. On 18 May 2004, she became entitled to income support. On 10 June 2004 she was given a claim form for housing benefit at the offices of the Department for Work and Pensions (DWP) and also completed and gave to the DWP a statement requesting backdating of her benefits or "whatever else I am entitled to" from the date she became an asylum seeker. However, she did not deliver a duly completed claim form for housing benefit until 24 June 2004. By Schedule A1 to the Housing Benefit (General) Regulations 1987, a claim for housing benefit was to be treated as made on the date on which the claim for asylum was recorded if an appropriate claim was made within 28 days of notification of the grant of refugee status; by regulation 72(5) of the 1987 regulations, where a person is entitled to income support, any claim for housing benefit made within 28 days of the claim for income support was to be deemed to be made on the first date on which the claimant was entitled to income support; and by regulation 72(6) to (9) the time limit for a claim was to be extended by 28 days where a defective claim was made. The Deputy Commissioner decided that no valid claim for housing benefit had been made in time. The claimant appealed to the Court of Appeal.

Held, allowing the appeal, that:

1. it is well-established that the meaning of documents should be ascertained in the light of the relevant surrounding facts (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 followed) and, while R(S) 1/63 and CG/3844/2006 are authority for the proposition that any "claim" must make it clear that a claim is being made, that clarity can be obtained from the document itself or that document interpreted in its context (paragraphs 19 to 27);

2. there is no justification for a requirement that every benefit being claimed must be expressly named because, provided that the reasonable official receiving the document can understand, with or without further information, which benefits are being claimed, there is no reason to have an express reference to them (*Kerr v Department for Social Development* [2004] UKHL 23; [2004] 4 All ER 385 (also reported as R 1/04 (SF)) cited) (paragraph 28);

3. it was clear that the statement of 10 June was a defective claim made within the extended time limit allowed by regulation 72(5) and was cured by the delivery of the duly completed form on 24 June (paragraph 29).

DECISION OF THE COURT OF APPEAL

Mr Adrian Berry (instructed by Hansen Palomares Solicitors) appeared for the appellant.

Mr Donald Broatch (instructed by LB Brent Legal Services) appeared for the first respondent.

Mr Tim Buley (instructed by DWP Litigation Division) appeared for the second respondent.

Judgment (reserved)

LADY JUSTICE ARDEN:

1. This appeal is about whether a claim for housing benefit can be made for the purposes of the Housing Benefit (General) Regulations 1987 (SI 1987/1971) (the 1987 regulations) without using explicit wording to indicate that a claim for that benefit is being made. The London Borough of Brent (Brent) contends that this question must be answered in the negative. Among other reasons for this, Brent argues that there is no claim for housing benefit if the benefit is not identified in terms. The appellant, Mrs Irina Novitskaya, and the Secretary of State for Work and Pensions (SSWP), disagree with Brent. This appeal therefore requires us to consider what makes for a valid claim for housing benefit. References in this judgment are to the 1987 regulations in force at the time of the events in question, ignoring any other amendments.

Background

2. Mrs Novitskaya arrived in the United Kingdom from Uzbekistan on 29 July 1999. Her ethnic origin is Russian. She claimed asylum on the day of her arrival. She was not, however, granted refugee status until 6 May 2004. She was notified of this on 12 May 2004. By virtue of Schedule A1 to the 1987 regulations, housing benefit can be backdated to the date on which the claim for asylum was recorded if an appropriate claim is made within 28 days of notification of the grant of refugee status. I refer to this below as a "retrospective claim". Thus, by virtue of the grant of refugee status, Mrs Novitskaya had until 9 June 2004 to claim housing benefit. I will call this "the primary period".

3. On 18 May 2004, Mrs Novitskaya became entitled to income support. The regulations also provide that, where a person is entitled to income support, any claim for housing benefit made within 28 days of the claim for income support will be deemed to be made on the first date on which the claimant was entitled to income support (regulation 72(5), set out below). I will call this "the secondary period". The secondary period expired on 15 June 2004. That meant that Mrs Novitskaya could submit a housing benefit claim up to that date even though the primary period had expired.

4. Mrs Novitskaya was given a claim form for housing benefit at the offices of the Department for Work and Pensions (DWP) on 10 June 2004. Her retrospective claim was worth some £29,000 in unpaid benefit. However, she did not deliver a duly completed claim form for housing benefit until 24 June 2004. This last-mentioned date was too late for a claim for retrospective housing benefit.

5. However, on 10 June 2004, on the day when Mrs Novitskaya was given a claim form for housing benefit, she completed and gave to the DWP the following statement (the 10 June statement):

> "DEPARTMENT OF SOCIAL SECURITY [*sic*]
>
> STATEMENT *HB + Income Support*
>
> Notes ….
>
> I**,** Novitskaya Irina

of 70A King's Road,
London NW10 2BN

state that I would like my benefits income support or whatever else I am intaital [*sic*] to, to be backdated from the date I became asylum seeker – which by 29.07.88 (because) according to an advice form "welfare benefit and tax credit' hand book" – 2004-05 by Child Poverty Action Group page 665-666. I'm applaing [*sic*] only now because I've become refugee from 14.05.09. Sincerely hope for your help.

*The above has been read over to me and I agree that it is a true and complete record of what I have said. I declare that the information I have given on this form is correct and complete.

Signature …….. Date 10.06.04
Witnessed by……"
(signature)

6. Mrs Novitskaya made this statement on a pre-printed form marked "MF47" at the bottom. Counsel for the SSWP, Mr Tim Buley, informs us that the form MF47 is used for taking a claimant's statements on any matter that is relevant to their claim to an award of benefit. The code MF47 is used when re-ordering the form from stationery suppliers. It has no other significance. The words "HB + Income Support" were added to the top of the statement but it is not known by whom. "HB" is obviously a reference to housing benefit. The parties have proceeded on the basis that the word "intaital" appearing in the text of the statement meant "entitled".

7. There is also in evidence a letter dated 11 June 2004 which arguably makes a claim. However, there is no finding as to when it was delivered to the DWP. It was attached to the completed form dated 24 June 2004 and therefore it is likely that it was delivered with that form. It does not appear that a case was made below that this letter was delivered within the secondary period. As this case does not turn on the letter of 11 June 2004, I say no more about it.

8. If the 10 June statement is a "claim" for housing benefit, then, even though it is incomplete and does not give Brent all the information necessary for a claim for housing benefit, it may qualify as a "defective claim" under the provisions considered below. If so, the defects were cured by the delivery of a completed form on 24 June 2004.

9. The Deputy Commissioner wrote a long and careful decision but she did not focus on whether the document of 10 June 2004 was a defective claim for housing benefit which, although outside the primary period of 28 days commencing on 12 May 2004, was within the secondary period of 28 days running from 18 May 2004. In paragraph 11 of her decision, the Deputy Commissioner dealt with the 10 June statement. She referred to the case of Commissioner Turnbull in CG/3844/2006 (considered below). The Deputy Commissioner then proceeded directly to the statement: "Further I note that even if the statement of 10 June 2004 had been accepted as a claim, it would still have been outside the 28 day limit." Therefore, as I read the Deputy Commissioner's decision, she reached no conclusion as to whether the 10 June statement was a defective claim. She decided that the appeal failed because the 24 June 2004 claim for housing benefit was outside both the primary period and the secondary period.

Housing Benefit (General) Regulations 1987

10. Social security legislation is enacted primarily for the benefit of social security claimants. Its meaning can therefore be tested from the perspective of such a claimant, or her adviser. A claimant may have sought advice from the Citizens Advice Bureau or a local law centre, instead of a lawyer. Alternatively, as here, the claimant may use sources of guidance available in public libraries or on the internet. In this case Mrs Novitskaya used the Child Poverty Action Group's *Welfare Benefits and Tax Credits Handbook*.

11. The first thing a claimant would ask is what she needs to do to make a valid claim. She would expect to have to fill in a form. If she fills in the right form in the right way and at the right time, no issue arises about what is a "claim".

12. Although the 1987 regulations do not define "claim", it is clear from the context that it refers to a form of words. The 1987 regulations stipulate that a claim must also have a particular objective, namely, it must be a claim for housing benefit. It must also be made in writing and on a particular form:

> "**2. –** (1) …
>
> 'claim' means a claim for housing benefit;
>
> …
>
> **Time and manner in which claims are to be made**
>
> **72. –** (1) Every claim shall be in writing and made on a properly completed form approved for the purpose by the relevant authority or in such written form as the relevant authority may accept as sufficient in the circumstances of any particular case of class of cases and be accompanied by or supplemented by such certificates, documents, information and evidence as are required in accordance with regulation 73(1) (evidence and information) [or paragraph 5 of Schedule A1 (treatment of claims for housing benefit by refugees)].
>
> (2) The forms approved for the purpose of claiming shall be provided free of charge by the relevant authority or such persons as they may authorise or appoint for the purpose.
>
> (3) Each relevant authority shall notify the Secretary of State of the address to which claims delivered or sent to the [appropriate DWP office] are to be forwarded.
>
> (4) A claim **–**
>
> (a) may be sent or delivered to the appropriate DWP office where the claimant or his partner is also claiming income support incapacity benefit or a jobseeker's allowance; …
>
> (5) Subject to paragraphs (11), (16) and (17), and to regulation 72A the date on which a claim is made shall be **–**
>
> (a) in a case where an award of income support, state pension credit which comprises a guarantee credit or an income-based jobseeker's allowance has been

> made to the claimant or his partner and the claim for housing benefit is made within 4 weeks of the date on which the claim for that income support, state pension credit which comprises a guarantee credit or jobseeker's allowance was received at the appropriate DWP office, the first day of entitlement to income support …"

13. The opening clause of regulation 72(5) refers to paragraphs (11), (16), (17) of regulation 72 and to regulation 72A but none of these provisions is relevant.

14. In the nature of things, claimants make mistakes and so the 1987 regulations make provision for rectifying claims, called "defective claims", which do not comply with the regulations:

> "(6) Where a claim received at the designated office has not been made in the manner described in paragraph (1), that claim is for the purposes of these Regulations defective.
>
> (7) Where a claim is defective because **–**
>
> (a) it was made on the form approved for the purpose but that form is not accepted by the relevant authority as being in a written form sufficient in the circumstances of the case; or
>
> (b) it was made in writing but not on the form approved for the purpose and the relevant authority does not accept the claim as being in a written form which is sufficient in the circumstances of the case,
>
> the relevant authority may, in a case to which sub-paragraph (a) applies, refer the defective claim to the claimant or, in a case to which sub-paragraph (b) applies, supply the claimant with the approved form.
>
> (8) The relevant authority shall treat a defective claim as if it had been made in the first instance where the approved form referred or sent to the claimant in accordance with paragraph (7) is received at the designated office properly completed within 4 weeks of it having been referred or sent to him, or such longer period as the relevant authority may consider reasonable."

15. In this field, therefore, Parliament has made the policy decision that claimants should not necessarily lose their benefits if they fail to make a claim in the right way. They may get some help to select the right form from the relevant authority, but, as I have explained above, there are other bodies who can provide help and so the authority is not required to provide the right form in every case. Claimants also have extra time in which to correct their mistake. This contrasts with the legislative policy in other fields, such as a notice under section 30(1) of the Landlord and Tenant Act 1954.

16. Housing benefit is paid by the local authority in which the claimant resides. A claimant may obtain a form used by the relevant local authority from an office of the DWP. The SSWP reimburses local authorities for housing benefit which they pay to claimants.

Case law on the meaning of "claim"

17. There are two Commissioners' decisions on what a claimant must do to make a claim. The first is the decision of the Commissioner in R(S) 1/63 on regulation 2(1) of the National

Insurance (Claims and Payments) Regulations 1948. This, so far as material, is in the same form as regulation 72(1) in this case. The claimant wrote a letter dated 16 January 1961 which read as follows:

> "I have received a letter about my National Insurance card. My card was lasted stamped by an employer on 4 July. I have not been employed since that date. Owing to illness I now have a small pension – is it necessary for me to stamp the card myself?"

18. The Commissioner held that this letter was not a claim for benefit. The letter made no reference to sickness benefit and nothing in its terms justified the conclusion that it is a claim for benefit. The Commissioner continued:

> "6. In my view, in order for the statutory authorities to find that a claim for benefit within regulation 2(1) has been made, there must be a document or documents (on the form approved by the Minister or accepted by him as sufficient) which appear on their face to make such a claim. It may be possible, for example, by reading form Med.5 with an accompanying letter to find that together they constitute a claim. But in my view it is not permissible to interpret form Med.5, or any other document, as a claim for benefit within regulation 2(1), merely because it may be possible to infer from the surrounding circumstances that in sending form Med.5, or the other document, the claimant must have been intending to claim benefit. That a claim for benefit is intended to be made must appear on the face of the document or documents which are alleged to amount to a claim. To hold otherwise would, I consider, ignore the requirement of regulation 2(1) that every claim for benefit shall be made in writing."

19. While this is a very helpful decision, excessive reliance should not be placed on the Commissioner's statement that the intention to claim benefit should appear on the face of the document alleged to constitute a claim. Claims are no different from any other document requiring interpretation and it is now well-established that the meaning of documents should be ascertained in the light of the relevant surrounding facts (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896). Thus, it may be possible to infer that a claim is being made from some other document. The Commissioner refers to the possibility that an accompanying letter might be enough to make it clear that another document was making a claim. In my view this is certainly legally possible.

20. Subsequently, in CG/3844/2006, Commissioner Turnbull considered whether an email asking for "information on whatever benefits I am entitled to" constituted a "claim". After citing R(S) 1/63, he held:

> "15. In my judgment, and this is the crux of the case, the terms of the e-mail sent in September 2001 cannot sensibly be read as making a claim for benefit. The statement that the Claimant [in that email] 'would like information on whatever benefits I am entitled to' was in my judgment no more than a request for <u>information</u> as to what benefits the Claimant was entitled to. It does not display an intention to <u>claim</u> benefits generally, still less any particular benefit. (If, for example, there had been some disadvantage to the Claimant in claiming benefits in England, the Claimant would have been perfectly entitled to say that she had not actually done so, but had merely asked for information as to what benefits she was entitled to)." (emphasis added by the Commissioner)

21. I would not wish to cast any doubt on the correctness of the decision of Commissioner Turnbull in CG/3844/2006 on its facts. However, the Commissioner in his final sentence took what seems to me to be likely to be an exceptional situation, namely that there was some disadvantage to the claimant in claiming benefits in England. I doubt whether that possibility should justify a tribunal taking a very cautious approach to the interpretation of a document which might otherwise be a timeous claim. Most situations would seem to me to call for a generous approach to the interpretation of such documents.

Analysis

22. Mr Adrian Berry, for Mrs Novitskaya, submits that the 10 June statement constituted a defective claim within the meaning of regulation 72(7) of the 1987 regulations which was later perfected by the 24 June claim. Mr Buley, for the SSWP, supports this submission. By contrast Mr Donald Broatch, for Brent, submits that the 10 June 2004 statement cannot constitute a claim for housing benefit because it is not a "claim" and because it makes no express reference to housing benefit.

23. Mr Broatch places reliance on the passages from the decisions of the Commissioner which I have already analysed. Mr Broatch also advances an alternative argument. He submits that that there are three stages to the rectification of a defective claim under the 1987 regulations. The stages are: (i) a defective claim is made (ii) a claim form is supplied to the claimant; and (iii) the claimant then submits the properly completed form. Mr Broatch submits that the three stages were not completed if Mrs Novitskaya did not receive a claim form *in response* to her defective claim because she had been given such a form already. Therefore there was no defective claim on 10 June 2004 and thus no retrospective claim for housing benefit was made within either the primary or secondary period. I would observe that, if this interpretation were correct, it would mean that Brent could, by its own default, prevent Mrs Novitskaya's defective claim being timeously rectified.

24. To contextualise the issue of interpretation in this case, I remind myself of the point, also made by the Deputy Commissioner, that claims for social security benefits do not give rise to ordinary adversarial litigation. This was confirmed by the House of Lords in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 4 All ER 385 (also reported as R 1/04 (SF). At [61] Baroness Hale held:

> "Ever since the decision of the Divisional Court in *R v Medical Appeal Tribunal (North Midland Region), ex p Hubble* [1958] 2 All ER 374, [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim:
>
> > 'A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds. Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action.' (See [1958] 2 All ER 374 at 379, [1958] 2 All ER 374 at 240.)"

25. The holding on this point in *Kerr* is a reflection of the fact that the distribution of benefits is different from many other areas of civil law. It is concerned not simply with

recognising rights or enforcing liabilities but also with sustaining members of the community whom Parliament has decided should be sustained through the welfare state.

26. Accordingly, where provision is made for defective claims, the function of "a claim" is not only to meet conditions on which some right to a benefit depends. It may have a lesser objective, namely that of placing the authority which is required to scrutinise a claim in a position to know that a claim for a particular benefit is being made.

27. In my judgment, the point which the two decisions of the Commissioners rightly make is that any "claim" must make it clear that a claim is being made. As I see it, this clarity can be obtained from the document itself or that document interpreted in its context. It is not, therefore, in general enough to send in a medical certificate without indicating that a claim is being made for a benefit. Thus, it does not appear that the inquisitorial duty of the authorities would necessarily extend to asking a claimant, who had sent in a medical certificate, whether he proposed to make a claim for some sickness or incapacity benefit. In this case, however, it made no sense for the claimant to ask for claims to be backdated if no claim was actually being made. There is, moreover, nothing to suggest that the claim was not then being made. It would be different if in its context the document had to be read as meaning that the claimant wanted her benefits backdated if and when she made a claim. That would occur for instance, if she had written a letter saying. "I will be sending you my completed application form next week. When my claim is received, I would like my benefits backdated." But that is not this case.

28. Mr Broatch's further submission is that housing benefit was not expressly referred to in the 10 June statement and therefore that that statement could not amount to a claim. In my judgment, there is no justification for a requirement that every benefit being claimed must be expressly named. Regulation 72 does not say that. Moreover, contrary to Mr Broatch's submission, I do not consider that, when he added the words "still less any particular benefit" in the passage cited above, Commissioner Turnbull intended to suggest that the specific benefit had to be identified in terms. There is no reason to imply such a requirement as I have mentioned because, provided that the reasonable official receiving the document can understand, with or without further information, which benefits are being claimed, there is no reason to have an express reference to them. The claimant might, after all, not know the correct name of the benefit that she needed. It cannot have been the intention of Parliament that she should go without the benefit because she did not know the right name. In my judgment, it is clear from paragraphs (6), (7) and (8) of regulation 72 that Parliament did not intend that the courts should approach the question of what is a claim in an over-technical way: that would defeat the object of the legislation. The form, after all, was to be completed by persons who included refugees who would only have arrived in this country relatively recently. I do not consider that the reasonable official would be under any doubt but that, if Mrs Novitskaya was arguably entitled to housing benefit, she was making a claim for that benefit. This is confirmed by the fact that (as it appears) an official applied the words "HB and income support" to her statement.

29. It is common ground that, if the 10 June statement was a defective claim, it was cured by the delivery of the duly completed form on 24 June. In those circumstances, the appeal must therefore succeed. Mr Broatch's alternative argument cannot realistically succeed if the 10 June statement is a defective claim because there is no finding that Mrs Novitskaya received the form before she wrote the statement. Moreover, even if she already had the form when she delivered the 10 June statement, the argument would have to be that the defective claim procedure did not apply because she should have been given the right form a few

minutes later after making the defective claim in the statement. That is a perilously technical argument. However, it is not in the event necessary to deal with it.

Order

30. In my judgment, for the reasons given above, this appeal should be allowed. I would direct counsel to draw up a minute of order.

LORD JUSTICE ELIAS:

31. I agree.

LORD JUSTICE MUMMERY:

32. I also agree.