

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal fails. Like the Fox Court tribunal which gave its decision on 19 June 2007, though not for identical reasons, I find that the claim to housing benefit made by the claimant on 24 June 2004 in respect of her asylum seeking period was made more than 28 days after she had received notice of her grant of refugee status. The fact that my reasons for this decision are in part different from those of the tribunal arises in large part from the considerably more detailed submissions which have been made at this stage, and not all the points which the claimant's representative now relies on were raised at the tribunal hearing, or so I surmise from reading of the written submissions made before the oral hearing, and scrutiny of the record of proceedings. No one has suggested that this is incomplete or incorrect. Having considered all the further submissions, I find there is no material error of law in the tribunal's decision, and therefore the claimant's appeal is dismissed.
2. The claimant is a Russian national who applied for asylum on 29 July 1999. She was not granted indefinite leave to remain as a refugee until 6 May 2004. Her solicitors received the relevant notice on 12 May 2004. The regulations provide that if a claim for housing benefit is made within 28 days of the claimant receiving notification from the Secretary of State that he has been recorded as a refugee, the claim will be treated as having been made on the date on which a claim for asylum was made: Schedule A1 Housing Benefit (General) Regulations 1987. It is accepted that the claimant is treated as receiving notification on the date it is received by her solicitor. No one has argued the contrary. There is a lengthy discussion of the relevant legislative provisions and the relevant case law in the decision of Mr Commissioner Angus, CIS/4022/2004. Although the tribunal concluded that the 28 day period expired 8 June 2004, I am prepared to accept for the purposes of this appeal the contention made by the claimant's representative that the actual date of receipt should not count. Accordingly, 28 days from the date of receipt of refugee status did not expire until 9 June 2004. However the claim made on 24 June 2004 was well outside this period.
3. Leave to appeal was granted in this case by the Commissioner, who directed that the Secretary of State should be added as a party, so that points made on the claimant's behalf in the application for leave to appeal from the tribunal's decision, though not made to the tribunal, could be considered. Although in general it is not an error of law for a tribunal to fail to consider a point which was not argued before it, I accept that the tribunal has an inquisitorial duty and therefore should consider points, even where the claimant is represented, if those points properly arise on the facts as they were known to the tribunal. Although the tribunal did not consider the point identified by the Commissioner in granting leave to appeal, having considered the relevant evidence, I am satisfied that it would not have made any difference to the outcome. I deal with this point at paragraph (12) below.
4. The history of decision making in this case does little credit to the local authority. I acknowledge that an authority is not likely to come across a great many such cases, but that is all the more reason for the authority to have sought at an earlier stage the advice which it eventually began to seek early the year following the claim being made. In the meantime, on 3 December 2004, it had made a decision concerning the claimant's entitlement which was in her favour. Her representative has complained that the local authority had no grounds to

revise this decision, but given that its decision was clearly made without any effective consideration of whether the claim was made in time, I cannot accept that this is the case. The local authority eventually, by a decision dated 19 July 2005, which is the decision under appeal, refused the claimant's claim to housing benefit for her asylum seeking period. This decision was based on two points. The first of these was that it did not accept that the claimant had established liability to pay rent in respect of the period 30 April 2000 to 29 April 2004. The second point was that the claim was made more than 28 days after the grant of refugee status. However, most of the authority's correspondence with the claimant's then representative concentrated on its doubts about the reality of the liability to pay rent in this period. Despite the tribunal's finding that there was a rental liability in this period, I am obliged to say that I am not surprised that the local authority had doubts about this. However, that is irrelevant to my decision, and had I found in the claimant's favour on the time limit point, I would have remitted her appeal to a differently constituted tribunal for rehearing on the question of rental liability. To put it mildly, the denial of the landlord's agent that she had ever heard of the claimant, the sudden production of a rental agreement, and the hitherto undisclosed information that £28,000 had been loaned to the claimant to pay rent during this period, raise significant issues of credibility. I note that when the friend whose parents were said to have made this loan wrote the letter which is at page 23 of the papers, his evidence was that he had lent the claimant £7,600 and could not afford to support her any longer. He made no mention whatsoever of being the agent by which a much greater sum had been given to the claimant by his parents.

5. The claimant was aware that she could make a backdated claim for income support to cover her asylum seeking period. If this had not been conveyed to her in information from the Home Office when she was granted refugee status, I would certainly expect her solicitors to have informed her of this. She made a claim for income support on 18 May 2004 (see DWP record at page 101 of the bundle), and on 17 June 2004 (see award letter of that date at page 26 of the bundle) she was awarded backdated income support for the period 29 July 1999 to 6 May 2004 in the sum of £11,927.20. As very similar provisions apply to housing benefit, the question arises why a timely claim to housing benefit was not made. The claimant and those advising her contend that she can be treated as having made a claim within the relevant time period. However, for the reasons set out below, I do not accept that to be the case.

6. The Housing Benefit claim made on 24 June 2004 is reproduced in the tribunal bundle. This is poorly numbered and therefore I will not give a page reference for this. However, in it the claimant gives her address as 70A K Road. She describes herself as a private tenant whose tenancy began 1 April 2004, and gives her immediately previous address as 143 K C Road. She says that she paid rent there, but the length of time that she was there is not stated. I note a contention that she was a tenant at K C Road for any time at all is inconsistent with the claim that she was the tenant of 5 B Close until 29 or 30.4.2004 (these dates are given at several points in the tribunal bundle). The claim form is signed by the claimant on 26 June 2004, and was accompanied by evidence of her claim for asylum, and by the Home Office letter received by her solicitors on 12 May 2004 confirming that she had been granted indefinite leave to enter the United Kingdom as a refugee. Besides the documents mentioned, the claimant also produced a letter from her current landlord, at 70A K Road saying that he could no longer afford to support her, having already lent her £7,600. She also supplied evidence of her award of income support for her asylum seeking period. Though there is no claim to backdating on the claim form, attached to it is a letter seemingly dated 11 June 2004 in which the claimant states "I would like my benefit – housing benefit, CTB and/or tax credit to be backdated from the date I became an asylum seeker" and

she quotes an article from a welfare benefits handbook. There is no explanation of the gap in dates between the letter dated 11 June 2004 and the Housing Benefit claim of 24 June 2004. Her letter dated 11 June says that an information sheet she received said that she could “claim those benefits to be backdated within three months of receiving the notification that she has been recorded as a refugee by the Secretary of State”. No evidence to suggest she had been informed the time limit was three months was produced. However, the local authority received a letter dated 29 June 2004 from the claimant’s MP. This was accompanied by an information sheet relating to backdating benefit for the asylum seeking period, and this clearly specifies there is a strict time limit of four weeks which applies from the date refugee status is decided by the Home Office. This information sheet states (incorrectly) that time starts to run from the date of the decision, not from the date the refugee or her agent receives the confirmation letter. The regulations provide that time runs from the time that the letter was received, which in this case was 12 May 2004.

7. One matter mentioned by the MP is of concern:

“[The claimant] tried to approach Brent Council to discuss her claim within the required 28 days and went to Wembley in person, but the receptionist was unable to help her. [The claimant]’s claim that she attended Wembley within 28 days can be supported by an adviser at the CAB.”

No evidence to that effect from the CAB has been received. I note that the claimant’s letter which accompanied the claim form is dated two days after the last date on which a claim for backdated benefit could have been made. Nor is there any documented evidence of contact with the local authority before 24 June 2004. In this respect, the claimant’s mistaken belief that the time limit was three months may well have been of significance.

8. There is evidence that the claimant attended at a DWP Office on 10 June 2004, and a copy of the statement made by her on this occasion appears at page 178 of the tribunal bundle. This document was produced after an earlier hearing of the tribunal was adjourned for further evidence. It is notable that this statement, which appears to be in the claimant’s own writing, states:

“I would like my benefit income support or whatever else I am entitled to, to be backdated from the date I became an asylum seeker – which is 29 July 1999 (because) according to an article from ‘Welfare Benefit and Tax Credit Handbook’ 2004 to 2005 by Child Poverty Action Group page 665 to 666, I’m applying only now because I’ve become refugee from 14 May 2004. Sincerely hope for your help.”

That is the full statement. In different handwriting is written, at the top of the statement page, ‘HB plus income support’. I note that at the date of that statement, the claimant did not specifically identify housing benefit, but to judge from her letter of 11 June 2004, she was advised of it. There is no obvious explanation for the wrong time limit for claiming given in her letter.

9. Given that a claim to income support was made on 18 May 2004, there has been speculation that a housing benefit initial claim form NHB1 might have been completed at that time. The DWP say there is no trace of such a claim form having been issued, and certainly the local authority has no record of receipt of such a form. The DWP, as well as not being able to find any record of such a form, believe that such a form would not have been issued

because at the time she claimed income support the claimant described herself as homeless. This is not wholly consistent with what she said in the housing benefit claim, but I do not think this gives rise to any real issues: she was at this period being housed, possibly unwillingly, by the person she described as the 'landlord' at 70A K Road. There is evidence that a CAB adviser attempted to clarify the question of an NHB1 being issued. On 26 August 2005 the CAB adviser contacted the Belfast DWP Income Support Office to try to clarify this matter. The DWP Office confirmed to the adviser that the claimant had attended a Jobcentre Plus office, but gave the date of claim as 28 May 2004, not 18 May. Other than the record of this telephone conversation, there is no evidence which supports 28 May as the date of claim. Certainly, the tribunal was entitled to prefer as more accurate the award letter giving the date as 18 May. This applies also to the comment made at the same time that a housing benefit claim form had been included which was sent to Brent Council, and that the local authority should be able to confirm this by accessing RATS data. The CAB adviser involved in this enquiry was expecting to get further information, but it seemingly did not ever arrive. In seeking leave to appeal, the claimant's representative criticised the tribunal for failing to say whether they found the evidence of the CAB worker, who attended and gave oral evidence, lacking in credibility. I do not think there is any question whatsoever about the credibility of the CAB worker. I have no doubt that he correctly recorded what he was told. The real question is whether what he was told was accurate. The date of claim to income support is nowhere else in the papers described as being 28 May 2004, and there is every reason to suppose that the reference to the issue of a housing benefit claim form being sent to Brent Council relates to a change in circumstances in September 2004. I note that the claimant's letter of 11 June 2004, attached to her housing benefit claim, makes no mention at all of any previous contact with the local authority or with the completion of any application for housing benefit. Further, as noted above, it is quite clear from the claimant's letter of 11 June 2004 that she was mistaken about the time limit for making such a claim. There is no evidence which supports the housing benefit form having been issued to the claimant at the time that she made her income support claim, and the absence of any record of it in DWP or local authority records, and any mention by the claimant herself before 24 June of an earlier claim, supports the tribunal's conclusion that no housing benefit claim form was completed at any earlier date.

10. In his grant of leave, the Commissioner points to a lack of certainty about the actual date of the claim to income support, but in my view the evidence supports the tribunal's conclusion of fact that the claim was made 18 May 2004. The Secretary of State, who was joined at the proceedings by the Commissioner, has suggested that the tribunal failed to consider whether the statement made by the claimant at the DWP Office on 10 June 2004 (see paragraph (8) above) constituted a defective claim for the purposes of the Housing Benefit (General) Regulations. In the view of the Secretary of State, it did, and therefore the tribunal should have gone on to consider whether the claim made on 10 June 2004 could be treated as a defective claim and therefore the time for claiming extended under regulation 72(6) to (9) Housing Benefit (General) Regulations. There is, of course, also the further point whether the time for claiming could be extended by four weeks under regulation 72(5) of the Regulations, which raises a different issue considered at paragraph (12) below.

11. The 'defective claim' question depends on whether the claimant's statement on 10 June 2004 could amount to a claim (and even if it could, I note it would still be out of time). Commissioner Turnbull in CG/3844/2006 considered the question of what could amount to a claim. The provisions for benefits administered by the Department of Work and Pensions are somewhat different, and the Secretary of State has power under the Claims and

Payments Regulations which allow him to accept as a valid claim something, in writing, even though not on an approved form. Nonetheless, as the Commissioner notes, it must on its true construction still amount to a claim. In CG/3844/2006 what the claimant had asserted to be a claim was an e-mail requesting a claim form. At paragraph 14 of his decision Commissioner Turnbull notes the words of the Commissioner in R(S) 1/63:

“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 a 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 requirements of regulation 2(1) that every claim for benefit shall be in writing.”

In Commissioner Turnbull’s case, he found that the terms of the e-mail sent in September 2001 could not sensibly be read as making a claim for benefit. The statement in that e-mail that the claimant “would like information on whatever benefits I am entitled to” was in his judgment ‘no more than a request for information as to what benefits the claimant was entitled to. He did not display an intention to claim benefits generally, still less any particular benefit’ (the emphasis is in the original). 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 and therefore the provisions of regulation 72(6) to (9) would not come into play.

12. There is, however, another provision which must be considered, and that is regulation 72(5)(a) Housing Benefit (General) Regulations which is more apt to the circumstances than trying to contort words of legislation and judicial precedent in such a way as decide that the words recorded on the statement of 10 June amounted to a claim. Regulation 72(1) and 72(5)(a) deal with the ‘time and manner in which claims are to be made’. The relevant provisions are as follows:

“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 of the relevant authority may accept as sufficient in the circumstances of any particular case or 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).

...

- (5) ... the date on which a claim is made shall be –
- (a) in a case where an award of income support ... has been made to the claimant or his partner and the claim for housing benefit is made within four weeks of the date on which the claim for that income support ... was received at the appropriate DWP Office ...”

The question then arises whether this four week extension can assist the claimant. I note that there is no exclusion of cases arising under Schedule A1 from the benefit of the provisions of regulation 72(5)(a) (or indeed for that matter from the benefit of regulation 72(6) to (9)) but accepting that the claim to income support was made on 18 May 2004, the four weeks extension provided for by regulation 72(5)(a) is until 15 June 2004, and accordingly the housing benefit claim made on 24 June 2004 is outside the four weeks provided for by regulation 72(5)(a). The only evidence that the income support claim was made on any date other than 18 May 2004 is the statement given over the phone to the CAB worker over a year later. No documentary evidence that the claim was in fact made on 28 May 2004 has been provided, and even if, as the Commissioner has speculated might have been the case, the claim was received on 28 May but then backdated and treated as being made on 18 May 2004, then it must still be accepted that the claim was made on 18 May 2004. That is the effect of backdating, where it is granted, though there is no evidence that this claim was in fact backdated. Nor would there be any reason for it to be so backdated: it would give the claimant no advantage so far as the claim for her asylum seeking period was concerned. Further, there is no power to backdate an income support claim for an asylum seeking period: regulation 19(8) Social Security (Claims and Payments) Regulations 1987 specifically provides that the backdating provisions of this regulation “shall not have effect with respect to a claim which regulation 21ZB(2) of the Income Support (General) Regulations 1987 (treatment of refugees) applies”.

13. Given that on any account the claimant made a claim for housing benefit on 24 June 2004, it is a matter for regret that the matter is only now, more than four years later, before the Commissioner. As noted at the outset, the decision making process revealed does no credit to the local authority, which acknowledged on 20 July 2005 that there had been an unacceptable delay in dealing with the claim. However the jurisdiction of the Commissioner is to deal with errors of law, not administration, and for the reasons set out above, I am satisfied that the claim for housing benefit in respect of the asylum seeking period was made out of time and therefore the tribunal was correct in finding that the claim must fail.

(Signed on the Original) Mrs A Ramsay

Deputy Commissioner

24 October 2008